TADC
THE TEXAS ASSOCIATION OF DEFENSE COUNSEL, INC
An Association of Personal Injury Defense, Civil Trial & Commercial Litigation Attorneys—Est. 1960

Office of the President
Mr. Dan K. Worthington
Atlas, Hall & Rodriguez, L.L.P.
P.O. Box 3725
McAllen, TX 78502
956/632-8293
956/686-6109 FAX
E-Mail: dkw@atlashall.com

December 6, 2012

Ms. Marisa Secco
Rules Attorney, Texas Supreme Court
P.O. Box 12248
Austin, Texas 78711

RE: Proposed Adoption of Rules for Expedited Trials

Dear Ms. Secco:

The Texas Association of Defense Counsel ("TADC") opposes the proposed rules for expedited actions submitted for comment by the Supreme Court.

While our specific comments are set forth below, there are several fundamental issues which warrant mention at the outset. The scope of expedited actions, as provided in the Court's proposal, greatly exceed the limitation imposed by the legislative mandate and the compulsory nature of the proposal is not required by the mandate and does not further the goal of the promotion of justice in cases which fall within its scope.

As noted in its docket order on page 4, Texas Government Code §22.004(h) limits the scope of suits to which the expedited process is to apply to those 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." However, despite this limitation, the Court's proposed Rule 169 specifically excludes counterclaims from the scope of its monetary limitation. For example, a party asserting a $1,000,000.00 compulsory counterclaim would nevertheless be compelled to prosecute the counterclaim in an expedited action if the plaintiff seeks monetary relief aggregating $100,000 or less. Removal of a suit from the expedited process is limited to a motion and showing of good cause by any party or the filing by the plaintiff of an amended or supplemental pleading seeking monetary relief exceeding $100,000. In our view, this proposed rule exceeds the legislative directive, would promote gamesmanship by pleading parties, would unfairly limit a counterclaimant to truncated discovery, and would leave an adversely affected party the sole remedy of a "good cause" motion with no explicit appellate remedy.

As the Court may be aware, several TADC members worked closely with the legislature in the development of the final version of HB 274,

which was enacted as Tex. Gov. Code §22.004(h), within which the legislative mandate for creation of rules implementing a procedure for expedited actions is found. Indeed, the TADC actively supported passage of HB 274. However, nothing within HB 274, Tex. Gov. Code §22.004(h), nor the legislative comments associated with its passage, contain a requirement that these expedited actions provide a plaintiff with the sole decision as to whether a matter should be submitted to a compulsory expedited trial process as opposed to a voluntary procedure by which both parties can exercise independent judgment in the submission of a case.

A review of the information considered by the Court, as described on page 5 of the docket order, weighs against a compulsory procedure. As noted by the Court, the TADC, the Texas Chapter of the American Board of Trial Advocates ("Tex-ABOTA"), the Texas Trial Lawyers Association ("TTLA") having reviewed the impact on litigants from a practice perspective concluded that a voluntary system would better benefit the civil justice system. After several discussions, the Court's Advisory Committee reached the same conclusion. While most of these practical issues are discussed in terms of the Court proposal's specific components, we have also included a list of real world examples which illustrate the "compulsory" procedure's shortcomings.

Furthermore, like the Court's task force, the TADC, Tex-ABOTA and TTLA working group studied the treatment of expedited actions in other jurisdictions. Our study of other jurisdictions, which was set out in a white paper on the issue, a copy of which is attached to these comments as attachment 1, revealed that most (if not all) other jurisdictions which have implemented an expedited actions system have made such system voluntary rather than compulsory. Having reviewed the impact on a litigant's right to a fair trial and a jury's right to be afforded the opportunity to render a fair verdict, we agree that a voluntary procedure is the superior alternative.

SUMMARY OF COMMENTS

- The Court's proposal exceeds the aggregate $100,000.00 limitation imposed by the legislature.
- Neither the legislative mandate contained within HB 274, the legislative history of HB 274, nor Tex. Gov. Code §22.004(h) requires the Court to promulgate a "compulsory" procedure for an expedited civil action process.
- A voluntary approach would allow an attractive option for parties to limit discovery, trial, as well as the appellate process in appropriate cases.
- The expedited process proposed by the Court is a "defendant-only Compulsory" procedure which assigns the unilateral power to a plaintiff to compel a defendant to abrogate the right to meaningful discovery without regard to the complexity of the issues or the non-monetary impact of an adverse judgment.
- The "good cause" removal component adds nothing to the rules. Aside from the lack of objective criteria upon which a "good cause" finding could be made, there is no provision to address the ability of a party to appeal or mandamus a trial court's granting or denial of a motion to remove a case from the expedited procedure. The lack of an interlocutory appeal of an order granting a motion to remove a case from the expedited procedure would deny the losing party the right to an appeal on the issue as it would have already been subjected to the full discovery this proposal seeks to avoid. Likewise, a party subjected to the process would have a difficult time

establishing harm as a result of the denial in that proving what full discovery would have revealed cannot be demonstrated since it was not permitted.

- After careful review, the TADC, Tex-ABOTA, the TTLA, and the Supreme Court Advisory Committee each concluded the voluntary approach was superior in advancing the goals of HB 274. Only the Task Force appointed by this Court failed to reach the same conclusion having failed to reach a consensus as to which approach was superior.

LEGISLATIVE MANDATE/LEGISLATIVE HISTORY

Tex. Gov. Code §22.004(h) requires that the Court adopt rules to promote the "prompt, efficient, and cost-effective resolution of civil actions." It required that these 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." It is left to the Court to develop rules which best advance these two primary directives. We have included a transcription of the legislative debate as it related to the expedited jury trial process with these comments. The Court will find nothing within this transcription that reflects either a direct or implied mandate to the Court that its rules be either voluntary or compulsory.

- While the forced elimination of available discovery may indeed lower discovery costs, it has the collateral effect of eliminating a party's ability to fully and fairly develop a case and a jury's ability to have all of the evidence it needs to fully and fairly render a verdict.
- An expedited trial process may contemplate the speeding up of the process, but should not result in an abridgment of meaningful rights.
- A "compulsory" procedure can do nothing to expedite either the trial or the appeal, both of which are components of the "civil justice" system and arguably part of the legislative directive. Conversely, a voluntary procedure can address all of the "civil justice" components as required by Tex. Gov. Code § 22.004(h).

THE COURT'S PROPOSAL EXCEEDS THE STATUTORY LIMITATION

As noted by the Court, the legislature limited the scope of the expedited actions to those 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 Court's proposal exceeds this limitation.

- Rule 169(a) (1) limits the monetary limitation to "all claimants, other than counter-claimants..." The exclusion of "counter-claimants" from the monetary limitation expressly permits claims of an unlimited monetary sum to be compelled to be brought in an expedited action.
- Similarly, Rule 169(a) (1) permits a compulsory counterclaim for non-monetary relief to be compelled into an expedited action as well. That is a claim for non-monetary relief involving a value greatly in excess of $100,000.00 could likewise be compelled to be asserted in an expedited action.
- With regard to multiple claimants, the Court's rule does not limit "the amount in controversy, inclusive of all claims for damages of any kind..." to $100,000.00 within the expedited action, but rather permits each Plaintiff within an expedited action to assert claims up to $100,000.00.

Like the exclusion of counter-claims from the $100,000.00, this proposal exceeds the legislative mandate set out in the newly enacted Tex. Gov. Code §22.004(h).

- Beyond exceeding the scope of the legislative mandate, to require a Defendant/Counter-Plaintiff to defend a case exceeding $100,000.00 while being compelled to prosecute a compulsory counter-claim of unlimited monetary value within a 5 hour trial with extraordinarily limited discovery amounts to an unfair denial of a meaningful right to a jury trial.
- As discussed in detail below, the "good cause" pathway out of the expedited action process is an inadequate safeguard to fair access to a jury trial.

A VOLUNTARY APPROACH BETTER FULFILLS THE LEGISLATIVE MANDATE

A recurring criticism to the voluntary approach is the claim that the discovery limitations contained within Texas Rule of Civil Procedure 190.2 "Level 1" cases were made voluntary and consequently went unused. This criticism is misplaced:

- Our members' experience regarding cases in which the amount in controversy is under $50,000 is contrary to the assertion that "Level 1" discovery limitations are not routinely observed. Our experience reveals that while parties routinely seek a "Level 3" discovery control order in all cases, it is for the benefit of the parties in having Court-ordered deadlines and not the availability of discovery in excess of that set out in "Level 1."
- A voluntary approach would allow the parties to expedite all aspects of the civil justice system, from inception of the suit through the conclusion of the appeal. A version of this proposal was previously provided to the Court by the TADC/Tex-ABOTA/TTLA working group as well as the Supreme Court appointed Task Force. While there were technical objections to the Task Force version of the voluntary proposal, there was nothing which could not have been tweaked.
- Contrary to the voluntary approach, the Court's proposal can "expedite" the civil justice system only by allowing for the unilateral limitation of discovery and a gross limitation of the trial itself. However, a compulsory procedure cannot expedite the appellate process (the delays of which the Court is well-aware). The entirety of this process is expedited in the "voluntary approach."
- The proposed rules treat every case as if the **only** consideration forwhen a case should be submitted to an expedited jury trial is the stipulation of the amount in controversy. The rules do not take into consideration other factors like reputation or stigma and issues of claim preclusion.
- Tex. Gov. Code §22.004(h) does not mandate rules which expose an attorney, accountant or engineer sued for professional malpractice to severely limited discovery and an extraordinarily limited trial solely because the sum sought is less than $100,000. What is the value of the professional's reputation and why isn't it part of the consideration?
- Likewise, a party could find a judgment entered against it in the expedited system used as claim preclusion in other disputes.

COMPULSORY MEANS COMPULSORY ONLY AS TO DEFENDANT

The procedure proposed by the Court is a "Defendant Compulsory" procedure which assigns the unilateral power to the Plaintiff to compel a Defendant to abrogate the right to meaningful discovery without regard to the complexity of the issues or the non-monetary impact of an adverse judgment.

- Without regard to the genuine amount in controversy, a Plaintiff controls access to the Expedited Jury Trial Procedure through providing or refusing to provide the stipulation set out in the Court's proposal. Whether a case is appropriate for limited discovery will be left to the strategic decision of the Plaintiff and not to the appropriate or fair application to any particular case.

GOOD CAUSE IS UNDEFINED AND THERE IS NO ADEQUATE APPELLATE REMEDY

Arguably the proposed rules provide a single mechanism for removing the case from the proposed process upon a showing of good cause. However, the Court does not provide a definition of "good cause" from which a trial court can make a determination. Furthermore, the proposed rules do not provide for appellate review of the granting or denying of a motion to remove a case from the expedited process.

- Should a Court improvidently grant or deny a motion to remove a case from the expedited process, there is no adequate remedy on appeal. For those litigants forced from the expedited process in the absence of good cause, they will have been required to undergo discovery which should have otherwise not have been available. Similarly, those litigants improperly constrained from full discovery will be precluded from demonstrating legal harm from the lack of full discovery because without full discovery, it would not be possible to know what material evidence might have been discovered had discovery otherwise been permitted.
- Under the proposal, a Plaintiff is afforded the opportunity to avoid the "good cause" standard by merely asserting a claim for non-monetary relief.
- If "good cause" is going to be panacea for all of the shortcomings of this proposal, it must be defined and there must be an explicit appellate pathway for review.

FIVE HOUR LIMITATION

The Court's proposal adopts a five hour time limitation for each "side" which includes the entire trial process from jury selection through closing argument. However, the proposal does not specifically address several issues which can reasonably be anticipated to arise:

- Does the time limitation include the time required for a bill of exceptions?
- Does the time limitation include the "Daubert" hearings which are now required, except upon request of the offering party, to be conducted during trial?
- If the five hours is going to be exhausted, what must a party demonstrate to obtain additional time from the trial court and would "in trial" mandamus relief be available?

CLAIM PRECLUSION

Without regard to the concerns noted above pertaining to the Court' proposal's monetary limitation, there is the potential that unless the Expedited Action expressly excludes a finding made in a case submitted under the Expedited Action as a basis for res judicata or collateral estoppel, that a judgment in a case submitted as an Expedited Action could serve as a basis for liability or a defense to liability in a case brought outside the Expedited Action process.

- A finding of liability in a tort case submitted as an Expedited Action in which a Plaintiff sought $10,000.00 could potentially serve to preclude a Defendant from challenging liability in another suit brought by a derivative Plaintiff seeking $1,000,000.00.

REAL WORLD EXAMPLES

The procedure proposed by the Court presumes that the amount in controversy (at least for an individual plaintiff's claims) is the sole consideration for the submission of a case as an expedited action. However, a voluntary approach allows a litigant in consultation with his or her attorney to consider other facts when deciding whether or not to submit a case as an expedited action:

- A teacher being sued in a civil action for assaulting a student;
- An attorney, engineer, or other professional being sued for malpractice;
- A business being sued for fraud or dishonesty; or
- Any civil claim alleging criminal conduct.

There are other considerations such as complexity of the facts or numerosity of witnesses which might also lead a litigant to elect for a full trial rather than being compelled into a process where discovery is largely denied and the trial is so truncated that a jury cannot be given the relevant and otherwise admissible evidence necessary to return a correct verdict.

RULE 47

Tex. Gov. Code §22.004(h) did not call for the major revisions found in the newly proposed Texas Rule of Civil Procedure 47.

CONCLUSION

One of the clichés sought to be cured by an expedited system is the often repeated "justice delayed is justice denied." But even more certain is that, "justice denied is justice denied." To develop a procedure which permits one litigant to force another litigant into a trial process where there is very little discovery permitted and even less time to present relevant and admissible evidence to a jury based solely upon the amount in controversy is unfair and unjust.

It was because we share the Court's concern that the legislature's mandate be fully implemented that we supported HB 274 and worked to develop a rule which would establish an expedited action procedure which could return litigants to the Courthouse, when needed, in a manner which could expedite the process by reducing unnecessary costs and unneeded time delays with no loss of due process or fairness.

A voluntary system, such as that crafted by the Trial Bar (TADC, Tex-ABOTA and TTLA) allows litigants with disputes over liability or damages (in appropriate cases) a method to have a jury answer the charge and a judge to render judgment without the prospect of an appellate system which forces an inordinate amount of time and expense on the parties. The challenge is for us to provide our clients an attractive alternative to arbitration and settlements based on litigation costs as opposed to liability and damages.

Expeditiousness at the expense of a fair jury trial is too high a cost and this Court should not take this universally rejected and unsound route.

Very truly yours,

Dan K. Worthington,
President

Enclosure(s)

cc:

Chief Justice Wallace B. Jefferson
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Justice Nathan L. Hecht
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Justice Philip Johnson
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Justice Paul W. Green
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Justice Eva M. Guzman
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Justice Don R. Willett
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Justice Debra H. Lehrman
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Justice David M. Medina
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Justice Jeffrey Boyd
Supreme Court of Texas
P.O. Box 12248
Austin, Texas 78711

Speaker Joe Straus III
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768

Senator Robert Duncan
Texas Senate
P.O. Box 12068
Austin, Texas 78711

Representative Tryon Lewis
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78768

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

RE: HB 274 Proposed Rule – Expedited Jury Trial Process

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 promote the prompt, efficient and cost-effective resolution of civil actions in which all claims for damages of any kind do not exceed $100,000. The Rules are to address the need for lowering discovery costs in these cases and for expediting them in the Civil Justice System. As a result of this directive, representatives of TEX-ABOTA[1], the Texas Association of Defense Counsel (TADC)[2] and the Texas Trial Lawyers Association (TTLA)[3] 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 effort to assist the Supreme Court and Supreme Court Advisory Committee[4]. Additionally, at our request, the working group sessions were attended by

[1] TEX-ABOTA is the regional organization for the 16 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.

[2] 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.

[3] 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.

[4] 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 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.

Mr. Corey 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.[5]

The working group convened on July 19, 2011 to reach consensus on rules for expedited jury trials and early motions to dismiss. 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. Research of expedited jury trial procedures in other jurisdictions was performed, exchanged, analyzed and discussed. A significant number of hours have been devoted to this project. The enclosed proposed rules are the end result. These rules represent the unanimous consensus of each member of the working group. In addition to these proposed rules, we offer the following comments.

First, we have written the procedure to be voluntary. HB 274 provides that the Supreme Court shall adopt rules for the expedited jury trial procedure, but is silent as to whether such rules should be mandatory or voluntary. The unanimous consensus of the working group is that, in order for these rules to be effective, accepted and actually used, it is imperative that the procedure be voluntary. It is a voluntary procedure in every other jurisdiction implementing the same or a similar procedure[6]. Those jurisdictions either require the consent of all of the parties after the claim has arisen, or allow the defendant to opt out of the procedure without penalty or judicial review.

There are several good reasons why the procedure, to be effective and to gain widespread acceptance and use, needs to be voluntary. First, our working group is concerned that a mandatory procedure would violate our State's Constitution and statutes. For example, our proposed rules require a six-person jury, primarily to help ensure that the case can be tried in one day or a maximum of two days. This reduces the cost of litigation and provides for an expeditious resolution. Additionally, our proposed rules do not allow for appeal except under very narrow circumstances. This also reduces the cost of the litigation and promotes an early, expeditious resolution of the litigation. If these rules were mandatory, a six-person jury in

[5] 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.

[6] *See, e.g.*, Cal. Rules of Court 3.1545-3.1552; Cal. Civ. Proc. Code §§ 630.01(a), 630.03(a) (West 2011) (expedited jury trial is consensual and all parties must agree to participate); Colo. R. Civ. P. 16.1(a)(2); Colo. R. Civ. P. 16.1(d) (defendant allowed to opt out without cause); Fla. Stat. Ann. § 45.075 (West 2006) (court may conduct expedited jury trial upon joint stipulation of the parties); Fla. Stat. Ann. § 45.075 (West 2006) (expedited civil trial program is voluntary if initiated by joint stipulation); New Jersey Judiciary, Civil CDR Program Resource Book 7-1 (8th ed. Sept. 2008) (expedited jury trials conducted pursuant to "Consent Order for Expedited Jury Trial" signed by counsel and the Court); N.Y. C.P.L.R. 3031 (Consol. 2002) (action may be submitted to New York Simplified Procedure by the filing of a statement, signed and acknowledged by all parties or their attorneys); 2011-1 Utah Adv. Legis. Serv. 861, 862 (LexisNexis), to be codified at Utah Code Ann. § 78B-3-902(2); Or. Unif. Trial Court R. 5.150(1)(a), (b) (parties must agree). *See generally* Steven Croley, E. Paul Gibson & Stephanie A. Nye, *South Carolina's Fast Track Jury Trial*, S.C. Law., July 2009, at 15, 16 (procedure is totally voluntary). Nevada may be a possible exception to this. Nevada has a "short trial" program that is voluntary, but evidently can be mandatory in judicial districts that are subject to mandatory arbitration programs. Nev. Short Trial R. 1(b).

district court runs afoul of Article 62.201[7], Tex. Gov't Code, and may violate Section 13, Article V of the Texas Constitution[8]. We believe a party can waive the right to a twelve-person jury in District Court, however, just as a person may waive the right to trial by jury itself. Similarly, our working group is very concerned about whether a limited appeal can be constitutionally mandated. Again, however, the problem is rectified if the parties voluntarily agree to these terms. Another concern is whether a cap of $100,000 can be mandated by rule. In each of these examples, the parties could agree to these things.

Secondly, a mandatory rule is unfair to defendants. Any mandatory rule will not be mandatory to plaintiffs. The plaintiff can voluntarily select the procedure or not, or can opt out or not, by pleading into it or out of it. Once it is voluntarily selected by the plaintiff, only then does the procedure become mandatory, and then only to the defendant. Unless there is an opt-out provision for the defendant without cause and which is not reviewable, this unfairness cannot be cured. Additionally, and from the defense perspective, a mandatory procedure, of which a limited appeal is a very important component, would force a defendant to accept the trial court judgment as the court of last resort in Starr County, Hidalgo County, Cameron County, Jefferson County and Orange County, among others.

Third, the amount in controversy does not always accurately reflect the real stake in the litigation. Stated another way, not all cases are about the money. For example, a school teacher accused of and sued for inappropriate contact with a child, in disciplining the child or otherwise, will face the end of his or her career in the event of an adverse judgment. In that instance, the defendant will want and should have full discovery, twelve jurors and a full appeal. Another example is a suit against a veterinarian for veterinary medical negligence in a small to medium community. Because animals are viewed as chattel under Texas law, the vast majority of such cases would involve significantly less than $100,000. An adverse verdict in a small town or small community, however, could ruin the reputation of the veterinarian and his or her practice in that community. For this reason, the plaintiff should not be the only party who gets to pick and choose the expedited jury trial procedure. Just as the plaintiff would be able to make that

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[7] Section 62.201 of the Government Code states: "The jury in a District Court is composed of twelve persons, except that the parties may agree to try a particular case with fewer than twelve jurors." Tex. Gov't Code Ann. § 62.201 (West 2005).

Tex. Const. art. V, § 13.

[8] Article V, Section 13 of the Texas Constitution states:

> Grand and petit juries in the District Courts shall be composed of twelve persons, except that petit juries in a criminal case below the grade of felony shall be composed of six persons; but nine members of a grand jury shall be a quorum to transact business and present bills. In trials of civil cases in the District Courts, nine members of the jury, concurring, may render a verdict, but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it. When, pending the trial of any case, one or more jurors not exceeding three, may die, or be disabled from sitting, the remainder of the jury shall have the power to render the verdict; provided, that the Legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict.

Tex. Const. art. V, § 13.

determination on a case-by-case basis, the defendant should also have the right to make that determination, based on the facts of a particular claim.

A suggestion has been made, outside of our working group, that the expedited trial procedure should be mandatory because Tex. R. Civ. P. 190.2 (Level 1 Discovery for cases involving $50,000 or less) never gets used. The experience of our working group is to the contrary. Parties may not formally plead into Level 1 Discovery, as there is no real advantage to do so, but as a practical matter parties follow the limitations of Level 1 discovery on a voluntary basis in the smaller cases. Regardless, the working group respectfully suggests that Level 1 and expedited jury trials are very separate and different animals. The Level 1 discovery provided by Rule 190.2 limits and reduces the cost of discovery (limiting oral depositions to six hours, subject to the parties' agreement to expand the limit to ten hours without court order and limiting the number of interrogatories). The similarity between Rule 190.2 and the expedited jury trial procedure ends there. Rule 190.2 does not limit the trial to one or two days, and places no limits on appeal. Trial can last a week or more, and the cost of litigation can continue for another year, two years or more, pending appeal. Level 1 does nothing to afford a prompt, efficient, cost effective and expedient resolution and does not try to. Rule 190.2 really does not offer any incentive to plead into it. The expedited jury trial procedure contemplated by the working group, on the other hand, will not only limit discovery with concomitant cost savings, but will also reduce trial time to no more than one to two days and will eliminate any appeal except in narrow circumstances (judicial misconduct that materially affects the substantial rights of the party, misconduct of the jury, or corruption, fraud or other undue means employed in the proceedings by the court, jury or adverse party that prevented a party from having a fair trial). The expedited jury trial procedure, in the format we propose, does afford a prompt, efficient, cost effective and expedient resolution of cases not exceeding $100,000.

There is serious concern in the working group that a mandatory expedited trial procedure will breed resistance and will be circumvented by the parties pleading around or out of it. Rather than attempting to force the expedited trial procedure on everyone, it is our belief that a voluntary procedure, in the format we have proposed, will be so attractive to the Bar, the Bench, the parties and their insurers, that it will receive widespread acceptance and use in those cases appropriate for that procedure. It will simply be a matter of educating the Bar, the Bench, the parties and their insurers on this procedure and promoting it, both before and after the procedure becomes available. The attractiveness of this procedure is not only the disposition of cases in a cost-effective and expeditious manner; the attractiveness is enhanced because it will make the courthouse more accessible to plaintiffs with relatively small claims, and at the same time will encourage defendants to try lawsuits instead of paying "nuisance value" settlements. We believe the Bar will recognize the importance of this, as it will likely mean more trials for young lawyers on both sides of the docket, thus preventing the loss of an entire generation of lawyers who know how to try a civil case.

A few other points are worth mentioning. Under the proposed rules of the working group a prior agreement to the expedited jury trial procedure is void. This would apply to both indemnity agreements and insurance policies. This will prohibit contracts of adhesion or contracts lacking fair notice from forcing or tricking a party into giving up the right to full discovery, a full trial and a full appeal, before a party has sufficient knowledge of a claim on which to base an intelligent decision that the expedited jury trial procedure is desirable.

Finally, mediation has become viewed by many as expensive, time consuming and inefficient. This is antithetical to the letter and spirit of HB 274. We propose, as an additional incentive to parties to use the expedited trial procedure, that mediation will not be required in cases submitted to the procedure.

We hope that the proposed rules of our working group are beneficial to the Supreme Court and the Supreme Court Advisory Committee. In addition to these proposed rules and comments, we enclose a state-by-state analysis of the expedited jury trial procedures in other jurisdictions. This analysis was prepared by ABOTA and carefully considered by our working group. We are willing to help the Court and the Court's Advisory Committee in any capacity to effect rules that satisfy the objectives of the statute, are fair, and incentivize parties to use the procedure in the appropriate cases.

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

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

Mike Gallagher w/permission
Member, TTLA

Professor Gerald Powell w/permission
Abner V. McCall Professor of Evidence
Baylor Law School; Member, TEX-ABOTA

Brad Parker w/permission
VP of Legislative Affairs, TTLA

Dan Worthington w/permission
Executive Vice President, TADC

Jay Harvey w/permission
Member and Past President, TTLA

Dicky Grigg w/permission
Past President of TEX-ABOTA and Past President of the International Academy of Trial Lawyers, Member, TEX-ABOTA

David Cherry w/permission
Past President of TEX-ABOTA, Member, TEX-ABOTA

Mike Wash w/permission
Member, TEX-ABOTA

Craig Lewis w/permission
Past President of TEX-ABOTA and ABOTA, Member, TTLA

cc: VIA FACSIMILE & EMAIL
Charles L. "Chip" Babcock
JACKSON WALKER, LLP
1401 McKinney Street, Ste. 1900
Houston, Texas 77010
cbabcock@jw.com

VIA EMAIL
Thomas R. Phillips
BAKER BOTTS LLP
98 San Jacinto Blvd., Ste. 1500
Austin, Texas 78701-4078
tom.phillips@bakerbotts.com

VIA EMAIL
Tommy Townsend, CAE
Executive Director
TEXAS TRIAL LAWYERS ASSOC.
1220 Colorado Street, Ste. 500
Austin, Texas 78701
ttownsend@ttla.com

VIA EMAIL
Zoe Taylor
TEXAS TRIAL LAWYERS ASSOC.
1220 Colorado Street, Ste. 500
Austin, Texas 78701
ztaylor@ttla.com

VIA EMAIL
James Fields
TEXAS TRIAL LAWYERS ASSOC.
1220 Colorado Street, Ste. 500
Austin, Texas 78701
jfields@ttla.com

VIA EMAIL
Pat Long Weaver
STUBBEMAN MCRAE SEALY
LAUGHLIN & BROWDER, INC.
550 West Texas Ave., Ste. 800
Fasken Center, Tower Two
Midland, Texas 79701
plongweaver@stubbemanlawfirm.com

VIA EMAIL
Willie Chapman, CAE
Communications Director
TEXAS TRIAL LAWYERS ASSOC.
1220 Colorado Street, Ste. 500
Austin, Texas 78701
wchapman@ttla.com

VIA EMAIL
Craig T. Enoch
ENOCH KEVER PLLC
600 Congress Ave., Ste. 2800
Austin, Texas 78701
cenoch@enochkever.com

VIA EMAIL
Erin Westendorf
CHAMBERLAIN♦MCHANEY
301 Congress, 21st Floor
Austin, Texas 78701
ewestendorf@chmc-law.com

VIA EMAIL
L. Hayes Fuller, III
NAMAN, HOWELL, SMITH & LEE
P. O. Box 1470
900 Washington Avenue
Waco, Texas 76703
fuller@namanhowell.com

VIA EMAIL
Thomas C. Riney
RINEY & MAYFIELD LLP
600 Maxor Building
320 South Polk Street
Amarillo, Texas 79101
triney@rineymayfield.com

VIA EMAIL
Jim M. Perdue, Jr.
PERDUE KIDD VICKERY
1330 Post Oak Blvd., Ste. 1800
Houston, Texas 77056
jperduejr@justiceseekers.com

VIA EMAIL
Cory Pomeroy
General Counsel | Senator Robert Duncan
cory.pomeroy@senate.state.tx.us

APRIL 6, 2011

HOUSE SUB-COMMITTEE HEARING
HB 274

April 6, 2011 House Sub-Committee Hearing, HB 274 - TADC

Chair	The Subcommittee on Torts will now come to order. The Clerk will please call the roll.
Clerk	Chairman Madden? [Reply] – Here Judge Lewis? [Reply] – Here Rep. Davis? [Reply] – Here Quorum.
Chair	Quorum is present. Thank you all for coming today. I am looking forward to working with all of you as we create something we can be very proud of here in tort legislation. The Chair lays out as a pending business House Bill 2031, 2437, 2661 and 3673 as pending business. The Chair also lays out House Bill 274 as new business. We have witness affidavit ___ we intend to take everybody as much as they can. We have to be done by 9:30 according to my Committee Chairman, so I ask everybody to be somewhat quick in their testimony, but say what you need to say. At this time, the Chair calls Joseph Nixon. Joe, please come forward and, as you know, state your name, who you work for, and your position on any of the bills that are up.
Joe Nixon ("JN")	Well, thank you very much, Mr. Chairman. My name is Joe Nixon. As some of you many know, I served in the House for a bit. I had an opportunity – I'm here on just behalf of myself. Rep. Creighton asked me, call me, yesterday and asked me to kind of come and see what I could – if I had some thoughts that might help the Committee move things along, and I do. So, to that extent
Chair	Joe, your just here on House Bill 274.
JN	House Bill 274. Rep. Creighton has done a masterful job, I think, in trying to address a very important issue. We tried to address this in House Bill 4, and quite frankly did not succeed in the language that we added to Chapter 42 of the Civil Practice and Remedies Code regarding offered settlement. So I think it's very appropriate for the Legislature to look at that and see if they can craft another way. You know, there are really two aspects of frivolous lawsuits that still need to be addressed. You know, the first aspect, as the Chair knows, are those lawsuits that are inherently meritless, and there needs to be a process by which those are dismissed early. There is also another aspect where the cases are completely valid, but an offer to settle is egregiously large, and a settlement cannot be obtained in an early resolution or a defendant who wishes to settle the case, buy their piece, make amends, may not because the settlement amount is too great. In looking at Rep. Kleinschmidt's Bill 2661, I have to tell you that I like very much what Rep. Kleinschmidt has done.
Chair	Uh, Mr. Nixon, if you're going to testify on 2661, I need a form from you.

JN	Okay. I will, but I'm suggesting that you maybe take what Rep. Kleinschmidt did
Chair	Yeah, I think that's testifying on the Bill, so I'm going to need a form.
JN	Okay, I'll fill out a form because we don't want a point of order.
Chair	That's great. You better fill it out before you testify just in case.
JN	Alright.
Chair	To remind everyone else here, if you're going to testify about separate or individual Bills, or if you're going to testify on a larger number of Bills, please make sure you fill out a form on each of the Bills.
JN	At looking at House Bill 274, the language in this section 2 regarding attorneys' fees to the prevailing party,
Chair	This is in House Bill 274?
JN	In House Bill 274. I would recommend to the Committee that it remove that language, and in its place substitute the language regarding offer settlement that is in House Bill 2661. I think that achieves much of the same purpose, and I believe that Rep. Kleinschmidt has done a very good job of rewriting the offer settlement portion of the Civil Practice and Remedies Code § 42 to make it workable and effective. So now we have, so now I believe that if you were to do that, then you would have in House Bill 274 an opportunity to deal with the overstated offers of demands. You'd also have the opportunity for early dismissal under a 12(b)(6) motion practice in the language of the Supreme Court. If you have, allow for the interlocutory appeals of controlling questions of law, I think you've done a very good job of expediting, and of course having the expedited trials for those cases and still within the dollar value, I think you've done a very good job a speeding the process along and making the judicial system a lot more effective, as well as eliminate frivolous lawsuits, which I know is the goal of the Legislature. With that, those are only my remarks.
Chair	This is a wonderful opportunity to ask Joe Nixon some questions. If not, Joe, he's got to finish filling out his form, and then you can ask him questions.
JN	New form since I was here, which are better.
Chair	It's not turned over the voter registrar in any way shape or form.
JN	[inaudible] I am happy to answer any questions regarding that, too.
[speaker 1]	If you would, please address the term "abusive civil action."

JN	Which one?
[speaker 1]	It's in 274. As I look at that, abusive civil action means a civil action that a reasonable person would conclude is an abuse of the civil justice process.
JN	Right. As I look at that, it looks really vague. It doesn't give any standards that I know of.
[speaker 1]	I agree.
[speaker 1]	And it's a problem if you're before a jury in a matter that might be unpopular on either side. If you are defending a case and you've got a very sympathetic plaintiff on the other side and the jury doesn't go with you, they don't like your stance even if it may have good legal basis, you could be in real trouble in a lot of counties that I know of, and the same way on the other side. So, I just wondered, do you think that definition of "abusive civil action" really gives a jury, is it restrictive enough where it doesn't give the jury or the finder of fact too much legal aid, or do you think it ought to be tightened up? That's my question.
JN	I think it needs to be tightened up. And Judge, you know, there could be an abusive claim, but there can also be an abusive defense. So, yes, I mean, but I think most of this, if you were to take Rep. Kleinschmidt's language, I think most of that section would be removed, which is what, because you don't really, anybody that's been on the receiving end of a lawsuit believes it's abusive. And any plaintiff whose on the receiving end of a vigorous defense believes the defense if abusive, so really I agree with your..
[speaker 2]	It's hard for a jury to know [inaudible] the whole legal background hard to know which is which.
JN	That's right.
[speaker 2]	Thank you very much.
JN	You're welcome.
Chair	Any other questions for Mr. Nixon?
JN	Thank you very much
Chair	Mr. Creighton has not had a chance to lay out his Bills and I know the other officers are here. If any of the officers would like to say anything on their bills, let me know and I'll call, but if not, we're going to continue to take testimony. Chair calls David Reagan. Good morning.

David Reagan ("DR")	Good morning. My name is David Reagan. I'm general counsel for Texas Municipal League Intergovernmental Risk Pool. I'm here speaking on their behalf and also on behalf of the Texas Municipal League, which is a sister organization. The Risk Pool provides workers comp, property and liability coverage to over 2,600 political subdivisions in the State of Texas, and the Texas Municipal League is a non-profit association in over 1,100 cities. The reason
Chair	You're here on House Bill 274?
DR	Bill 274, that's correct.
Chair	And your against the Bill?
DR	One minor part of the Bill
Chair	One minor part.
DR	The basic purpose of the Bill we're not opposed to. In section 2, there is a phrase in section 2 as the Bill is currently written that talks about who is liable for attorneys' fees. It has nothing to do with the election sections later on. As the Bill is currently written, it adds the phrase "or other legal entity." That would make governmental entities now liable for attorneys' fees for the causes of action that are listed in section 2. They have never been liable for those causes of action before, except for a short period of time in 1986 after *Gates v. Dallas* came down from the Supreme Court, but in 1987 the Legislature corrected that problem and said, "no, they're not going to be liable." So, that's the problem I'm having with the Bill right at the moment is the addition of the phrase "or other legal entity," puts governmental entities in there at a time when, as you all well know, tax revenues are shrinking, it creates an additional expense for governmental entities. I understand the balance that needs to be struck by the Legislature in taking care of private interests, but also not allowing too many funds to be diverted from their intended purposes to public use. In listening to the testimony of Joe Nixon, I could not follow what he was suggesting in changing section 2, and would be happy to visit with him because those changes may take care of our concerns, I don't know, but that is our objection is making governmental entities in 38.001 liable for attorneys' fees.
Chair	Members, any questions for the witness? Thank you very much. The Chair calls Jerry Gallow.
Jerry Gallow ("JG")	Thank you, Mr. Chairman.
Chair	Jerry, you're just here on 274 also, right?

JG	No, sir. I filled out four of them.
Chair	Okay. I've got to find them. Alright, I'm sorry; they're here. Go ahead. So, you're here on all the Bills?
JG	Alrighty. Well, all but one. Not on Rep. Madden's bill.
Chair	I'm glad you're not here on his Bill. That's good.
JG	I can lump the three, Mr. Chairman, that Rep. Kleinschmidt and Sheets and Dutton's Bills all relate to basically the same topic, which his the revision of Civil Practice and Remedies Code chapter 42. I am in favor of Dutton's Bill and opposed to Kleinschmidt and Sheets on certain points. Just for background of me: I'm a trial lawyer here in Austin, Texas, and have been practicing here for 26 years. The first 20 years of my career were basically doing personally injury work; I'm Board certified in that. For the last 5-6 years of my career, I've really concentrated on doing business litigation. I represent small business owners most of the time in disputes, and that's been the last 6 years or so of my career. The three Bills that I see, if I put them together, the thing that I guess bothers me the most is that we've had a Bill very similar to this in effect now for 7 years. I've done a sort of informal study by calling a bunch of my friends who were trial lawyers or people who do a lot of plants work. None of us has ever had the provision of 42 invoked. So in seven years, I've talked to 10 lawyers from Dallas, San Antonio, Houston, a lot from Austin; probably 100 years of trial experience and nobody has ever seen it used. So, my first question, then, is
Chair	You would admit there's a lot more legal hours and a lot more lawyers than that out there in the community.
JG	Well, certainly, certainly. I've got about 100 years of experience, but sure, I guess what it tells me having all the years that I've been dealing with it and never had to use against in any of my cases either, is either there is not this problem that is perceived as being such a dramatic one, or maybe the problem is not that the defendant should be the only ones to invoke. And that's really t my main issue with the Bills by Kleinschmidt and Sheets and why I'm in favor of Mr. Dutton is, I've been doing this long enough to see abuse on all sides, I have, it's not all that often, but I can give you horror stories of defendants who have defended liability in cases up to the nth minute and filed summary judgments on liability when there were three eye-witnesses to the wreck and the police officer ticketed their person, and then they'll admit liability going into trial because they don't want those bad facts in front of a jury. That's an abuse of the process, as far as I'm concerned. And we have seen that plenty of times, where it, just from the perspective of having done plaintiffs' work for as long as I've had, I can guarantee you that no plaintiff's lawyer wants to file a lawsuit; they'd rather settle a lawsuit. For all plaintiffs' lawyers who were ranking on a contingency fee basis, our production is

	best when it is done quick; it's just a matter of fact. On the other side of the coin, a lawsuit that goes on longer and goes on longer generates more fees for somebody who is an hourly lawyer. That makes sense. So I have not personally seen the abuse that seems to drive these Bills, but I have seen what I would call abuse of defenses, and I will tell you that the plaintiffs' lawyers who filed bad lawsuits, they go broke in a hurry. That's just kind of the nature of the beast that's on a contingency fee. The other issue that I have with regard to these Bills is that it appears to me that we should at least try, allowing the plaintiff to invoke the process. Then, if we see a difference in the process, if we really want to speed the judicial process allowing the plaintiff to also invoke the process only makes sense. It seems fair. It seem equitable. Good plaintiffs' lawyers, I can tell you, vet their cases very well before they take them because we are going to be risking time and our expenses on a case before we would ever file a lawsuit. The decision to file a lawsuit is rarely left with the plaintiffs' attorneys solely; it's often between the plaintiff's attorney and the insurance carrier that he or she is dealing with. So, it's not as if someone walks in our door and we file a lawsuit tomorrow. I would venture to say that, and this is not a study I've don't, but just knowing what I've seen all these years, about 80% of the PI cases that are currently filed are probably car wrecks under $100,000; probably about 80% of them. No plaintiff lawyers wants to file those cases; it's inefficient. It's an inefficient waste of our time and money. So, I can promise you the problem is not coming from this side for most of the plaintiffs' lawyers. I'm not saying there aren't boneheads out there, there are, but a lot of them have been driven out of the business by the Bills that have been passed in the past. With regard to Rep. Creighton's Bill, I have so many concerns about this Bill as it's currently drafted that I don't want to bore you with them, but some of them that just jump out at me is, trying a case of what is abusive to a jury would automatically require experts, which would mean that in every single case in which somebody wanted to assert abuse, both sides, one or both sides would have to go out and hire lawyers as experts to say that what the lawyer has done in this particular case is a reasonable thing to do under the circumstances. So, every trial will driven up in cost and, at least when this provision is invoked, and every trial will be driven up in length. If you're going to have such a standard, I would say since this Bill says that the judge will determine what the prevailing party is, it would seem to me that you would want the judge to determine if this was, in fact, and abusive situation. There's not a trial lawyer on the plaintiff side or the defense side who says, "I can gamble and bet what a jury will do." Anybody who says that hasn't been practicing law very long. So to guess that if a jury decides against me that my case has been abusive, I think is difficult to understand. Having a judge who has seen many, many cases over time do it and was likely a practicing lawyers, I think makes a lot more sense. These second huge problem
Chair	You're assuming that a judge is not on his first case, that's he's received [inaudible]

JG	I'd still take that over the jury, Judge. Mr. Chairman, I'd still take the judge over the jury. But, the other problem that just seems to jump out at me is the plaintiffs' lawyer on these, on Rep. Creighton's Bill is the way section D is written, 3801(5)(d), plaintiffs' lawyers cannot recover their fees because it is written that if the fee is contingent or fixed, there is not recovering fee. That on a breach of contract action would change the law in the State of Texas that has existed for 150 years. And because I do a lot of business work, I can tell you that would have an enormous impact on my clients. My average client is a small business person. Here, she has suffered, to come to me, they've suffered a pretty bad loss; either haven't been paid on a major contract, or partners are trying to freeze them out of their company – something along those lines. Usually when they come to me, they are in a financial hardship. If I were to say them, "you must pay me $300-400 an hour to do the job, they can't do that. They have to be able to find a lawyer who can represent them on a contingency fee basis. This Bill appears under that section. To deny them the ability in a breach of contract case, which under Texas law we've been able to recover attorneys' fees forever, even contingent attorneys' fees, and it would take that right away from them automatically. Even though they are correct, the contract has been breached and they are entitled to recover. So, I vehemently disagree with section D of 38.015 because it is completely one-sided so that only an hourly lawyer can make recovery and the plaintiffs' lawyers cannot. The next portion of this under 38.017 where only the plaintiffs' lawyer, again, cannot make the recovery. Under 38.017(c), it says, "a determination of whether an attorney has a financial interest in the civil action is a question of law for the court." So, we're supposed to – within our case – determine whether we have a financial interest in the outcome of the case. Well, we all know that every contingency fee contract has that; it's automatic. You have a lien on the case, you must have a financial interest in the case. I would do, if this provision comes into being, what I would have to do in my cases is get all of the billing records from the attorney to the insurance carrier or the defendant, whoever it is, and I would be entitled to them under this law. In order to demonstrate the attorney cut his bill, i.e., had a financial interest in the outcome of the case, has made some sort of commitment to the client: "I'll do this and if it doesn't work you don't have to pay me." All of those would come into play on whether there was financial interest in the case. It's obvious that the plaintiff's attorney who is on a contingency fee is going to fall with that. Under subchapter 541, § 41, it says, somebody, Judge, you had addressed the idea of vagueness in this Bill, this section under subsection 1 says that you can get an appeal if there's substantial ground for difference of opinion. Well, that is the adversary process, and it will never not be so. Again, I think if we're going to do this, we have to trust our trial judges to know when it's a bad faith motion for summary judgment, or a good faith. I can give you a great horror story: Three eye-witnesses to a wreck, a Mexican national driving a dump truck runs a red light and smashes into a lady; she was terribly injured. I worked

	on this case with another lawyer. They denied liability on the case, they file a motion for summary judgment. Three eye-witnesses say it's the driver's fault, the cop says it's the driver's fault. They file a motion for summary judgment. This could go up on appeal, potentially. There's a substantial difference of opinion, I'll tell you that! To conclude that horror story, after the summary judgment was denied, we went to mediation on the case and it was a large, large case, and we were telling the lawyer how bad it was going to look denying liability in this case and how we thought it would be a real benefit to us before a jury. He simply says, "we're going to stipulate liability." That's after two years of fighting it and a motion for summary judgment. So, I believe, I think, chapter 29, Early Dismissals of Actions, sets forth the policy that you guys are looking for. Fairly, promptly and with the least possible expense to the litigants and to the state, get rid of cases. If that's what we're trying to do, and I don't disagree with that at all, if that's the policy that's being sought here, then I would say the way to do that is to allow Rep. Kleinschmidt's Bill and Sheets' Bill and Dutton's Bill to go forward where both sides have the right to invoke the process, so when it is a lousy plaintiff's lawyer being abusive of the system, there is a remedy. When it is a bad defense lawyer, or insurance company, abusing the system, there is a remedy. Thank you.
Chair	Any questions? Thank you.
JG	Thank you.
Chair	Chair calls Allen Waldrip.
Allen Waldrip ("AW")	Good morning, Mr. Chairman.
Chair.	Allen, make sure I'm right here: I have witness affidavits from you on 274, 2661 and 2457. Is that right?
AW	There should be one more in there. I think I've got the same form that Mr. Gallow had.
Chair	We will have to look here.
AW	Should be all but your Bill.
Chair	We may have. We've sorted them out. If you said you didn't want to testify on one it may be in a different file here. I don't see one on the other Bill. [inaudible – looking for form – riffling papers]. Allen, I just show them here on 2661, 274 and 2457. I need to ask you; I'm sorry. I just found it. I stacked it in the wrong stack. Thank you. Go ahead. Please state your name, who you're with and your position on each of the Bills.

AW	I'm Allen Waldrip, and I'm here on behalf of Texans for Lawsuit Reform. The Committee members have heard from me extensively so I don't
Chair	You did mark for on each, all of the Bills.
AW	I did. There's, you've got to mark something on there.
Chair	That's true.
AW	The reality is, is that we are Texans for Lawsuit Reform is working with Rep. Kleinschmidt, Rep. Sheets and Rep. Creighton on coming up with a kind of a compromise on what might be the best approach for this issue. Our anticipation is that Rep. Kleinschmidt will offer a Committee substitute that will address some of the issues that came out in the previous Committee hearing, and that it should address, I believe, the vast majority of the issues that have come up. I really don't want to belabor this Subcommittee's time, but I am happy to answer questions about the Bills, TLR's position on the Bills. TLR's position today is we believe that Rep. Kleinschmidt's ___ approach and the Committee substitute that he will be laying out is the best approach under the circumstances, and we'll address what needs to be addressed. It basically, I believe, I'm kind of predicting a little bit, here, but I think it is going to be a Bill that primarily addresses chapter 42, the offer settlement mechanism, and looks primarily, there is some clean up to it, but it looks primarily to remove the cap on the fee shifting in chapter 42 to make it more usable is what I'm anticipating. With that, I will answer and address any issues that the Committee would like me to. Also, I will be here throughout the remainder of the hearing if the Committee has something that comes up that you would like TLR to address.
Chair	Members, any questions for the witness? I think Judge Lewis has a couple.
Judge Lewis ("JL")	Just really, one line of questions. With regard to Rep. Kleinschmidt's Bill and what I think he anticipates is going to be filed is an additional Committee substitute
Chair	I just have to warn the Judge that there is no Committee substitute before us.
JL	Right. Yes, thank you. Let's say with regard to Rep. Kleinschmidt's [inaudible] as it is presently filed, if one were to, as presently filed it has voluntary damages, it has injunctive relief, and I had questions early on in the hearing about that as to, what if you have a combination of relief or other different kinds of relief. If one were to have a bill that dropped the injunctive relief and just had monetary damages in it, so basically the Kleinschmidt bill but without the injunctive relief part, just monetary damages, and there was a lawsuit that had both monetary damages and other types of relief mixed in it, the claim was for several different types of relief, would the Bill allow the offer just to be made on the monetary damages and you could recover your litigation costs if you prevailed on that part,

	or would the rule just not apply? How does that work?
AW	The way it would work is, is that way the statute works, chapter 42 works today, it applies only to monetary relief. It specifically excludes any non-monetary relief. Now, because of that, it makes it something of a cumbersome device to use in mixed cases of monetary and non-monetary relief because the only thing that you can use chapter 42 for today is to make an offered settlement on the monetary claims. If those claims, if that didn't resolve the case, for example, if you had a non-monetary claim that was so significant that the amount of money you were getting offered didn't resolve that, then, and, of course that's going to be a rare case, and you imagined that case, the offer being rejected and that case going to trial to verdict to the end, then what you would have to do, since chapter 42 does not apply to non-monetary relief, is there would have to be a segregation of costs and fees, and you'd have to be prepared to prove that, and you'd have to be prepared to get up in front of the finder of facts and say, "alright, we've got this rejected offer here, this is what it costs to litigate those claims that that offer was unreasonably rejected over, but we also have this other set of costs over this injunctive relief that chapter 42 does not apply to. Now, the reality of that in real life is that it will almost never going to be worth doing that, almost never. And so, the honest truth is you wouldn't, if you got a mixed case where you're non-monetary relief is truly a significant part of the case, chapter 42 doesn't work.
Chair	What kind of case would that be. I'm sitting up here trying to visualize what kind of case is that?
AW	Well, one kind of case that might fall in that category, and once again this is going to be a pretty narrow band of litigation, but one kind of case that it might be is a business litigation trademark case, trade secret case where what you want to do, one of the major things you want to do, is you want to stop somebody else from using certain material so that the relief of injunction where you're saying, "please, court, enter an order that enjoins the other side from using certain types of information" is a major part of your case
Chair	Because there's trademark or patent
AW	Or trade secret is probably the more likely, that somebody has got a former employee or former partner or former business partner who has split with you, and he knows all the things you know about your secrets for your business model, and he takes it off to either somebody else or to some company. Those types of situations sometimes have litigation that is very significant over the non-monetary aspects of who gets to use the information, and who gets to use the business model. In that situation, you might have a piece of litigation where the damages don't drive it. You know, maybe he hasn't done it a lot or maybe that's not what the real value is.
Chair	Or he hasn't don't it yet.

AW	Or he hasn't done it yet, or hasn't done it enough that the damages from doing it are the significant part of the case. And so, in that kind of situation which does happen, you would have a non-monetary piece of your case that is significant.
JL	And also, you'll have foreclosures of personal property where you're suing the contract and you're suing to get the property back, you'll have employment law is a big one, trespass to try title or other invasions of a property interest. You'll also have a declaratory judgment, request for return of property or performance of some type, plus damages that were ancillary, so you can get them.
AW	As a matter of fact, the single case that I wrote by appointment for the Supreme Court involved non-monetary relief. It was specific performance case. So they do happen.
Chair	Members, any other questions? Thank you. You're going to be around?
AW	I will be around.
Chair	The Chair calls Brad Parker.
Brad Parker ("BP")	Thank you, Mr. Chairman.
Chair	Brad, I think I have witness affidavits for you on all five of the Bills. Is that right?
BP	You do. And I guess my question is would you like to hear me speak just once?
Chair	We'd like to hear you speak as long as you'd like to one time.
BP	Very good. Thank you very much. My name is Brad Parker. I'm here today on behalf of the Texas Trial Lawyers Association, and I'm testifying against all of the Bills being presented today, except for HP 3673, Rep. Dutton's Bill. Let me start by addressing HP 274. The attorney fees, well, the whole premise of a loser-pay system seems to be based on that there are too many frivolous lawsuits and, thus, a loser-pay system would somehow discourage those lawsuits. Although we hear the rhetoric of too many frivolous lawsuits, we don't see the proof in the pudding, so to speak. I think with the passage of the tort reform measures in 1995, 1997, House Bill 4 in 2003, and subsequent reforms after that have eliminated frivolous lawsuits. Not to mention, except in the rare case, that there are adequate rules and statutes currently in place to specifically deal with frivolous lawsuits. That's chapters 9 and 10 of the Texas Civil Practice and Remedies Code, and that Chapter 13 of the Texas Rules of Civil Procedure. I would suggest to this Committee that frivolous lawsuits are not a problem. The rhetoric sounds good and thus it justified the rhetoric for a loser-pay system. Obviously, any defendant, as Mr. Nixon said a moment ago, who is sued probably

	feels that they were sued unfairly. Just as a plaintiff who a counterclaim is filed against, or even a vigorous defense, probably feels like they were unfairly treated. That does not make it a frivolous filing. And, again, we have adequate rules and statutes on the books to do that. Further, as Mr. Gallow indicated,
Chair	Some of my experiences with the correction side, we have a lot of those items that are sent forward by prisoners. Would you put all of them in the category of acceptable lawsuits or would you possibly put some of those in the category of frivolous.
BP	I'm sure, without question, that some of those are frivolous, but how does a loser-pay system stop that abuse? Prisoners don't have any money; they're lucky to afford candy bards in the commissary.
Chair	Well, I don't jump to that conclusion always. [inaudible] jump to that conclusion, too.
BP	You've seen it much more than I have, Chairman, but that's what a loser-pay system doesn't discourage; and that is, those that are judgment proof will not be deterred in the slightest. Nor will those that have, extremely rich will not be deterred in the slightest; it's only those betweeners. The people between being judgment proof and the people who are uber-rich. It's those who are trying to put their children through college; it's those who are trying to save for retirement; it's those small business suits that are going to have to suffer the brunt of a loser-pay system, and that's been demonstrated time and time again with the British rule and the French rule that he model of the model of the loser-pay system
Chair	We have a little touch up that we need to do on one of your forms. We don't want a point of order or any of these.
BP	The other problem that I see from a loser-pay system is that you're going to create a cottage industry in Texas, and that's going to be a new insurance market. Just as the British rule has proven, they're will be insurance policies to cover these types of costs, or there could be. Also, a loser-pay system increases the administrative costs. You're going to create litigation over what constitutes reasonable litigation costs. In fact, in Rep. Sheets Bill, he specifically says, there must be a hearing to determine the litigations costs. Then, you're going to have appeals on what is or was not done as being correct on the litigation costs. Then, there's several questions. What about if you have multiple defendants in a case, and there are cross-claims between the defendants; does the loser-pay provisions pay for that? Especially as those outlined in 274 and in the amendments to 42? What about if you have some defendants exonerated and others not? How does loser-pay apply to that situation? What is you have a subrogation interest, which you do in almost every personal injury case; that is, where the hospital or the healthcare provider is trying to assert a subrogation right

Chair	Are you saying in your previous statement in cases where there are defendants, some of which obviously had liability, but they may have picked a defendant somewhere out of the case which somebody says they shouldn't have put that person on the list, you're saying that's a concern you have?
BP	That is a concern I have, and how the rule would apply in that particular situation. And so I don't think that Bill even touches on that, on how that would be addressed or how that would happen. And then, going back to the subrogation interest, where you have a healthcare provider who is trying to recover by and through the plaintiff in a case their costs, their expenses. Or an insurance company that has a subrogation interest because they paid the healthcare costs. Well, if the plaintiff is unsuccessful, should some of the loser-pay be transferred to the insurance company that was seeking to recover on by and through the plaintiff? That would seem only fair. That's not addressed in it. Also, when you have a defendant represented by an attorney whose fees are being paid by an insurance carrier. If they win, who gets that recovery? The defendant or the insurance carrier? On the other hand, if they have to pay it, if the defendant has to pay, who pays? The carrier or the defendants? What if there's a question about that? Aren't there going to be instances, then, between a defendant and its carrier about who exposed whom to responsibility and liability for these attorneys' fees or litigation costs? Loser-pay just creates an all-in game of poker, and those who have the biggest pot can afford to play all-in, and they will be able to squeeze who don't have as big of a pot of money out. In the Texas Rules of Civil Procedure, Rule 1, basically states, "that it is for just, fair, equitable and impartial adjudication of the rights of litigants." I suggest to you that when you interject loser-pays, you've thrown that out. But there are other provisions within 274 that I think are troubling, as well. Specifically, the abuse of civil litigation costs that can only be applied to someone to an attorney who has a contingency fee interest in the case. I won't belabor the point. I think Mr. Nixon and Mr. Gallow commented that there can abuse of civil litigation on both sides. The other section is interlocutory appeals. Interlocutory appeals, I think you burden an already over-burdened intermediate appellate court system. Chief Justice Terry Livingston gave a seminar last Saturday at Possum Kingdom at the Tarrant County Benchmark Conference, which I attended. During that seminar, she talked about how their court, because of the budget crisis, has already had to scale back on their money that they receive for operations, and that they've been asked to so again. And it's anticipated that they'll take even a bigger hit in the upcoming budget process. She indicated in her talk that their court is burdened with interlocutory appeals, and that it causes, in her, I don't want to speak for her, but what I understood her to say, the reason for the delays in getting the real opinions out the courts, they can't do it. If the interlocutory appeal provision passes that's currently under 274, the floodgates are going to open and we'll be lucky to any kind of opinions in any kind of timely manner. Not to mention, that when you have interlocutory appeals on any decision made by a trial court in essence, not any – there's some guidelines – but you just perpetuate the litigation process. You increase the costs, you increase the administrative costs. Your not

	serving the policy of expedited, fair and cost-beneficial process by opening the floodgates on interlocutory appeals. Early dismissal of actions: I think it's a great concept, except there's nothing in 274 that describes what it is, and it leaves it up to the Supreme Court. It's hard to be for something if you don't know what it is, or against. It's much like going to the prom, everybody likes to go the prom, but if you have a blind date, you don't know if you're going to like the prom after all or not. Expedited civil actions: I would suggest to you that we already have that in essence through the level 1, level 2 and level 3 schedule ____, that were passed back in HB 4. Level 1 specifically applies to $50,000 lawsuits that are less, it has a limited amount of discovery. My experience, at least in Tarrant County and Dallas County where I primarily practice, is I have no trouble getting a trial setting. I think that if you were to poll, most judges would tell you that if a plaintiff or a person wants to go to trial, there's not a backlog on their docket. They can get to trial. I don't think that we have a problem right now.
Chair	A judge comes in and tells us we need more judges because of backlog, but you say that that's not the case.
BP	Well, it may be for criminal cases. I don't know. You know, I can only speak from my experience and may discussion. As President of the Tarrant County Bar Association, I try to communicate with all members of our Bar and the judges, and I've been very active up there. I think I can safely represent there's not a backlog in the civil district courts of Tarrant County, Texas or Dallas County, Texas. That's my impression, no research and it's certainly not peer review.
Chair	No research and no other judges here to say that they agree with you.
BP	No, sir, there's not. There's not. Not that I'm aware of. But, again, the concept of an expedited civil action is a good one. I think we already have it. I think it may be something in search of a problem. The last part of the Bill is the no implied causes of action, that statutes do not create causes of action unless they expressly indicate that they do. I don't know exactly what that means because in many cases, the statutes are used as standards, and I'll give you a perfect example: a car wreck case. It's illegal and it's a statute to drive drunk in this state. That level of intoxication can be used as a standard in your negligence cause of action at times to establish the negligence. My fear is that under, if this were to pass, there could be an argument, that, no you could never use a statute as a standard. Also, there's negligence per se cases, which a violation of a statute can give rise to a negligence per se lawsuit, and that's been the common law of this state for a long, long time. So, I'm a little concerned about what the goal or the underlying motivation for the standards on those statutes are. So, therefore, it's not clear to me and I'm opposed to that. As for the offer of settlement of chapter 42. I'm not clear exactly what the committee substitute is going to do, but it's my understanding that all, both Rep. Sheets and Rep. Kleinschmidt's Bills, both of them have one thing in common,

	and that is the ability to get into the defendants pocket, if you will, from the standpoint of under the current scheme the most that a plaintiff could be responsible for paying is an offset against any judgment that he might get. We're opposed to that for many of the same reasons that I just spoke to you about under the loser-pay system. It squeezes out the betweeners. The mom and pops. The small businessman. The family trying to put their kids through college who may have suffered a grievous harm, but now has to make a decision as to whether or not the kids get to go to college or I'm going to be the college education on my recovery because somebody ran into me or I suffered an injury somehow, or even I suffered a loss in my small business. The, if you want to make the offer of settlement rule fair, in my opinion, in our position, that would be to allow both sides to trigger it, keep it just as it is. Just because the 42, chapter 42 is not utilized often in cases may speak volumes, it's use can be deafening or it's non-use deafening, from the standpoint, it's very effective. It's already played a major role
Chair	What plaintiff was ever triggered?
BP	They can't trigger. I'll tell you
Chair	It's triggered by the defendant.
BP	Yes, sir.
Chair	Okay. And what you're saying is, then, make it fair so that both could be the recipient of that trigger.
BP	Yes, Mr. Chairman. In the case that a plaintiff might do it is in a car wreck case. That is a smaller case where the defendants dig in their heels and say no we don't think we're going to
Chair	The defendant might say, I'll take an offer of $50,000 and the plaintiff may say, no I'll trigger I'll also put out an offer of $150,000. Is that what you're saying?
BP	Well, under the current scheme that scenario could happen. What Rep. Dutton's Bill would do would allow the plaintiff to make the first move. In other words, the plaintiff before the defendant ever tried to initiate the benefits or the application of chapter 42. A plaintiff could do it first. They'd say, Mr. Defendant, I want $50,000 for this claim and it would cause the defendant, then, to have to make a decision about whether or not they felt comfortable enough proceeding with the case at the risk of having to pay attorneys' fee and litigation costs as it's defined. I will not speak right now, unless you want me to, on your Bill, Chairman Madden, I haven't heard anybody else speak on it, and I'll wait for that because it is so different than the other issues we've talked about. Again, I appreciate your consideration and attention this morning.

Chair	Members, questions? I think Judge Lewis has a couple of questions.
JL	We've had a lot of testimony indicating a lot of fears and concern over what we call loser-pay or offer settlement, but it's my understanding, my experience, that in federal court we have an offer of judgment rule I think since the '30s, I think since it's an old rule since the 1930s or so, certainly, and I don't, what everybody thinks is wrong, I don't go back to the 1930s practicing law, but we have had that rule
Chair	We have to have an ID card showing that wasn't the case.
JL	I'll address that later, Mr. Chairman. But only to you under cover of confidentiality.
Chair	Okay. Thank you.
JL	So, we've had an offer of judgment, and it's one way, I mean a defendant makes an offer of judgment, it's not two way, it's in every case, I think it's a more favorable standard, I'm not sure exactly what it is to [inaudible] more favorable result than that offer the defendant can recover the costs. So, it's all the things that are stated here as fear and concern. My experience of trials in the time I've practiced law is that really made almost no difference in people wanting to seek justice in federal court. Over my legal career, people have readily and plaintiffs have readily accessed the federal courts and filed lots of lawsuits of all kinds in federal courts and are there all the time and nobody avoids federal courts because of the offer of settlement rule because it somehow sets up some evil situation where injured litigants can't get redress as sort of the fears that have been stated here. I'd just like to hear from you what your experience has been, and if there's something about that that I'm incorrect about. Just kind of give me your perspective since we already have a rule that has these things that you, since they are draconian in federal court, tell me your perspective on that.
BP	I will, Judge, and I got to tell you that a lot of my practice is not done in federal court and I've had some experience with the offer of judgment in federal court but it's been several years so my memory is a little hazy. I would say that it does play a factor in how the litigation proceeds whenever it's invoked. In the federal cases I have been involved in, it's rarely ever been invoked and I can't tell you why that it right now, but just like the Texas rule it just isn't used, at least in my experience, very often at all.
JL	Let me ask it this way then: have you ever been in a case, as a plaintiff getting ready to file a case and federal court was available and the lawyers sat around and discussed, we don't want to go to federal court because there's that offer of judgment rule? And there's lots of reasons to go and not go. Has that every come up?

BP	That has never been a reason in my discussions.
JL	Thank you.
BP	Thank you very much for your time.
Chair	Thank you very much. Chair calls Lee Parsley. Lee, I have witness affidavits from you and all the Bills, is that correct?
Lee Parsley ("LP")	I believe that is correct. I wanted to not have to fill one out in the middle of my testimony in case something comes up. Good morning,
[speaker]	Chairman, point of order, do you have to have a coat to testify?
Chair	I'd have to check with the Sergeant of Arms on that. But his color is a good choice.
LP	Thank you, Mr. Chairman.
[speaker]	I think you just risked the Chairman finding you in contempt.
Chair	[inaudible] in contempt or else he may have to provide something at some later time at one of the Committee hearings.
LP	Good morning, Mr. Chairman and members of the Committee. My name is Lee Parsley. I'm here on behalf of the Texas Civil Justice League and I do apologize for not having a coat. I had texted my wife and asked her to bring it down to me. She has agreed
Chair	If the Sergeants come in and start hauling you out, we'll know what the ruling was.
LP	Frankly, I think it's stylish without it.
Chair	So you would be against that rule?
LP	I would be against that rule. I'm not far off your colors this morning. I would like to spend a little time with you this morning on House Bill 274 more than anything else, although as I said I did file sheets on all of the Bills so that we can talk about them all quickly.
Chair	And you marked for on all of those except you are against 3673, is that correct?
LP	That is correct. So in favor of 274, 2661, 2437 and 2031, and against 3673. On House Bill 274, I think the first item in the Bill is a change to chapter 38 to create

	essentially a two-way loser-pay system in what is currently chapter 38 a one-way system; that is, if you're suing on an oral contract or a written contract that does not currently have a provision for attorneys' fees in it, as the party bringing the suit, you can invoke chapter 38 and recover your attorneys' fees, but the party that you sued cannot recover their attorneys' fees. I think the first item in House Bill 274 is to make that a two-way loser-pay system of a sort in chapter 38, which we think is appropriate. The second part of House Bill 274 is what I think everyone is referring to as the loser-pay provisions of the Bill. The Texas Civil Justice League while it supported with the governor's ideas and concepts that are incorporate in 274, prefer modifications to chapter 42, the offer of settlement statute that currently exists as an alternative to the loser-pay provisions that are in chapter 274, we would like to Rep. Kleinschmidt's Bill, Rep. Sheets Bill or Rep. Creighton's Bill incorporate the following ideas in modifications to chapter 42. That it continue to have a defendant trigger, that once the defendant triggers it both sides can then use the offer of settlement provisions, which is what currently is in place, and that we remove the items that make it not useable today, which are the offset against the judgment and the cap provisions that are in there. So I think that if you remove those items, you have the possibility of making chapter 42 a more useful tool that it is today as a sort of form of loser-pays, but it's a form of loser-pays that first requires put an offer of settlement on the table. Therefore, they've got some skin the game and they're trying the resolve the lawsuit and you're using this mechanism to encourage settlement and to resolve lawsuits. So we believe it is, that's the fundamental reason to have chapter 42 and is the reason we should continue to have it, to try to make it more useful and include it in House Bill 274, if possible. At least, it's our opinion. I want to cover the other aspect of House Bill 274 rather quickly. The interlocutory appeal provisions, we support at the Civil Justice League. We would like to see the following elements in regard to that. First, that you remove the requirement for an agreement of the parties; that's what limits the usefulness of that provision right now. If you have won a decision from the trial court on an interlocutory order of some sort, you very seldom want to agree to appeal that even if everyone would agree that it's a controlling question of law on which there is a substantial and good faith ground for disagreement. If you've won, you very seldom want to have that reviewed; you'd rather hang on to your victory. So we think you need to remove the agreement of the parties limitation on that that exists today which makes it more in line with the federal rule that has been in existence for many, many years. We do think that it needs to have a trial judge as the gatekeeper, which would be a change from the draft of 274 that is filed. So we believe that the trial judge should essentially certify the question to the court of appeals, and then the court of appeals can either accept or not accept the question. So we believe that element is there. The third element we believe is important to that is a fee shifting element in that, as well, to provide that if you take the appeal and you don't prevail, that there is fee shifting in that and you then have to pay the other side's costs of defending that appeal. We think that will, again, is fair, equitable, is another concept that's a loser-pays concept and it also would discourage frivolous appeals and discourage too many appeals. So, someone would have to be serious about the appeal to take

	it. So, those are the elements we think would help in regard to the interlocutory appeal provision of the statute. In regard to the motion to dismiss, we would favor the Senate Bill's language describing what the Supreme Court should do in drafting a motion to dismiss practice is somewhat simpler, and we think it probably better. The Supreme Court has shown, in my opinion, a very strong ability to draft fair rules without having to have too much guidance from the Texas Supreme Court. They've been doing it since 1933, when they given rule-making authority. I held that job for the Supreme Court as the rule staff attorney for a period of time. I have great faith in the Supreme Court's ability to write the rules, and its seems to me that House Bill 274 should say, please incorporate into the Texas Rules of Civil Procedure a motion to dismiss practice and not try to micromanage how the Supreme Court does that. They may find the federal rules to be helpful. They may find the rules of Georgia, California or New York to be helpful. I think they should have the discretion to figure out what rules are most helpful and blend best with Texas Rules of Civil Procedure that currently exist. In regard to the expedited smaller civil cases, it seems to be again that the Senate Bill does a slightly better job of describing how that should go. It's much simpler language. House Bill 274 has several pages to describe what the Supreme Court is supposed to do. We are inclined to say that that should be a shorted description again and to just ask the Supreme Court to try to figure out how to expedite small civil cases. On this point, I do particularly think the Governor is on the right track. While I am an appellate attorney almost all the time these days, I've done a little small litigation over the years and it's been my experience that clients on both sides of small litigation think that those cases go too slowly and cost too much money. So, anything we can do through the legislative process or to ask the Supreme Court to do through the rule-making process that will expedite those cases and result in a quicker yet fairer resolution of those cases I think is helpful and I think would be very much appreciated who use our court system, and will help offset some of the move we see to arbitration as an alternative to litigation because so many businesses and people think that litigation is expensive, time-consuming and difficult on them personally and professionally. So, that is a good step that we simplify the language just again to tell the Supreme Court go forth and make rules to expedite small civil cases. Finally, the provisions about specifically including a reference in statutes to creating a private cause of action we think is appropriate. I had an instance some years ago in practice where the lawsuit was about whether the unsolicited good statute of Texas carried along with it a private cause of action. The statute says in Texas now that if you receive goods in the mail that you did not ask for that they are unsolicited by you that you are entitled to keep those goods, but it doesn't say whether there is a private cause of action against the person who sent you the goods and sent you a bill for them if you happen to pay that bill. That was a live question in a class action about some software that had been sent unsolicited. Were those people entitled to their money back or was their sole remedy just to keep the goods and if they paid then they had made a mistake for which they could not recover. We spent a large amount of time litigating that specific issue about whether that statute which was silent on whether it created a private cause of action did, in fact, create a cause of action for

	damages. So, it would be helpful for statutes to regulate, to specifically say it either creates a private cause of action or it does not. It seems to me that there is very little harm in specificity, and that's all this does. To ask the legislature to say specifically whether it creates or not and it eliminates the litigation that flows from the ambiguity that's in statutes today and could be in future statutes. I've already testified in this Committee, specifically in regard to Rep. Dutton's Bill, House Bill 3673, so I won't touch on that unless someone would care for me to, and, Chairman Madden, your Bill 2031 in my mind is an entirely different topic and so I'm not going to touch on that again and I have already testified on that committee. So, with those remarks I will of course be happy to answer questions or to yield the podium.
Chair	Members, questions? Lee, I guess we'll let you yield the podium since the Sergeants haven't been here, you're all right.
LP	I'm going to run away.
Chair	Chair call Ryan Brannon. Ryan, good morning. Will you state your name, who you are with and your positions on, I just have a witness affidavit from you on 274, is that correct?
Ryan Brannon ("RB")	That is correct. Chairman, Members, my name is Ryan Brannon. I'm with the Texas Public Policy Foundation. Handing out a research paper that is in the final stages right now, I thought it was important that we get the draft to you as we discuss House Bill 274 today. The recommendations that we make in our paper as we go through the analysis of a loser-pay statute are actually similar to Rep. Creighton's Bill so while the members that have been working on this and they've been going back and forth on this in the weeds, I thought I could better serve the Committee's time by giving some facts and figures that we found in the paper that kind of reinforce the reason we're doing this. Americans go to court more often and at more cost than any other people in the world, and while Texas has made strides in the right direction, in the 2003 reforms, those reforms dramatically reduce doctors malpractice insurance premiums and cut the number of lawsuits filed against physicians in half. In fact, since 2003, medical malpractice lawsuits have dropped by more than 50% and the number of practicing physicians in Texas has increased from 35,000 to 55,000. Nevertheless, Texas still faces a large number of frivolous lawsuits. The current system of court litigation is expensive. In the United States, the direct cost of tort litigation reached $247 billion in 2006 with these costs growing at an annual rate of 9.2% of gross domestic product, even as GDP was growing at only a 7% rate. By 2008, the static cost of litigation, which is damage awards, defense costs, administrative costs, had risen to $328 billion per year. Adding the indirect economic effects on society from tort cases making figures swell to over $865 billion annually, that number constitutes what we call at TPPF an annual tort tax of $9,827 on a family of four, and equates to roughly 2.2% of the GDP. So while we don't know the exact toll that frivolous litigation takes on the economy, we do know that frivolous lawsuits represents a

	significant portion of the total number of lawsuits. To fully understand the need for tort reform measures, including loser-pay statute, we must take the total cost of our tort system into account. As Lawrence McWillen explains in his *Wall Street Journal* article, "any true estimate of the costs of America's tort system must also include these dynamic costs of litigation, the impact on research and development spending, the costs of defense of medicine and the related risk in healthcare spending and reduced access to healthcare, and the loss of output from deaths due to excess liability. Additionally, the opportunity costs must be considered. Money spent defending frivolous lawsuits could be spent elsewhere in the economy. PriceWaterhouseCoopers calculates that the medical liability concerns increased annual healthcare spending by $124 billion in 2006 alone. This cost related to the medical liability increase companies and small businesses are forced to respond by switching funds from research and development and innovation into litigation defense. Foregone research and development due to excessive liability results in estimated loss sales of $367 billion in new products. There is no way to properly calculate the opportunity costs from the billions of dollars that could have been invested or otherwise used for innovation and economic growth." When we look at these numbers and facts and figures that we found when doing our research, the conclusion that we draw is that a loser-pay statute would overcome many of these high transaction costs and insure that all court plaintiffs with meritorious claims do have access to the judicial system, and such a statute would decrease the costs of litigation and insure that only meritorious claims are heard. Thank you.
Chair	Members, questions? Judge Lewis is sitting behind you [inaudible].
JL	Okay, thank you, Chairman. Just a few questions. First of all, your comments are with regard to tort lawsuits. Some of the Bills before us are broader than that, it's not just torts, it's lawsuits for monetary damages, in general, under most of these. Do you have any comments with regard to non-tort cases or are you limiting your remarks to tort cases.
RB	I'm limiting my comments to tort cases. Those are the ones that were most easily quantifiable in studies that have been done, so I just didn't have the data to expand it.
JL	Thank you. With regard to those, you've told us about frivolous cases and there your remarks are limited to those tort cases that are brought frivolously. In other words, you realize that you can have, a party can loose but it not be a frivolous lawsuit that was filed, it was just, you know, a jury decides you're wrong and you go. Are your remarks and your concerns only with regard to frivolous lawsuits?
RB	The numbers I'm giving aren't necessarily just on frivolous lawsuits. The amount of frivolous lawsuits aren't quantifiable, you know. Atlas said they don't see the problem, I just listed a lot of numbers that show there is a problem, but there's a lot of people out there who won't come forward and release their information and

	so we don't know what those cases are. In some cases, they choose to remain anonymous, which makes sense when you get sued, I would think. So, I can specifically garner that information.
JL	Let me put it this way: your remarks about, or your feelings about loser-pays in lawsuits, are your remarks that losers should pay frivolous lawsuits or losers should pay in any lawsuit that is lost, that the plaintiff doesn't prevail?
RB	Well, I think that the way 274 is written is that the defendant can opt into loser-pays and we think that that seems a pretty good way to go.
JL	Okay. So, it's not just frivolous cases that you're talking about. Your talking about basically loser-pays whether it's frivolous or not.
RB	Yea, I think, well I know it's something that the parties to the lawsuit would determine at that point or especially the defendant is the way it's written now. I know there's been debate back and forth on that here today and whatever the minds that are working this out a little bit deeper into the weeds than we are decide. I think we can make that determination at the time, but I don't want to jump in front of that just yet.
JL	Well, then, the last question I have is, you've talked about loser-pays and of course the loser is the defendant, and if the case is meritorious and, therefore, the defendant did the wrong, is responsible for what happened, do you feel just as strongly about that, that the defendant should pay the costs if the defendant is the loser?
RB	Yes, sir.
JL	Thank you.
Chair	Any other questions for the witness? We have witness affidavit forms from Luke Belschneider of the Texas Association of Manufacturers for House Bill 2661 and House Bill 2031, but did not choose to testify. We have witness affidavit forms from John Fisher for House Bill 2661, for House Bill 2437, for House Bill 274, for House Bill 2031, but he did not wish to testify. We have witness affidavits from Dennis Kerns from the...wait a minute. I need to announce that John Fisher is in the Associated Builders and Contractors of Texas. I have witness affidavits from Dennis Kerns from BNSF Railway for House Bill 2031, but did not wish to testify. We have witness affidavit forms from Stephanie Gibson, the Texas Retailers Association for House Bill 274, for House Bill 2437, for House Bill 2031, for House Bill 2661, but did not wish to testify. We have witness affidavit forms from Corbin van Arsdale from AHC Texas building branch for House Bill 274, but did not wish to testify. Is there anyone else here who wished to testify for, on or against House Bills 2031, 2437, 2661, 3674 or 274? That's 3673. Alright, we have Mr. Travolsy is up here with a couple of forms and he obviously

	wants to speak.
Dick Travolsy ("DT")	Just a brief comment on [inaudible – talked over by Chair]
Chair	The Chair recognizes Mr. Travolsy. Dick will you please notify who you are wish, and which Bill you are here on – House bills 274 and 2661, is that correct?
DT	Correct.
Chair	And you are for both of them.
DT	I applaud both of those Bills, Mr. Chairman and Members and all I want to say is that TLR believes that if you look at Rep. Kleinschmidt's offer of settlement Bill, which I understand is being discussed between Reps. Kleinschmidt, Sheets and Creighton about what vehicle to pursue that offer of settlement provision in that we think the other four provisions of 274 are also extremely important, and whether the Members and Committee decide to pursue those in separate vehicles or in one vehicle, we think they ought to be looked at as a unit because they are intended to add efficiency to the litigation system. There are loser-pays provisions in a number of those provisions and, Mr. Chairman, I would comment that already there are a lot of loser-pays provisions in Texas law, usually one way, usually in favor of the plaintiff and against the defendant. So, it's not new Texas jurisprudence to do a loser-pays concept.
Chair	Members, questions? Dick, thank you very much. Is there anyone else here wishing to testify for, on or against House Bills 2031, 2437, 2661, 2673 or House Bill 274? If not, I believe that at least one of the authors would like to make a close on the Bill. The Chair would recognize Mr. Kleinschmidt.
Rep. Kleinschmidt	Thank you, Mr. Chairman. Obviously, we don't want to loose sight of the goals here to increase efficiency, decrease the costs and, of course, give the parties justice. I do believe that it's important to maintain the defendant trigger because what we'd be looking at here is a gamesmanship kind of situation because it's too easy, I mean most actions have at least a two-year statute of limitations. You can take any plaintiff these days of ordinary means or these mid-road people, or even of several million dollars worth, and they don't have any liability at the time so they're free to move their assets. So, asset planning would make any plaintiff judgment-proof and, therefore, having a free shot at these defendants, if you were to give the plaintiff a trigger in this situation. Conversely, most plaintiffs have opportunity to research the judgment, proof nature or collectability of their lawsuit, obviously. In my experience with, you know, when our law firm looks at filing any lawsuit, what we're going to do is research the ability to recover and if there's no pot of gold at the end of that rainbow, I mean if they're judgment proof or if there's no insurance, we don't file it; it's pointless. So, the plaintiff has all those advantages right up front and so I do believe maintaining the defendant

	trigger is one of the vital aspects of the Bill. As we know, we've heard a lot of talk about, you know, 42 and 38 and what have you, the problem we run into from a practical standpoint out there in our court systems is our local judges' hesitancy to impose any sanctions at the local level and so we, that's what we're here for; we're trying to find some system that allows a fair recovery of costs associated. I do contemplate filing an additional committee substitute. I am hesitant to hand it out right now. If you want to see it, I could, but sense it's not filed, it's just proposed at this point in time, I believe I'd be better off holding that and providing that at some point in the future. Are there any questions.
Chair	Members, questions? Thank you.
Rep. Kleinschmidt	Thank you.
Chair	Do any of the other Representatives want to, Rep. Creighton, do you?
Rep. Creighton	Mr. Chairman, Members, thank you. I appreciate being able to lay out HB 274. We have heard a spirited discussion on much to do with loser-pay. I think it's a win either way for me because it's important, I think, since we've had some of these, you know, reforms enacted from '03, I saw Rep. Nixon here earlier, I guess he's still here,
Chair	No, he's gone.
Rep. Creighton	Okay. I wanted to tell him thank you. We went through what we went through on the budget and talked about a couple of hundred amendments that we looked at. I did a little research and found that when he was on the floor in '03 for his tort reform efforts on HB 4 there were over 650 amendments.
Chair	We had to listen to every one of them.
Rep. Creighton	I imagine, you were there, I wasn't; I got here in '07. But, it, we've had a lot of discussion on loser-pay. It's my goal either way to pursue something along the lines of non-prevailing party pays, or loser pays in, Mr. Travolsy made a good point, that in DPTA and consumer litigation and other areas, we've got many areas of the law where legal fees can be obtained, but, you know, what we need to focus on is the problem at hand, you know, we had some comments by a plaintiff's attorney would said that their intent every time is to settle, not to go to court and that's good in a sense, but in another sense that's part of the gamesmanship that Rep. Kleinschmidt just referred to. In working in and out of this building for a couple of sessions in the early '90s in the Senate and now five years in the House Subcommittee to me over time has usually either meant a sunrise or a sunset and I hope that what we're doing here today, you know, continues to be part of the sunrise. I wanted to make it very clear at the front end on the loser-pay provision itself, I'm very willing to work on language and I have

	been working with stakeholders. We submitted a hearing request 24 days ago and I always knew that when I got the hearing and was able to talk about the Bill itself, we would get into whether or not it ended up being a true loser-pay set up or if we sort of evolved into a revise offer of settlement. What I have trouble with personally in working for, I worked for the Attorney General for Texas and then for Oklahoma as a brief writer for a few years and then went into private practice for a few years, and found myself always in land development issues and I really had a passion for that. I went into that business after practicing for a few years, but sense then every year I've been some sort of a target for a lawsuit and named as a party to a lawsuit simply because, again, just what Rep. Kleinschmidt just mentioned. I had an insurance business owner's policy or general liability policy or pockets in general, and it was just convenient to name to a lawsuit. So, you know, under the current offer of settlement, the way it's set up, the defendant rarely triggers it because if the plaintiff makes a counter-offer, then the defendant is at risk right off the bat for, for instance, if I'm name as a party because I have an insurance policy and I'm not even privy to contract with the parties, you know, with the true plaintiff and defendant themselves, but I've got an insurance policy and I'm named, and then I go to the table after being sued and I just say, here's a $50,000 bill to get me out of this because after a year, a years and a half of trying to get a day in court in Montgomery County and dealing with all the headache and the exposure to this and the distraction in trying to assign employees to it, and we've only got a five-man team and everything else involved, I'll give you a $50,000 bill to get out of this even though I'm not even supposed to be a party. Well, the total claims are for $3 million, we'll take $650,000; well, there's your counter-offer, and then the risk is just too, you know, too great to even be involved in the current set up of the way the offer of settlement is in place. I like the defendant trigger and I think it needs to be there. If we inserted instead of what I have and what I believe to be true loser-pay as a revised offer of settlement provision, I think the defendant trigger needs to remain, but through that revised language, you know, at least you have a shot where both sides are contemplating litigation costs and, you know, the Manhattan study and, the Manhattan Institute study and there's been many, many opinions through academia and from economists who say that frivolous lawsuits will decrease if litigation costs for both sides are contemplated or are on the table. The other provisions of the Bill itself, interlocutory appeals and having a gateway provision for the trial judge, Judge Lewis, you and I visited about that and I think that's a great suggestion. The alignment state district court and federal court with rule 12(b)(6) and rule 9 for summary judgment, and motion to dismiss, I think that it is very important and there are provisions, you know, aspects of both of those that can help on plaintiffs' side. And tying the specific causes of action to a specific statute, rather than have it be implied, I think in a lot of our legislation we have to put a provision in there that clarified, you know, what our exact intent is and if we get something comprehensive in place where a defendant is not just burdened with a few statutes that he or she must prove their way out of, but really they're not clearly and unambiguously applicable. I think that would go a long way toward reform, as well. So, I don't want to belabor the point. There's been a lot of good

	testimony, and I appreciate your time as a Subcommittee on top of working on the Committee, at large, and your case load or the number of Bills you're hearing, as well. It was mentioned that, again, it is never an intention to bring a frivolous lawsuit by plaintiff's attorney except for some boneheads. I can tell you I've met a lot of them, and they've been with the biggest firms in Texas and have the best pedigrees from the best law schools in the nation. So, I wouldn't refer to them as boneheads; that was another comment by another witness that testified, but I would say that it is targeted to gain the system geared toward an early exit for a payout and there's not always, you know, the most thought put into from the plaintiffs whether or not the evidence supports the case more than it is a business that's run. And I understand business; I understand a calculated risk; I understand, you know, what it's like to run a law office and try to keep the doors open, and I understand what it's like to be an entrepreneur for someone in business in what I work in, in construction and development, every day which is 1 out of 6 jobs in Texas, and I have to leverage my marketing dollars and the dollars that I commit to personnel to make sure that people have jobs everyday, I have to leverage that versus what I am expecting in legal fees just to make payouts to settle, to get out of what I consider to be an extortion situation. So, thank you for your time. It's an earnest intent and a genuine intent to bring about reform that I think we need after eight years of Rep. Nixon doing such a great job on the floor in '08. We've got a different make up in the House now and a different opportunity to hopefully bring about reform that makes sense, and protect defendants and plaintiffs, both, because at any certain time, at any time, I could be a plaintiff, as well. So, I don't have any intent whatsoever to create barriers or a chilling effect or access to the courts. So with that, thank you very much for the opportunity to lay my Bill out, and I appreciate your consideration.
Chair	Questions for Rep. Creighton? Thank you. Rep. Sheets, do you have something you want.
Rep. Creighton	Just briefly, Mr. Chairman. I know it's been a long morning already, and I appreciate your work and the Committee's work, and the Committee as a whole's work. I just, when we were talking, when some of the witnesses were talking about the concern about the abuse by defendants in using the system and whether or not these provisions are being brought forward because they make political talking points, I want to just briefly explain why I brought my Bill because my Bill was never meant to be brought as an issue for loser-pay. And now, while I understand that it is an alternative to loser-pay, for me I brought this because in my practice there have been numerous times where I've looked at chapter 42 and the associates and partners in my firm have seen cases where it would be good idea to bring chapter 42, bring the provisions of that into our cases. The problem is that those cases are cases where we're disputing damages and liability. The way the rule exists right now is only effective in cases where liability, excuse me, where damages are in question. Because it is a provision where the defendant beats the spread, the defendant gets as an offset his attorneys' fees. But, if the defendant wins outright, then he gets nothing. So, this tool, the reason why it

	doesn't get used is that it's ineffective. Because the provisions aren't there to make it effective. Now the type of cases where, for my practice where I see where this would be effective would be cases where you have multiple defendants where the plaintiffs have brought suit against every party that could possibly have liability, and you dispute liability for your client. In construction cases, in tort cases, in contract cases, there is a multitude of cases where these could be effective. Now, when we're talking about the abuses with the defendant trigger only, those arguments ignore the fact that this is a reciprocal rule. The Bill that I've offered, and I believe the substitute that Rep. Kleinschmidt is going to offer, both have reciprocal nature to them. So that once the defendant triggers it, the plaintiff can then invoke the rule, as well. So if the defendant does lowball the plaintiff in his offer, the plaintiff can then reciprocate with another offer, and then the defendant will bear the liability, too. I think their argument also ignores that the rule as it stands right now also requires that an offer of settlement be included with the offer. You have to have, you have to provide some offer to settle with. So it makes it where you're giving the plaintiff a choice: here's a fair amount of money to settle your case and if you don't, well then this gets triggered, and if the plaintiff doesn't feel that's a fair amount of money, they are open and they are free at that point to make another offer in invoking this rule. And then it's invoked against the defendant, as well. If the plaintiff prevails in that situation, the plaintiff will get this attorneys' fees. And they when we're talking about the judgment-proof plaintiff, it is absolutely true that if this allows a plaintiff trigger on it, that the judgment-proof plaintiff will have no reason not to invoke this rule every time so that we'll have attorneys' fees available for plaintiffs in every case. This is not meant to be a loser-pay in every situation case. This is mean to be a loser-pay provision to, as a tool to motivate parties to settle. I think Mr. Travolsy made a great point when he mentioned that there are already provisions throughout our law that allow cost shifting of attorneys' fees to the plaintiff. Those provisions already exist in Texas law. What we're trying to do right now if just make the offer settlement rule, which already exists in Texas law, effective so that we can use this tool to reduce the strain on our court systems and also make our trial process more efficient so that we can get these cases settled and that we can address these cases that are the frivolous cases. With that, I'm open to any questions that the Committee may have.
Chair	Members, questions to Rep. Sheets? Thank you.
Rep. Sheets	Thank you, Sir.
Chair	As the other author that's here, obviously I close on House Bill 2031, and we'll continue to work on the voluntary compensation plan, but as the Members pointed out during the witness, there's a significant difference in that Bill compared to most of the others that are out here. At this time, the Chair withdraws [END OF DICTATION].

APRIL 11, 2011

HOUSE COMMITTEE ON THE JUDICIARY AND CIVIL JURISPRUDENCE HEARING – HB 274

4 11 11 House Committee on the Judiciary and Civil Jurisprudence – HB 274

Rep Hughes — Thank you Mr. Chairman and members. Under the rules, accelerated appeals are dealt with in 28 of the Rules of Appellate Procedure. It deals with _____ orders like the witness mentioned, and it is logical to carve those out and we've been talking to the supreme court rules attorney about possible solutions. Anything that we ask this committee to do would of course carve our those accelerated appeals. We don't want, at the end of the day, make it take longer than it currently does. We appreciate the witness and the Chair clarifying that he's testifying individually. The first we'd heard of that when you heard it here today. So we're gonna try to get a good bill for the committee to move forward.

Chairman Jackson — Thank you rep. Any other questions of Representative Hughes? If not, thank you very much. House Bill 3393 we've left pending at this time.

The Chair recalls House Bill 274 from _____ Committee and recognizes Representative Clayton – uh Creighton – to lay out his bill, or explain his bill. The Chair offers up a substitute, uh committee substitute for House Bill 274. Before you start let me tell you, members, if you are going to testify on this bill and you do not have a copy of the substitute, I've handed out some but there are some copies right over here and the members have them in your substitute packet. And please specify if you are going to testify on the substitute. So, Representative Creighton.

Creighton — Chairman Jackson, members, thank you. As instructed I am here to testify for the substitute – no I'm just kidding. I appreciate the time. I wanted to mention, Chairman, you know as we've worked through this process over the past few weeks, it's been a good process, it's been effective. I want to thank you for allowing me to present this measure in subcommittee with Chairman Madden, Representative Lewis and Representative Davis for hearing me out on that and we've worked since then – prior to and since then – with stakeholders to make some changes that I think will hopefully meet your expectations for solid fair and necessary approach to reasonable tort reform efforts and Texans.

The committee substitute itself removes the more strict loser pay provision that I had in the original bill – HB 274 – and replaces it with offer of settlement reforms that mirror Representative Kleinschmidt's bill that was presented to you, I believe, maybe two or three Mondays ago. And so those particular provisions are the same as the bill that he presented but for a couple of small tweaks and I'll present those to you here in just a second because those tweaks were instructions or feedback from you as a committee to help me hopefully make the bill a better bill. So again, as Representative Kleinschmidt laid out of his prior bill – committee substitute house bill 2661, what I've done with my loser pay provision is adopt those suggested changes into my bill in place of the more strict loser pay provisions that I have. As well, you know from that point forward, I've got a few more provisions to

address. The committee substitute for HB 274 includes a provision on motion to dismiss which aligns with state courts, with federal courts, on Rule 12(b)(6) so that marital suits can be dismissed earlier and allows the court to award litigation costs to the prevailing party. So what we want to do there is hopefully implement the success that federal courts have had with, you know, when they have ended up in the result of an order that shows that the case was without merit or lacks the evidence that it should have had to proceed. We want the state district courts or the state courts to be able to have those same rules in place. We have a provision for expedited civil actions which provides a quicker avenue to resolving cases between 10,000 and 100,000 dollars and lowers discovery costs in certain cases. With these claims for these lower numbers between 10,000 and 100,000 dollars, the cost of litigation for these claims in this area is the costs are so high that what this would do is hopefully reduce the burden and the time that it takes to find resolution or compromise on these cases and get those parties – plaintiffs and defendants – their day in court quicker or get them to a settlement faster.

Creighton Next is a provision on no implied cause of action which simply stipulates that a statute must clarify an unambiguous language that a cause of action is created. So it would take the burden off the parties. For example, the defendant – if a suit is brought and a certain statute is implied – that they would have the burden of proving themselves out of that statute rather than the claim being based very conspicuously on the fact that that statute governs, and it's very clear within the statute that it does. Last, on interlocutory appeals, or interim appeals, on controlling questions of law maybe made to the appeals court with the trial court's written order of permission. So there's a gatekeeper provision in there and working with this committee, that was added so that the trial judge would have discretion there that's determining whether or not to go the distance at the state court level even if there is a question of jurisdiction or another matter or the trial judge would be able to say no, it needs to go on from here to the appellate level where the appellate court can make that decision instead of us going all the way through the trial to determine so before it would be advanced on appeal.

Creighton So, with those provisions, alignment with state courts and federal courts on 12(b)(6) motion for summary judgment, expedited civil actions of a limited dollar amount – 10 to 100,000 – no implied cause of action in a statute unless its very clear in that statute that it applies. And interlocutory appeals being able to advance on questions of controlling law if the trial judge gives the green light. Those are the main provisions of committee substitute House Bill 274 and from there I know we have some witnesses and I appreciate your time and consideration.

Chairman Jackson And you'll reserve the right to close?

Creighton And I'll reserve the right to close. Thank you, Chairman.

Chairman Jackson Any questions?

Yeah, I do. What do you think this is going to . . . I'm sorry, Mr. Chairman?

I'm sorry I wasn't here whenever you spoke before, I got sick and the Chairman knows. But, tell me why you feel you need this bill?

Creighton — It's a great question. You know, in my past experience and working in this building 21 years ago in the senate, and then moving on to work for the Texas Attorney General and the Oklahoma Attorney General as a brief writer, past that time I went into my own practice for a few years in, you know, general civil litigation and a lot of real estate, contracts, on and on. I found myself working so much on real estate and land development and construction that I went into that business from my practice, where I was actually the entrepreneur or the business owner. And using my law degree to play defense or to stay on the right path and avoid problems rather than creating them. And what I found after practicing a few years and then working in my own business for 10 or 11, is that every year I found myself in some sort of litigation where because of deep pockets or a very good business owner's policy in insurance policy I was a named party to a conflict where I didn't have any privity or contract the parties much less, and there was not even a Nexus to connect me. Yet continuously every year, I found myself feeling in some way that I was supposed to be satisfied if being attached or named to a 3 million dollar claim, I was released from the effort because I threw a $50,000 bill out there.

Creighton — In the subcommittee testimony, some plaintiffs' attorneys testified that plaintiff's counsel rarely file a lawsuit with the intention to go to trial. They mostly file lawsuits with the intention of settling.

Raymond — And this is something they told you?

Creighton — This is what they testified to.

Raymond — This is what all the lawyers that you dealt with on the other side of you testified to?

Creighton — Plaintiffs' counsel that testified in the subcommittee just a few days ago – on this bill.

Raymond — I'm sorry, since you are referencing your experiences and you said that they would file, not that they wanted to go to trial, they wanted a settlement. And so you're referencing your personal experiences but then you're quoting testimony from the other day?

Creighton — True, I mean every . . . every . . .

Raymond — We don't really know what you're . . . I mean, with all due respect . . .

Creighton — Everything I'm talking about is my experience from the past all the way to the other day.

Raymond — So the lawsuits you dealt with before, opposing counsel said to you "we really just want to settle, we don't care about going to trial"?

Creighton — No, but what was said afterwards, between the parties, was that the reason why I was named was because I had a good insurance policy and the true defendant did not.

Raymond — And there was no connection whatsoever? They just pulled you out of the yellow pages, or something?

Creighton — Not out of the yellow pages, no it was just . . .

Raymond — You said there was no connection. So they sued you but you had no

connection with . . .?

Creighton — From what I understand, Representative Raymond, in some way there's always a connection, so in other words, I could always try to figure out a way to sue you for something, all the way from your district to mine, I could figure out a way somehow to name you. So I understand from the broad aspect when you ask me how in the world was I even there in the room if there was no reason why I should have been? I can tell you that that's such a broad question that you could never – and it's crafty – I mean I could never answer that in anything but the affirmative, but yes. . .

Raymond — In the affirmative being that there was a connection between you and the people who were suing you?

Creighton — That it's always arguable. But it never advanced in any of those scenarios – in ten times over ten years it never advanced past just simply asking for a way out on a 2 or 3 million dollar claim, other than just saying we'll take some really small amount to let you go.

Raymond — So you settled all these times, even though you never once felt that you had any responsibility, is that right?

Creighton — Well, let me tell you, the difference between practicing law and then being in business, is it's so distracting to be a part of any kind of a suit like that. It's so distracting with a five-man or five-man and woman team that's in business that the stress and the distraction and the time that it takes where you have to assign employees to that, it prevents . . .

Raymond — I understand all that and I appreciate . . .

Creighton — Well I was hoping I'm answering your question . . .

Raymond — You're not. I asked you – I said, in all those times you settled each time even though you felt like you never had any responsibility whatsoever but you gave them money anyway.

Creighton — Yes, what we would do at the beginning of the year is we would access or leverage what we would spend in advertising against what we thought we would spend in extortion.

Raymond — So again, you never felt like you, not once did you do anything wrong but you paid anyway?

Creighton — Correct, yeah. And it never went past that. So in other words, they let me out on a 3 million dollar claim – they let me out for 30 or 40-50 grand. Wouldn't you go for the 3 million if I really should have been there?

Raymond — And so when was the last time this happened to you?

Creighton — 2010.

Raymond — 2010? Last year?

Creighton — Yeah.

Female — Chairman . . .

Creighton — I can only give my experiences. It might not be broad enough to answer your question, but really in this legislative body, with all I can do to somehow bring about reform is to use my experience and yours and then hopefully, through the process, we can come together and that makes for better legislation. Now, if there are ways that I can improve it, that's only my personal experience.

Raymond — You're not concerned about limiting people's abilities – the little guys – the

small companies? You reference yourself as a small lawfirm, so you understand small businesses, and you don't . . . I have to tell you, it certainly seems to me that it's not a secret that those who are pushing this would like to put the small guy, the small business, in a disadvantageous position against the larger corporations, the larger businesses. Would you agree with that?

Creighton I would agree that that's always a possibility. We don't want any chilling effect or any barriers . . .

Raymond You don't think that this committee substitute can have any chilling effect on small business?

Creighton I've worked real hard for it not to, you know why? Because . . .

Raymond First of all, I'd like to know. You don't believe that this bill is going to have a chilling effect on small businesses that have real claims of merit?

Creighton No, can I tell you why?

Raymond But if you don't, you just said that . . . you're probably going to have to do a rewrite then.

Creighton Well, it could be either way but it's not . . . .in this process

Raymond I can assure you TLR is not going to be for this if it doesn't put the small business at a disadvantage. So you may have to rewrite it.

Creighton TLR is not going to be for this if it doesn't put the small businesses at a disadvantage??

Raymond Right. And so if you don't think it does, you're probably going to have to rewrite this.

Jackson Representative Scott. . .

Scott I am sorry to interrupt Chairman Raymond, but I just wanted to – I had an example that you were talking about of someone that had been sued or been added to a lawsuit. A good friend of mine is an ob-gyn that worked in a doctor's office and she actually just moved to town and she got listed on a lawsuit some three years ago. She wasn't even practicing there yet. It's just they went through the whole register of all the doctors that were listed at the clinic and she had to pay $10,000 to get her name off and she wasn't even practicing yet. She wasn't even there. And so not to interrupt ya'll's conversation, but I just had a real example of something that had happened.

Jackson Representative Davis . . .

Davis I was just looking at the committee substitute and you've worked so hard on this and you've listened to the input of so many people on the committee, so first I want to say thank you very much for doing all that and for bringing this to us. And I had a drafting question, and I don't know if I'm asking the right person but regarding the early dismissal of actions, which is section or just article 1 of the committee substitute. I notice that it's amending the government code, but in the original bill filed for early dismissal, it's amending the civil practices and remedies code. Now it's essentially doing the same thing, which is granting . . . if a supreme court shall adopt rules for the fair and early dismissal of non-meritorious cases, but I was curious as to why there . . . what the difference is there?

Creighton Well, we want to . . . and you know, I've worked with you a little bit on some of those concerns. We want to make sure that on suits _____ against the

	government, that you know, this intent is separate from that effort. I think you and I talked about a hypothetical there, and then there may be some other witness testimony on that further, but . . . that's my intent.
Davis	Okay that's great. The only other question I had regarding the early dismissal, and I know that we are wanting to model them after the 12(b)(6) motions in federal court. And I've not really had any expense in federal court. Does that allow for the award of attorney's fees? As . . . the committee substitute is adding?
Creighton	Yes, we're adding that provisions to where if it is in those lesser percentage circumstances, if the suit is deemed to be without merit or lacks evidence based on the judge's decision to go forward, that the non-prevailing party would pay the other party's costs or fees.
Davis	And is that how it's handled in federal court?
Creighton	No. So, what we have now is we have a situation where if the defendant is not, you know, under offer of settlement currently – even if the defendant wins – the defendant does not get their fees paid. If the plaintiff wins, then it's possible under the current offer of settlement provision that the defendant's fees would be reduced off of the award from the plaintiff, yet the defendant still gets nothing. So all we're doing in revising the offer of settlement provision is changing that to where both sides, hopefully plaintiffs and defendants, will work together to make the best offer possible to reach settlement so that the cases that do break down and go forward from there, that hopefully there would be less of a backlog in the courts. In my county, it's a year to a year-and-a-half, in Montgomery County, to get your day in court. And that through those changes where both sides have some cost shifting possible that they both will come to the table with a genuine and earnest effort to work out a compromise. And from there, I hope that answers your questions.
Jackson	Any other questions?
Creighton	And I know we've got some witnesses . . .
Jackson	We'll call those, and you reserve the right to close?
Creighton	Yes, I reserve the right to close.
Jackson	Chair calls Keith O'Connell. Hello, how are you doing? Tell us who you are, who you represent and you're position on the bill.
O'Connell	My name is Keith O'Connell and I'm from San Antonio. I'm president of the Texas Association of Defense Counsel. And on behalf of the TADC I'm here to testify in favor of the bill. And really I just want to thank you, members of the committee and Representative Creighton for taking the time to help us address our concerns regarding your original bill. You know I still have a concern or two but I just want to say that we look forward to working with Representative Creighton in this committee to continue to address any concerns with the substitute bill. Thank you.
Chairman Hartnett	Respresentative _____ Sorry, I'm trying to catch up here, but originally you testified against the bill, right?
O'Connell	I testified against HB 274.

Hartnett	Yes, this bill. But now . . .?
O'Connell	So, not the substitute.
Hartnett	Okay, I know, but I . . . so you're against the bill as filed, but you're in support of it as substituted?
O'Connell	I'm supporting it as a substitute bill. Certainly.
Hartnett	Okay, and it's because we're moving this from broad based loser pay into a targeted offer of settlement?
O'Connell	Yes. I still have some concerns about potential interference with the freedom of private parties to contract. I do have that out there, but . . . I just appreciate not only ya'll's hard work and Representative Creighton's hard work in allowing us to be part of the process.
Jackson	Any other questions, Mr. O'Connell? Thank you sir.
O'Connell	Thank you.
Jackson	Chair calls Joseph Nixon.
??	Is that an alias?
Jackson	That's an alias. . .[laughter] Joseph. Mr. Joseph, tell us who you are, who you represent and your position on the bill.
Nixon	I'm Joseph Nixon and also known as Joe. You may know me as that. Representative Creighton asked me to . . . well, I'm just here on behalf of myself. Representative Creighton asked me to help him with some of the language and sort of clarification of several things. To answer your question, the reason that section is in the government code is the rule making authority used to belong to the Texas Legislature. But in 1932, the Legislature signed to the Supreme Court delegating to the court that authority. That's in the government code. So when you change, and so you've got rulemaking authority. And to answer, to make sure that you're clear, section 1.02 of the bill is lines 14 through 20 make it discretionary for the court to award attorney's fees when they grant a motion to dismiss.
Davis	And since I've not had real experience in the federal court practice, is it common under 12(b)(6) for the judges in federal court to award attorney's fees?
Nixon	No, not really. And I have practiced a lot in federal court and when you file a motion to dismiss, you file it before, or subject to, any kind of answer. And that's the perfect time to get rid of a case that doesn't have a cause of action – or at least not one against you. And the judge can take a look at the law on that and he can get rid of it. And at that point, most people are just happy to be out of the case. It's truly egregious – the court – and sometimes they do award the cost of attorney's fees against the losing party on those motions. This is actually a very good effort – and some of you may remember and were here when we passed HB 4 back in 2003 and we had the original offer of settlement language in there. And I will tell you that it really has not worked to our expectations because it was clumsy and cumbersome. This is a much . . .
?	Did you say culversome?
Nixon	Yeah, I was gonna say culversome (laughing) . . . and this is a much cleaner effort and in a better way to deal with fostering settlements. You know there's

really kind of two types of quality in lawsuits – one is where there's just no claim and the second one where the settlement demand is outrageous. And so this works perfectly. The other things in there happen to streamline cases, find efficiencies in the system, and it's really good and really quite frankly I think it has a way of really opening courthouse doors to more resolutions of cases and protecting people, both who have valid claims and those who are defending themselves against invalid claims. I'm happy to answer any questions.

Jackson — Any questions.

Nixon — Thank you very much.

Jackson — Show Ms. Thompson present? Chair calls Lee Parsley, Texas Civil Justice League.

Parsley — Good afternoon Mr. Chairman, members of the committee. My name is Lee Parsley and I'm the president of the Texas Civil Justice League testifying in support of HB 274. I'll run quickly through the draft, the committee substitute 274, specifically. The Supreme Court rules regarding the motion to dismiss practice, I think is appropriate and that it gives the Supreme Court the ability to draft rules that are – that fit with Texas practice and it doesn't require necessarily adopting the federal rules, although the court certainly will look, I'm sure, at the federal rules that have the ability to adopt whatever the rules are that are appropriate for Texas. It is accompanied by essentially a loser pays provision that will allow a court to award attorney's fees against the losing party. That might address, and I hope will address, some people's concerns that in every case, a motion to dismiss will be filed. You hear criticism of the federal court practice that in every case a motion to dismiss is filed under 12(b)(6). And this, I think, attaches a potential penalty to that, so to discourage inappropriate 12(b)(6) motions because if you file one you may get to pay the other party's attorney's fees. And so I view this, although the federal court does not typically shift fees in 12(b)(6) practice, well not always anyway. I think this is an attempt by the bill's author, to me anyway, to create a reason to be serious about your motion to dismiss before you file it, which I think is a good thing. The Supreme Court adopting rules on small civil cases, in my experience as a lawyer and there's been many people who are involved in the litigation process find it to be stressful, slow, complicated, difficult, and I think anything that will expedite those kinds of cases, in fact, all civil cases is a good idea and quite warranted. The implied cause of action section 3.01 of the bill, as you all probably know, this has become more and more of a regulated society. More and more often the legislature passes laws that say you can or can't do something and the question is does that law also, does it have a company in it, a cause of action if you don't do something that you're supposed to do, can you be sued for that? And all this does is say that the legislature will be specific when it's creating a cause of action which seems imminently reasonable to me.

Parsley — Article 4 of the bill, section 4.01, having to do with interlocutory appeals from trial court orders is an improvement to that section. Right now that section of the law is not terribly useful because it requires the agreement of the parties.

This does away with the requirement of the agreement of the parties, but requires the trial court to certify the question essentially to the court of appeals, which is the way I think it ought to be. And then that is accompanied with another sort of loser pay provision. That is, if you take one of these appeals but you don't prevail, you may have to pay the lawyer's fee for the party that had to defend the appeal. And that's in fact a sort of a one-way loser pays provision against the party who takes the appeal. So again, I think it will limit the number of appeals that are taken under this section and should address some critics of the bill that this opens up to too many new appeals. I think that you have to be serious about your appeal before you take one.

? Lee, what about motions for summary judgment? Are those appealable?

Parsley I think it is possible that a motion for summary judgment that presents a controlling question of law would be then appealable under this. That's right. I believe that's actually one of its benefits. In the federal court system, sometimes you can appeal from a controlling question of law decision that's come to the trial court in the form of a summary judgment motion and I think that's actually one of the attributes and the benefits to it.

? [mumble]

Parsley Uh, the section of the bill regarding the amendments to chapter 38 and oral and written contracts, seems to me, is appropriate also to provide that whichever party loses in a contract action, they have to pay the other party's attorney's fees, and finally the offer of settlement provisions are good in that it ties the chances of paying attorney's fees to a settlement offer and should encourage settlement of cases, which I think is an appropriate policy for the legislature. So with that, we support the bill.

Jackson Any questions? Representative Hartnett?

Hartnett We've asked kind of a dumb question but, and you can answer this elsewhere, but does it require . . . I understand how the defendant can get his attorney's fees, but the plaintiff also can get attorney's fees, right?

Parsley Under the offer of settlement?

Hartnett Yes.

Parsley Yes.

Hartnett And _____ it's triggered by the defendant.

Parsley That's right.

Hartnett Now does the plaintiff have to make an offer in order to get that, or is it just automatic?

Parsley No, the plaintiff would have to make an offer also. So for either side, it is contingent on making an offer and attempt to settle the lawsuit before you can get your attorney's fees from that point forward.

Hartnett So in order for one party to recover attorney's fees, they have to make an offer?

Parsley Right.

Hartnett Okay, so let's say the defendant offers $500,000 and the plaintiff offers to accept for $1 million and the award is $700,000. What would happen in that scenario?

Parsley There would be no attorney's fees shifting in that scenario. In order for

attorney's fees to shift, it would have to be that the plaintiff recovered 1.2 million, so the plaintiff was willing to settle for a million, but then they get in litigation 1.2 million, which means they made the defendant a really good offer that the defendant didn't take and should have taken, and therefore, now the defendant has to pay the attorney's fees. Or in your example, $500,000 would be reduced by 20%, so if the defendant offered $500,000 and the plaintiff got $400,000 or less, then the defendant made a really good offer that the plaintiff should have taken, and they didn't and the attorney's fees would shift. But anything in between those two points, there's no shifting of attorney's fees.

Hartnett — Okay, then what if the plaintiff gets the exact amount that the plaintiff offered?

Parsley — Again, no shifting. It has to be that, the way it's set up is, you have to have refused what turns out to be a good offer. There's a margin of error on both the top and the bottom. Ok?

? — I may need to do a little _____ and maybe you can help me with that.

Parsley — Okay.

Jackson — Any other questions? Thank you.

Parsley — Thank you Mr. Chairman

Jackson — Chair calls Jeff Moseley. Tell us who you are, who you represent, and what's your position on the bill.

Moseley — Thank you Chairman, thank you members. My name is Jeff Moseley. I'm president and CEO of the Greater Houston Partnership. Our business organization has 2,100 businesses and last Wednesday our board met and adopted resolution language that embraced the Omnibus Tort Reform that you're considering today as the substitute for the bill being laid out. We would support those concepts, we believe that making Texas a business friendly state is good for the tax base and so I'm just here to represent for the substitute.

Jackson — Any questions? Mr. Moseley?

Moseley — Thank you Chairman, thank you members.

Jackson — Thank you. Chair calls Brad Parker. Who you are? Who you represent? And your position on the bill.

Parker — My name is Brad Parker. I'm here today on behalf of the Texas Trial Board Association and we're against the bill and the committee substitute as filed. I think what I heard Rep Creighton say the premise behind this bill was frivolous lawsuits and the concept that there's a bunch of frivolous lawsuits out there. And that leads from _____ can pass for cases that he didn't believe he should have paid for. But we don't have any kind of empirical data to come forward with to show that frivolous lawsuits are a problem. And in fact, the data would suggest just the opposite. Baylor Law Review did an article in 2007 based on a 2005 survey of district court judges in the State of Texas. Remarkably, 78% response rate was made in that study. And of that 78% of the trial court judges in the State of Texas that responded to this survey that Baylor was conducting, 86% of those judges believed that there was no need for further legislation addressing frivolous lawsuits. I think that

speaks volumes as to the span out there of frivolous lawsuits. Loser pay is a tool that they want to try to use to conquer frivolous lawsuits. And I would suggest that they just don't exist. And to the extent that the frivolous lawsuit does exist, Texas enacted and has enacted sufficient tools and mechanisms to sanction the attorney and/or party that brings a frivolous lawsuit. We have Texas Rules of Civil Procedure 13, the Texas Civil Practice and Remedies Code Chapters 9 and 10, all that were put in place to sanction and prevent frivolous lawsuits. There's no question that a defendant probably feels they were not properly sued whenever they were sued. Likewise there's no question that a plaintiff probably feels that the defenses that the defendant raised may be frivolous, but the feelings of a party don't make a case frivolous. And I would go back to the judges of the state who when asked, said that they didn't think that there was a problem. Furthermore, the fact of the contingency fee system, the inherent principle behind the contingency fee principle promotes that their not be frivolous lawsuits. You cannot, as a plaintiff's attorney or contingency lawyer, have a very active practice for very long if you're going to pursue frivolous lawsuits. The trier of fact will smell those out if the judge doesn't, and the judge often will. We – or I – can speak for myself – and it wasn't my testimony . . .

Jackson Mr. Castro has a question.

Parker Yes sir.

Castro I guess a few points regarding your testimony really. First I want to commend Rep. Creighton on working with the subcommittee on this legislation and paring down from what it originally came forward as. But with respect to the legislation, I recall a few years ago I saw an annual end of the year story in Bexar County in San Antonio that said that that year – I think this must have been 06 or 07 – that there were only 49 civil jury trials in a county of about 1.3 million people at that time. Most of what those judges are doing in Bexar County – and I assume other parts of the state – is really family law. I mean that's probably 80% of their time is family law now. Divorces, custody cases – all that stuff, as opposed to lawsuits against businesses or anything like that.

Parker I think that's a trend statewide, in fact, the office of court administration in their year ending August 2010 report indicated that there has been a 16% decrease of new injury or damage cases filed between 1991 and 2010. And that does not take into consideration a 35% population growth that this state has experienced over those same 20 years.

Castro I mean who does med-mal anymore?

Parker Not many. Not many. And like you have determined, our informal – or my informal poll of some of the judges in Tarrant County would reflect the same thing. Filings are down and the trial settings are down. In fact, Judge Reimhold (sp?), who is the county court of law number 1 – I'm sorry number 2 – in Tarrant County, Texas heard his very first jury trial the week of April 4 of this year. Likewise, Judge Lable (sp?), who is the county court of law number 3 – is trying his second jury trial today – if it actually went. The point being they've both told me that they have no trouble – that litigant has no trouble getting into their courtroom if they want to try.

Castro And also you see it in more contracts – either mandatory arbitration provisions or mediation provisions – these alternative dispute resolutions provisions in contracts that have proliferated over the years.

Parker You have. And then the mediation system itself resolves cases. And while most cases resolve, I never file a lawsuit that I don't expect to try, every single time. Some of the unattendant consequences of a loser pay system as experienced in Britain and in France where these systems are prevalent include a new market of insurance. This is you buy your homeowner's insurance, and you'll probably start buying litigation expense insurance on the off-chance you should ever become involved in a lawsuit. Also, the administrative costs of determining what the fees or litigation costs might be are going to skyrocket because they'll be arguing over that. In Europe and in UK where they have loser pay, there are documented tendencies that the middle class – those who are not judgment proof and those who are not uber-rich – are discouraged from participating in the system. However, they have a different system. And many times there are other entities bringing a case like such as the labor unions on behalf of a plaintiff who's been injured on the job or something like that. So it's a little bit of apples to oranges comparison to some degree on the systems. Likewise, the offer of judgment system under Rule 16 of the Federal Rules of Civil Procedure, while they allow the awarding costs do not include attorneys fees. So this would be a departure even from the federal rules of civil procedure which in their comments recognize the American rule.

Some of the questions that I think are also raised is how would it work with multiple defendants with cross-claims against one another. What happens when some defendants are exonerated or only found 10% responsible and others are more responsible. How does loser pay kick in at that point in time. What about subrogation interests? Any part of a plaintiff's practice deals almost as much now with satisfying subrogation interests that are out there. For instance, a healthcare provider. For healthcare insurance company that has paid the medical bills of the injured claimant. If this litigation is not successful for whatever reason and you are, as a lawyer, pursuing on their behalf, in essence, the subrogation interests, should they be responsible for part of those loser pay penalties as well? Also when there's a defendant in the carrier? What kind of conflict may be raised by that? If the defendant is successful in the recovering of fees under their loser pay stature? Does that go to the carrier? Or does that go to the defendant. They have to pay. Who has to pay? Who put who in the box? The carrier or the defendant? These are all questions that I don't think are adequately addressed in the loser pay scenario under any situation. What about a legal aid claimant? Someone who has legal aid for Northwest Texas from where I come from. What if that litigation is not successful for whatever reason? Does the loser pay kick in? Does the legal aid foundation then have to pay the costs or does the plaintiff have to pay the costs. The plaintiff wasn't paying any attorney's fees, there wasn't even a contingency fee arrangement.

Ultimately this is a game about money. Who has more money? Those that have more money can play all in, those who don't can't afford to take the risk. The other provisions of this bill that need to be addressed are the early dismissal of actions. Texas has a pleading requirement that is much much different than the federal rules. The federal rules require specific pleading. Texas requires general pleading, and general denials. That practice of the 12(b)(6) that we've heard about would not fit into this type of pleading situation. So you're really asking the supreme court to change the pleading requirements of this state. They already have the power to do that if they want to, I would submit to you, under the government codes. But, and if they feel like it's necessary they can do that. As far as the court may award the costs. You're right. That's not in the federal rules. That would be another departure from the federal rules and the 12(b)(6) motion as the one that's proposed in 274. I touched on the expedited civil actions.

We already have, I would suggest to you, an expedited civil mechanism, and that is scheduling order number 1. Back in HB 4 we created three different types of scheduling – schedule 1, schedule 2, schedule 3. Schedule 1 relates to claims under $50,000, limits discovery to no more than 6 hour of deposition testimony, and 25 interrogatories. That, given with the fact that these courts don't seem to be backlogged according to the empirical data if you believe the Baylor Law Review, does not prevent a claimant to get to court if they want to get to court. That's not a problem. No implied cause of action under article 3. We're troubled by this because we don't know what it means. Does that mean that the common law in this state stops? Does that mean a drunk driver – we can't use the drunk driving statute to prove negligence in our case? Does that mean we no longer have negligence per se in this state? Does that mean that we can no longer use statutes to establish the standards for the different causes of action.

Appeal – or article number 4 – we believe that this will create an unnecessary burden on our intermediate appellate courts which are already terribly overburdened and underfunded. They will have not only one but two things they have to do. They're gonna have to look, of course, at the way the rule is written. They have to accept the interlocutory appeal. But they've gotta stop and look at that and make that decision. Then if they do take the interlocutory appeal, then they must act on it. The recovery of attorney's fees in article 5, I think it's particularly significant. It allows the prevailing party in a contract case where there's a breach of an oral or written contract, to recover their attorney's fees. This is a departure from current law. Current law says only the prevailer – only the party – the claimant – under a breach of contract can recover their attorney's fees. Does this now mean that if I'm a homeowner or a car owner and I'm involved in a car accident and have to make a first party claim that they won't pay, and I have to sue my own insurance company to pay, that I would run the risk of having to pay their attorney's fees? If I have

a wind storm damage or, last night we had hail damage in [garble] . . .

Jackson [garble] ask one question.
Parker Yes sir.
Jackson How do you _____ this committee substitute with the original bill.
Parker Well, I still think it's bad, but it's better.
Jackson How much better? Is it enough better we need to pursue it?
Parker Personally I think that this bill is still bad. And just because . . . it's like we've heard people say outrageous settlement demands. You know the first thing I was taught as a lawyer . . .
Jackson But you'd rather have this than the original?
Parker I would rather have nothing, but yes . . .
Jackson But you'd rather have this than the original, hadn't you?
Parker If I had a gun to my head, yes? There's no question, but just because a plaintiff can ask for a million dollars in settlement and then moves it to 500 doesn't make his move grand or magnanimous or a good move when the claim clearly wasn't even the 500 to begin with. It just makes it outrageous that they asked for the million. But that's all I have. I'll be happy to take any questions. Thank you very much Mr. Chair.
Jackson Chair calls Alan Waldrop.
Waldrop Thank you Mr. Chairman, members of the committee. My name is Alan Waldrop. I am here on behalf of Texas for Lawsuit Reform. And Texas for Lawsuit Reform is for HB 274. I am a former appellate judge and I am currently a practicing commercial litigator with Locke Morgan Bissell (sp?) here in Austin.
? Is that on the committee substitute, Mr. Chairman?
Jackson You are testifying on the committee substitute?
Waldrop On the committee substitute, absolutely. Thank you Chairman Raymond. I will touch on each one of the five sections of the bill, very briefly, and respond to a couple of comments that have been made. But let me make some quick responses to what has been said by previous witnesses. Number 1, this committee substitute doesn't have a loser pay provision in it – in the sense that, that would be anything like the English rule. And so, I think that we may just have a little misunderstanding about that. What has happened with the committee substitute is that the previous provisions from loser pay had been substituted for offer and settlement amendments to the current offer and settlement statute that mirrors Rep. Kleinschmidt's HB 2661. One of the things that keeps coming up is this idea that bills like this are primarily targeted at frivolous lawsuits. Well, that's not what these provisions of this bill are primarily targeted at. The offer of settlement provision is not targeted at frivolous lawsuits really at all. The appeal of controlling questions of law really has nothing to do with frivolous lawsuits. No implied causes of action has nothing to do with frivolous lawsuits. Expedited civil actions certainly doesn't have anything with trying to control frivolous lawsuits. And the motion to dismiss practice is a means of just having/allowing the supreme court and encouraging the supreme court to come in to Texas and repair an

archaic procedural set of rules to take care of cases that ought not be in the civil system at all in the first instance.

Now I'll start there. The motion to dismiss practice is a practice that is the modern rule across the country. Texas has an archaic special exceptions procedure today that is difficult and cumbersome and doesn't really do what a true motion to dismiss practice would o. A true motion to dismiss practice would allow courts to address cases on legal questions only . . .

Raymond Jackson — Mr. Chairman?

Yes?

Raymond — Chairman Jackson? So in your opinion this bill doesn't have anything to do with frivolous lawsuits, right?

Waldrop — No, in my opinion it has something to do with frivolous lawsuits, but most of the provisions of this bill do not address frivolous lawsuits.

Raymond — Oh, okay I thought you said a minute ago that there was a misconception here that this bill was aimed at frivolous lawsuits. That's what I heard you say.

Waldrop — Well, I don't think you heard me say that, but what I meant to say . . .

Raymond — That is what I heard you say, but maybe you didn't say it clearly enough, but that's what I heard.

Waldrop — Perhaps I didn't say it clearly enough, let me clarify. Four of the provisions of this bill – of the five – really are not designed or targeted at frivolous litigation. One of the provisions does effect – can effect – frivolous litigations pretty significantly, even though it's not designed to go after frivolous litigation. It's designed to allow the courts to have a procedural mechanism . . . .

Raymond — What's your opinion? Is that your opinion that there are a lot of frivolous lawsuits that exist now, that are filed now?

Waldrop — In my opinion, well, I don't know what we're gonna - well, we probably could get in a debate about what a lot is. In my opinion, most . . .

Raymond — Is that your opinion that there is a need to address frivolous lawsuits in the state of Texas?

Waldrop — In some circumstances, but I was going to concede a point which you may be interested in hearing my concession on, is I don't think most of the cases in the system are frivolous at all. Certainly not. There are some cases in our civil justice system that are frivolous. And there are . . .and you could debate – a person could reasonably debate how many those are. But, certainly I would not take the position that most cases in our civil justice system are frivolous. They aren't. They have some merit. But that's precisely why the offer of settlement rule has been proposed. It's not designed to address frivolous litigation. What it's designed to do is to get at cases that have merit but the debate is how much merit. And to get parties more serious, quicker, about the process of settling. The reality is the vast majority of cases in our system settle. And they settle at some point, usually rather late. But, the question is how to we limit the expenditure of resources and the use of system resources on cases, and how do we provide incentives to get cases that are going to settle, to settle quicker. And that's the whole point of this offer of

settlement amendment. Bear in mind that we do have, as it stands today, we have chapter 42 in the Civil Practices and Remedies Code, which is an offer of settlement procedure. The reality is that it is not used very often. It's pretty rare that it's used. And the reason for that is because of the odd way that the capping mechanism in the current chapter 42 works. It creates an imbalance in how litigation costs can be shifted. What the thought is behind the amendment that is being offered in this bill to chapter 42 is that we take this extremely narrow range of cases where it's useful and we broaden that somewhat so that that mechanism becomes more useful in a broader number of cases. The reality is is it's not going to go from a very narrow range that chapter 42 can be used to chapter 42 is going to be used across the entire spectrum of civil litigation. That's not going to happen even with the amendments that are suggested in HB 274. But if we can incentivize parties to use that mechanism more often than they do now, it would be a good thing because cases that have merit, they're not frivolous, will get serious real offers on the table sooner, at least in certain cases. Serious real offers – and that benefits the plaintiff side. It also benefits the entire system to have plaintiffs get more serious about the true value of their claims sooner in the process, so that there's less of the settlement dance.

Raymond Let me just tell you. Let me just tell you publicly how much I appreciate you looking out for plaintiffs. [laughter]

Waldrop Well, actually the truth . . . one of the things that has been talked about is the no implied cause of action. And the question is what does this do and how does it affect things? Does it affect the common law, and the answer is very clearly no. It does not affect the common law – topside and the bottom, in any shape, fashion or form. The no implied cause of action in this bill is simply and purely a rule of statutory instruction. It applies to statutory causes of action and it's very plain on its face. It is nothing more than that and does not touch the common law at all, does not change the standards for negligence per se action at all, and does not threaten to change it at all.

Interlocutory appeal – the appeal to controlling question of law – a major complaint about this particular section, as we've already heard, is that it might swamp the appellate courts, might make cases even longer. There is a part of this bill that actually is designed to prevent that and will – and that is that the trial court has to agree and certify the question to the court of appeals in the first instance. If the trial court does not agree that it's a controlling question of law that needs to be heard on an interlocutory basis, then it won't be. There is a second gatekeeper at the court of appeals. The court of appeals gets to make the same judgment call about whether or not that particular action should be appealed.

[background talking]

Aright, if there are no further questions, I'll conclude my testimony.

Jackson Chair calls Ryan Brannon. Ryan Brannon? Please tell us who you are, who

you represent, and your position.

Brannon — Yes sir, I'm Ryan Brannon and I'm with the Texas Public Policy Foundation and we are in favor of the bill. I had a lot of prepared remarks but, looking around since we just had the two new members that weren't on the subcommittee, I'll just be very brief. You have a research paper there as well, but I just wanted to point out some numbers. These are specific primarily to tort litigation as the . . .

Jackson — And you're testifying on the committee substitute?

Brannon — Committee substitute, yes. And that's the kind of point to the reasons why we need the bill, we need to move in this direction. The current system of tort litigations is expensive. In the United States, the direct cost of tort litigation reached $247 billion dollars in 2006 and these costs are growing at an annual rate of 9.2% of the gross domestic product, even while the GDP itself is only growing at 7%. So by 2008, the static cost of litigation – which is damage awards, defense costs, administrative costs, and so forth had risen to $320 billion dollars per year. If you add the indirect economic affect on society from those costs, that swells to over $865 billion dollars annually. So if you break that down to a family of four, that's a tort tax of $9827 per family. And equates to roughly 2.2% of the GDP. So PriceWaterhouse Coopers has calculated that medical liability concerns have increased annual health care spending by $124 billion in 2006 dollars alone. So, as cost related to medical liability increased, companies and small businesses were forced to respond by switching funds from research development and innovation over into litigation defense. So, the forgone research and development due to excessive liability results in estimated lost sales of $367 billion dollars annually in new product. So these aren't small numbers. They are very large numbers and indicate why we need to keep moving in this direction and keep reforming our litigation system in order for our economy to continue to be effective and grow. So . . .

Jackson — Any questions? Thank you sir.

Brannon — Thank you.

Jackson — Christie Borsky, General Electric, for the bill. Does not wish to testify.
Cathy Barber, NFIB, for the bill, does not wish to testify.
Texas Watch, against the bill. Dennis Spite, Texas Watch, against the bill, does not wish to testify.
Julie Williams, Chevron USA, for the bill, does not wish to testify.
Bill Hammond, Texas Association of Business, for the bill, does not wish to testify.
Bill Lewis, Mothers Against Drunk Driving, against the bill, does not wish to testify.
Grant Connaught, Texas Conservative Coalition, for the bill does not wish to testify.
Wendy Wilkson, Texas _____ Assocation, for the bill, does not wish to testify.
Rick Levy, Texas AFLCIO, against the bill, does not wish to testify.
Luke Bell Schneider, Texas Association of Manufacturers, for the bill, does not wish to testify.

Bill Oswald, Coke Companies, for the bill, does not wish to testify.
Is there anyone else here who wishes to testify on, for, or against HB 274?
If not I'll call on Rep. Creighton to close.

Creighton — Mr. Chairman, members, with that I close, and I appreciate your consideration and time during the hearing today. Thank you very much.

Jackson — Any questions? Thank you, sir. At this time, the Chair withdraws the substitute for HB 274. HB 274 will be left pending and will be referred back to the subcommittee on torts for a later report. First let me tell everybody how much I appreciate the hard work you've been doing. This includes the trial lawyers, TLR, Justice League, defense attorneys, and particularly, Chairman Madden, Vice-Chairman Lewis and Representative Davis – they've put in a lot of time on this and they've really done some hard work and I appreciate all of you for it. Even though we may not all agree on everything, we've gotten a long way down the road and people have worked in good faith and I appreciate it. Thank you.

MAY 7, 2011

HOUSE FLOOR DEBATE - HB 274

05 07 11 House Floor Debate HB 274

Chair	On second reading, House Bill 274. Clerk read the Bill.
Clerk	HP 274 by Creighton relating to attorney's fees, early dismissal, expedited trials and _____ certain remedies and procedures in civil actions.
Chair	Mr. Castro.
Castro	Mr. Speaker, a parliamentary inquiry.
Chair	State your inquiry.
Castro	It's your understanding that the body just refused to excuse how many members?
Chair	I believe it was three members.
Castro	Mr. Speaker, I raise the point of order against further consideration of House Bill 274 under Rule 6, Section 7 of the House of Representatives because the Bill was not eligible for placement on the emergency calendar at the time that calendar was posted.
Male	Mr. Speaker.
Chair	The House will stand at ease for five minutes. House come to order. The Chair has reviewed the precedents and reviewed Rule 6, Section 6 and has also reviewed Rule 13, Section 1. Chair is of the opinion that the point of order is respectfully overruled. Chair has Representative Creighton. Mr. Hartnett for what purpose?
Hartnett	Will the Chair recognize me to make a motion to suspend all necessary rules to take up and consider House Bill 274 today on second reading?
Chair	Mr. Hartnett it is on the floor currently.
Hartnett	Yes, but by accepting that motion it will wipe out all points of order on this bill.
Chair	Bring your motion down front please.
Hartnett	Thank you
Chair	Chair recognizes Rep. Hartnett for a motion.
Hartnett	Thank you, Mr. Speaker, Members. We've seen a lot of bills, we've had multiple hours of debate, and had points of order raised and we've lost all that time, and we've got bills dying all over the place, so I would just like on this bill to try to get the will of House to eliminate all points of order, so my motion is that we suspend all necessary rules to take up and consider House Bill 274 on second reading today.
Chair	Members, you've heard the motion. Is there any objection? Mr. Eiland, for what purpose?
Eiland	Mr. Speaker, you are recognizing Mr. Hartnett's to eliminate points of order on this bill, is that correct?
Chair	I believe that's what he said in his motion.
Eiland	And you recognized him for that purpose?
Chair	Yes, I've recognized him.
Eiland	So is that the way it's going to be from now on?

Chair	That's the way it is for this motion.
Eiland	Mr. Speaker, Mr. D?? for what purpose?
Mr. D??	Parliamentary inquiry.
Chair	State your inquiry.
Mr. D??	Essentially, we would be setting a precedent with this motion that from this point forward we could eliminate all points of order using this exact procedure in perpetuity, moving forward?
Chair	Mr. D??, the House in the past has limited debates.
Mr. D??	Excuse me, I'm sorry?
Chair	The House in the past has limited debates on specially set items. A number of other items.
Mr. D??	[laughing] Oh, I'm sorry, I'm over here watching a movie, give me a second.
Mr. D??	Okay, so if moving forward this particular motion were to succeed any bill forward someone could come up and say, I want to suspend all necessary rules to keep points of order from this bill only. So, essentially, it does not keep anyone in the future in the 83rd, 84th, 85th session from coming up prior to laying out their bill and ask for the majority of the House to suspend all necessary rules to keep a point of being called on the bill their about to lay out?
Chair	Mr. D?? we take motions one motion at a time. Chair recognizes Rep. Eiland speaking opposition
Eiland	Mr. Speaker, Members you are about to make a bad day that we've had here much worse. We've been working hard this week, 7:30 Monday and after 10:00 every other day of this week. We are not here at 2:00 before Mother's Day, people are testy and people are tired. But that does not justify breaking the rules and wiping away rules where we are supposed to have public disclosure, we are supposed to have public notice. If it's going to be our procedure to take up any bill you want to and eliminate the public notice and the public disclosure, that's a bad idea and that's a bad precedent. Last night, the licensing and administration committee gave 2-minutes notice before meeting -- [interrupted] -- Just a minute, Mr. Berman -- before meeting and voting [interrupted] -- I do not yield -- before voting out a gambling bill. Okay? The public notice we are giving and the public requirements that we have should not be wiped clean on one bill or ten bills.
Chair	A record vote has been requested. A record vote is granted – strict enforcement. Vote from your desk. Clerk, ring the bell. [bell rung] Strict enforcement means that sit at your chair and vote at your desk. [bell ringing] [inaudible] Have all voted? 82 ayes, 15 nays, 1 present not voted. Members, Rep. Martinas Fisher makes a motion to adjourn until 10:00 a.m. on Monday, May 9. All those in favor say, "eye." All those opposed say, "no."
Members	[Resounding answer of "no."]
Chair	Members, there is a motion to adjourn by Mr. Martinas Fisher. Motion to adjourn until 10:00 a.m. on Monday. Record vote has been requested. Record vote is granted. [bell rung] Strict enforcement has been requested. Vote from your desks. Members, please strike the board. Mr. Martinas Fisher has requested strict enforcement. Strike the board. Members, a question occurs on Mr. Martinas' motion to adjourn until 10:00 Monday. It's a record vote. Strict enforcement has

	been requested. Strike enforcement is granted. Please vote from your desks. [bell rung] Have all voted? Have all Members voted? Being 10 ayes, 93 nays, 1 present, not voting. The motion fails. Mr. Weber, for what purpose?
Weber	Mr. Speaker, I move that the Speaker put a call on the House.
Chair	Mr. Weber, would you come down front, please? Chair recognizes Rep. Weber.
Weber	Thank you, Mr. Speaker. I will withdraw that motion.
Chair	Chair recognizes Rep. Creighton.
Creighton	Mr. Speaker, Members. Mr. Speaker, under the rules of the Texas House of Representatives, Rule 7, section 21, make a motion to move the previous question.
Chair	Mr. Creighton, you have 25 seconds. Mr. Allen, for what purpose?
Allen	Mr. Speaker, parliamentary inquiry.
Chair	State your inquiry.
Allen	Are you recognizing for that motion to be made at this bill, at this time, without a single amendment being offered by any member of the House?
Chair	I've asked for verification of his motion. Mr. Eiland.
Eiland	Parliamentary inquiry.
Chair	State your inquiry.
Eiland	Is that a privileged motion that must be recognized?
Chair	No, it is not.
Eiland	So, it's your choice to recognize him for the motion before a single amendment has been offered, before a single minute of debate has occurred on this bill.
Chair	Mr. Eiland, there will be a three minute pro and con debate.
Eiland	On the motion?
Chair	On the motion.
Eiland	I'm talking about the bill. The bill has not been laid out, there has been no debate, there have been no amendments offered, correct?
Chair	Pursuant to Rules 7, section 23. After the previous question has been ordered. There shall be no debate upon the questions on which it has been ordered or upon the incidental questions except that the mover of the proposition or any of the pending amendments or any other motions or the member making the report from the committee or in the case of the absence of either of them any other member designated by such absentee shall have the right to close the debate on the particular proposition or amendment. Then a vote shall be taken immediately on the amendment or other motions, if any, and then on the main question.
Eiland	So what you choose, to recognize him, which you don't have to, there's nothing else that can be done, correct?
Chair	There will three minutes of a pro and con debate. Chair recognizes Rep. Creighton for the motion.
Creighton	Mr. Speaker, I make a motion to move the previous question under Rule 7, section 21.
Chair	Members, the motion has been seconded by 25 members. Three minute pro and con debate will be allowed on the motion. Chair recognizes Rep. Eiland in opposition.
Eiland	Mr. Speaker, Members. As I've said a while ago, this is a bad day that is getting much worse. I'm a member of something call the America Board of Trial Advocates, which is what I'd call the cream of the crop of trial lawyers of all

	types: family law, criminal law, civil law, personal injury law. You have to meeting strict criteria and be invited to be a member. They are against this bill. They have issues and have amendments to make it better. Mr. Smithy has amendments to make it better. When you call the previous question, this is a republican supported bill. You all have 80 co-authors; you have 101 members of this House. You can pass this bill at any time you want to, but to eliminate debate, eliminate hearing other voices and to eliminate opportunities to make it better, that is a grave mistake. I have to go out and work under these rules and to know that there is no debate in the House of Representatives where we mix is up as opposed to the club and the Senate where they don't, it is very disappointing. Ya'll can pass this bill and any other bill you want to at any time without resorting to this depth of elimination of public debate and suppression of the minority voice.
Chair	Chair recognizes Rep. Creighton.
Creighton	Mr. Speaker, Members. We've been trying to debate this bill for days. We've been trying to debate this bill for hours today. We've had parliamentary procedure used as trench warfare to keep this bill from being considered. We've got over 80 authors joined and co-authors on this bill. We will be able to consider debate and amendments on third reading. This is an emergency item. Everyone on this floor has measures that are to be considered that are very important following this bill that we have to get to before this session expires, and my motion stands. Thank you for your consideration, and please support this motion.
Chair	So enter Rule 7, section 21. All those in favor of ordering the previous question say, "aye." Opposed say, "nay."
Members	[answers]
Chair	A record vote has been requested. A record vote is granted. Strict enforcement has been requested. Vote from your desks. [bell rung] Have all voted? [bell – endlessly] Have all voted? Being 86 ayes, 11 nays, and 3 present, not voting, the motion prevails. Mr. Weber, for what purpose?
Weber	I'm just waiting for the gentlemen.
Chair	Chair recognizes Rep. Creighton.
Creighton	Thank you, Mr. Speaker, Members. Move passage.
Chair	Question occurs on passage on _____ on House Bill 274. all those in favor say, "aye". All those opposed, say "nay."
Members	[answer]
Chair	The ayes have it. House Bill 274 is [sentence not finished]. Record vote has been requested. Record vote is granted. Strict enforcement has been requested. Clerk will ring the bell. [bell] Have all voted?
Members	Resounding "NO."
Chair	Have all voted?
Members	Resounding "NO."
Chair	Have all Members voted? The 89 ayes, 12 nays, 2 present – note voting. House Bill 274 is passed ___.
Chair	_____ second reading, House Bill 274. Clerk read the Bill.

MAY 9, 2011

HOUSE FLOOR DEBATE - HB 274

House Floor Debate 5-9-11 Transcriptions – 1:20 to 3:40 min

Chair — Chair lays out as a matter of unfinished business House Bill 272 on second reading. Clerk, read the bill.

Clerk — HB 272 by Smith relating to the operation of the Texas Windstorm Insurance Association and to the resolution of their disputes concerning claims made to that association.

Chair — Members, when we left this bill on Saturday, there was a pending point of order by Representative Gallegos. He would like to temporarily withdraw his point of order. Chair recognizes Representative Smithee.

Smithee — Mr. Speaker, Members, I move to postpone further the consideration of House Bill 272 until a time certain, that being 7pm this evening.

Chair — Members have heard the motion. Is there objection? Chair hears none. So ordered.

Chair — Chair lays out on third reading House Bill 274. Clerk, read the bill.

Clerk — HB 274 by Creighton relating to attorneys' fees, early dismissal, expedited trials and the reform of certain remedies and procedures in civil actions.

Chair — Chair recognizes Representative Creighton.

Creighton — Mr. Speaker, Members, I'm going to go through a couple of high points on 274. I'm going to also consider, take on a couple of amendments myself and some clarifying amendments that make it a better bill and then I also visited with Representative Eiland. I'm working with him on some legislative intent from the back mike.

There are five provisions of this bill. First, it – the bill asks the Texas Supreme Court to promulgate rules to establish a motion to dismiss practice in Texas. Right now, we do not have such a practice where parties come to the courtroom or they actually have some litigation that ensues and there's no remedy at law whatsoever to accompany – to help them find resolution. The judge could just simply dismiss the action because there was not a remedy at law. There are 42 states that have a motion to dismiss practice. The federal courts use a motion to dismiss practice and all it would do was direct the Supreme Court to promulgate rules to recommend the establishment of the same for us.

Second, it also asks the Supreme Court to promulgate rules for expedited civil actions. So, right now it's very expensive, as everyone knows, to try a lawsuit so, for cases that have a claim of $100,000 or less, what we would be doing here is we would be expediting the discovery process which is very expensive for

both parties and time consuming, preventing them from getting their day in court. And we would be asking the Supreme Court to establish guidelines for an expedited civil action remedy there where if you had a claim that was $100,000 or less, then we could get our day in court faster rather than in my county, which takes a year and a half to two years to get there. That saves time for the plaintiffs, saves time for the defendants, and saves resources for the courts.

Next, we have a provision that is called "no cause of action implied in statute." What we want to do here is make sure that when we have a statute that is used in a case, if it is ambiguous and it leaves the defendant responsible for proving themselves out of that statute governing that cause. We want to do away with that, we want to make sure that under the statutory construction, that if we have the cause of action is clear and concise within that statute, for the judge to allow it to be used.

?? Mr. Speaker, --

Creighton I'll deal with that in just a second.

?? Okay. Thank you.

Creighton For interlocutory appeals, that is another word – another description of that is interim appeals; so, if you have a trial court litigation taking place and there is a jurisdiction question, right now the way it is in Texas, if both parties agree, we have a serious issue of asking whether or not this – we even have the right jurisdiction here. They would have to go all the way to the end of that trial before they could go up on appeal and get an answer as to whether or not the jurisdiction was correct. All this bill does is it allows the trial court judge to go ahead and send the case up to the appellate court and allow that decision to be made. That helps the plaintiff, that helps the defendant, that again saves time and resources of the court, so both parties can reach resolution on that matter. The judge could not send it up to get resolution on such an interim question unless an application was made by one of the parties.

We make a change to the offer of settlement provision that was enacted in House Bill 4 in 2003 where the defendant still has the trigger to invoke offer of settlement in 167, but the way we have it now, when the defendant wins, they still lose because they do not have the ability to get their costs covered. In this change, we have an even playing field where the plaintiff and the defendant equally if they invoke – go through the offer of settlement statute itself where they're able to recover their costs.

For breach of contract, I have the last provision is that there can be some cost shifting involved and permissive by the court itself, but there can only be cost shifting if the documents themselves worked out by the parties did not cover the way cost shifting was allowed in the first place. So the original documents would govern and, under the amendment that I'm about to add to the bill, that's

the way that that last provision would work. So, I have a couple of clarifying amendments and, at this time, I'll yield the mike.

Chair — Mr. Lucio, for what purpose?

Lucio — To ask a few questions, Mr. Speaker.

Chair — Gentleman yields.

Lucio — Thank you, Mr. Speaker. And Representative Creighton, I haven't had an opportunity to speak to you about my one – well, I have many concerns, but my specific concern with this bill – a majority of the law at practice and I am a practicing attorney – is family law. I believe it's your intention to not include the provisions of this bill in the Family Code. However, you have been very detailed and very thorough in how this bill will be implemented and I would only ask you if we could have a conversation about amending your bill to exclude it from the Family Code. And the reason for it, Representative Creighton, the family law process – the divorce process is extremely different in my opinion than the rest of the litigation world. It's very passionate. We've done a great deal of things in our work here in Austin to change the structure of it and to allow help in that process by _____ facilitation, family mediators, whatever it may be. I think the process works very well and I'm afraid if it is somehow misunderstood that some of the provisions of your bill be included in the family law process, it would change drastically our ability to get through a very emotional process. Could we at all talk about removing this from the Family Code?

Creighton — Representative Lucio, we've got a provision in the bill where the Supreme Court may not adopt rules under this subsection that conflict with any provision of the Family Code and that also under the interlocutory appeals section of the bill where at the trial court level if there is an interim question and based on an application from the parties, the judge can send it on up to get an answer at the appellate level for that question. That's an issue. The reason why we have that trial court trigger/gatekeeper provision in there is for those exact situations, so if that's not answering your question, then give me some more specifics on what provision of the bill conflicts --

Lucio — I'm not sure what could potentially happen at the trial court level that would need to be addressed that would cause concern and need to be addressed, that would cause concern and need to be addressed --

Creighton — To answer your question --

Lucio — -- at the family law and I mean if you – we understand how family law --

Creighton — I had a case --

Lucio [unintelligible]

Creighton -- conversation on the floor right before we called the bill up with Representative Phillips regarding this same thing and once we visited about that interlocutory appeals section and the gatekeeper provision in there on Family Code, he was more comfortable with that, so that's why I brought that up, but --

Lucio So when you say trial court, I'm not – I'm not exact-, I don't know what you mean by trial court being the gatekeeper.

Creighton Tell me what – again, conversely, tell me what provision of the bill you're concerned about with regard to the Family Code.

Lucio The motion to dismiss…

Creighton Okay.

Lucio Loser pays … any of those things and how they apply to the – those are my concerns. Not necessarily the appeal process.

Creighton Okay. Well, we – and that was --

Lucio -- family law cases don't get, I mean --

Creighton -- well, that was my first answer to you. In the provision of the bill that deals with instructing the Supreme Court to promulgate rules for motion to dismiss practice where we have Civil Practice Remedies Code, the Family Code, the Property Code and the Tax Code --

Lucio So --

Creighton -- outlined there that they're not --

Lucio -- earlier you said the Supreme Court cannot adopt rules that would be contradictory to the existing Family Code.

Creighton The expedited civil action and the provisions for motions to dismiss will not apply to --

Lucio Right. Cause we said that it takes sixty days for us before we can even grant

Creighton Right, so --

Lucio So that wouldn't apply --

Creighton If you intention was to get _____

Lucio — And what was the other expedited pro- what was the other?

Creighton — The provisions that are covered in that and excluded from that, is that what you're asking?

Lucio — So, yeah, so settlement offers, loser pays, would that apply to the Family Code under your bill?

Creighton — The only situation in Rule 12(b)(6), your motion to dismiss for the non-prevailing party would possibly pay is if the judge allowed that. It's permissive. It's only in the small number of cases where the case would actually be dismissed because there's no remedy at law whatsoever to govern the case, so -- If you have a family law case where there is no law whatsoever, it would be a remedy to the dispute which I would assume that you hardly ever bring a case where there is no remedy at law. It's not even applicable to what you're talking about.

Lucio — So, for instance, if we have a property – community property lawsuit as well as custody of children lawsuit. The custody of children I don't believe you can create a loser-pay structure based on who's granted custody of the children, but let's say that community property has a dollar value and I'm the petitioner and the defendant offers me $150,000 monetary value and that encompasses the house, the cars, retirement, so on and so forth. I decline that $150,000 because I think I'm owed more or my client is owed more based on how the retirement structure is, the value of the home, so on and so forth. And it comes back that I'm only awarded $135,000 by the jury. Would your bill affect that scenario where I would have to pay attorneys' fees because there was a settlement offer on the community portion of the family law matter.

Creighton — Representative Lucio, Chapter 42 excludes the Family Code in offered settlement.

Lucio — Chapter – okay, so what instances would your bill apply to the Family Code if you could just – for intent purposes --

Creighton — The only mention of the Family Code is excluding under the expedited claims section four different sections or codes. We have med mal, we have Family Code, we have Property Code and Tax Code.

Lucio — So, it's your intent to not affect the family law litigation process.

Creighton — The only – we're not making any changes to the current law other than the few specific changes that we made here. The motion to dismiss practice …

Lucio — Would that apply to the family law practice?

Creighton — We don't have – we don't stipulate one way or the other. We're going to rely on the Supreme Court to make suggested rules and guidelines for a motion to

dismiss practice and what we're doing is establishing what 42 other states and the federal courts enjoys successfully today.

Lucio — So, which other states apply your intent for motion to dismiss practice in the family law sections? In their family law practices?

Creighton — I – I don't have an answer to what other states do, but I'm not as much concerned about the other states and how they stipulate it. If we're going to rely on the Texas Supreme Court to make those recommendations and then after that branch of government makes those recommendations, if we have issues with their decisions, then this legislative branch can speak to those issues, and then I've got some legislative intent that Representative Eiland and I are going to go through that I think will ease some of your concerns as we direct the Supreme Court.

Lucio — Mr. Speaker?

Chair — Yeah? Representative Lucio, for what purpose?

Lucio — Can I have an exchange between me and Mr. Creighton, reduced to writing and placed in the journal, please?

Chair — Members, you heard the motion. Is there objection? Chair hears none. So ordered. Representative Dutton, for what purpose?

Dutton — Will the gentleman yield for a question?

Creighton — Sure.

Chair — Chairman yields.

Dutton — Thank you. Mr. Creighton, let me start with, this bill applies to every cause of action?

Creighton — Well, there's different provisions of the bill, so for instance under the expedited claims action where we have, after my clarifying amendment, from $500 up to $100,000 worth of claims, we're not going to have it apply to the Family Code, the Property Code, the Tax Code or med mal cases.

Dutton — Are there similar exclusions under the loser pay provision? Or does it apply to every cause of action?

Creighton — That was a similar discussion that Representative Lucio and I had. For the motion to dismiss practice section that we're asking the Texas Supreme Court to recommend guidelines and promulgate rules, they will make recommendations for what that will cover. Now, there's only for the non-prevailing party in this section to actually owe costs – that's permissive, and only allowed if the trial court allows it. And that's in the small number of cases where there is no

remedy at law whatsoever to support those parties even being there with that claim. So, when you say, I want to make sure it's clear that that might be 8 or 9% of cases, but that's a very small number, and only --

Dutton — Well – well, let me ask --

Creighton — -- and only if the court allowed it.

Dutton — Well, let me ask it this way. For example, under certain claims, let's take personal injury as an example. Personal injury causes of actions right now do not permit the winning plaintiff to get their attorneys' fees. Is that right?

Creighton — I don't believe that's correct, but go ahead with your question.

Dutton — Well … no, I think I am, Chairman Creighton. The winner, for example, in a personal injury case, the law does not provide attorneys' fees for that person. The only way the --

Creighton — Representative Dutton, I'm … this bill pertains to offered settlements – it makes a small change in making sure plaintiffs and defendants have cost shifting there, but --

Dutton — I understand --

Creighton — Under – once invoked, under 167, that is the case for the hypothetical that you're giving.

Dutton — But … but what I'm getting at if you'll follow me is that if, for example, a plaintiff sues under a particular statute that doesn't allow the plaintiff to collect attorneys' fees, your bill though would permit the defendant in a situation to possibly collect attorneys' fees. Is that right?

Creighton — That's the way it exists under current law, but also --

Dutton — No, no, no – that doesn't exist – that's not the way it exists under current law. [talking over each other]

Creighton — Gross negligence … you would also be able to … you would have cost shifting as well, so …

Dutton — No. Let me see if I can get you to understand my question. In a lawsuit, in a personal injury lawsuit, for example, where I'm suing because somebody ran the light and ran over my client and they injured the person. The person brings a lawsuit. Under that situation, the plaintiff is not entitled to attorneys' fees. And what my question has to do with is however the way this law affects that is that even though you're not entitled to attorneys' fees [gavel clacking] _____

Chair — Could we have some order? If you have conversations, take them outside; or else the members can't hear this dialogue.

Dutton — Mr. Speaker, I didn't understand what you said either.

Chair — Senator, conversations other than the one you and Brandon are having …

Dutton — Oh, okay …

Chair — -- take them outside the room.

Dutton — Oh, okay. Thank you. Mr. Creighton, what I'm saying is, what I'm asking is that when a statute does not provide attorneys' fees for a plaintiff, for a winning plaintiff, your bill, though, turns it on its head and does permit attorneys fees for the defendant even though the plaintiff is not entitled to attorneys' fees. I mean, the way I read the bill, I'm not trying to prejudge it, I'm just trying to ask a question of whether or not that's the case under your bill.

Creighton — Representative Dutton, under Chapter 42, under Offered Settlement, which is all this bill speaks to …

Dutton — Right.

Creighton — … cost shifting is already allowed. So, what we're talking about today is you still have your defendant trigger – all we're doing here is allowing cost shifting by both sides depending on – and what this does is it encourages both sides to actually deal with each other genuinely in trying to resolve the case.

Dutton — Well, would you agree with me that the benefit is heavily weighted on the side of the defendant though?

Creighton — Well, I agree that the defendant can invoke the Chapter 42 itself, but the plaintiff files the suit to begin with, so --

Dutton — But the burden falls more heavily on the plaintiff under Chapter 42 even as exists today.

Creighton — I think that's -- As it exists today, it's not working and so what we're making a change to is to change that burden that you describe and it's going to be more of an even playing field for both parties and actually may be used now.

Dutton — How is it going to be even for the plaintiff?

Creighton — The plaintiff brings the case and if the defendant so chooses, they trigger the offer of settlement provision. If they choose not to trigger the offer of settlement provision, those parties can negotiate settlement without it. But --

Dutton — Let me ask my question again. How does your changes in 274 benefit

plaintiffs?

Creighton — It benefits plaintiffs because defendants will be more encouraged to come to the table with a real genuine either offer or counteroffer depending on how the case – what plays out under that section.

Dutton — What in the bill presupposes that? I mean, what in the bill causes defendants to do that? I don't read it that way and maybe I'm reading it wrong.

Creighton — The provision of the bill that enables both parties to negotiate and be successful within offer of settlement is the provision that changes cost shifting to where both parties can benefit from that, whereas now only one can, the plaintiff. That, therefore, is not used. So, if offer of settlement is not invoked, the plaintiff is going to be hurt because the defendant not only not going to invoke it but if they ever actually did, they're not going to negotiate with a genuine intent to find resolution. They may just offer a dollar --

Dutton — Well --

Creighton — [unintelligible] today ...

Chair — Representative Sheffield raised a point of order, the gentleman's time has expired. Point of order. [Unintelligible]

Dutton — Could I move to extend the gentleman's time?

Chair — First extension of time. Is there objection? Chair hears none. So ordered.

Creighton — Thank you.

Dutton — But let me move on to your 12(b)6 motion. Are you aware – does your bill require that when a court dismissing a case on the basis of a 12(b)6 motion that they have to enter a written explanation of why it was dismissed?

Creighton — We don't – I'm not requiring that in this bill, Representative Dutton. All we're asking for is just ask the Texas Supreme Court as promulgated and recommended the Texas Rules of Civil Procedure, we're asking them to make their recommendations to us. Now they may require that but that is – we're going to have to see what they come up with. Representative Eiland and I are going to exchange legislative intent to where the court could consider input from the bar, the state bar, and I think that that's accomplishing his goal and maybe yours, to make sure that --

Dutton — Well, not in mine – but I'll tell one of the troubling parts about this is I think you agree that this represents a fairly huge departure from our over-200 years of legal jurisprudence. I mean, that's a departure in Texas for Texas courts now to be able to enter a 12(b)6 motion as they do in federal court. In federal court,

you always get a written explanation of it.

Part of the problem is – well, let me ask you this. Are you aware that in many cases the defendants always have the option to file what's called a motion for summary judgment and that usually follows after some discovery in the case. Some reasonable period for discovery has taken place. What 12(b)6 does is simply backs that up to sometime even after the lawsuit is first filed, the defendants would file a 12(b)6 motion asking the court to dismiss it for some basis. Whether or not that's appealable or not, I don't know, I don't read that under your bill whether that appealable or not. But to the extent it is appealable under your bill, I think we ought to require that the Court enter a written order, a written explanation rather, a written memorandum, at least indicating the basis upon which they granted the 12(b)6 motion and that would generally come from defendants. Plaintiffs don't generally file a 12(b)6 motion.

Creighton Well, I appreciate your comments and your experience there, Representative Dutton. I fully expect that this – the Texas Supreme Court will make those recommendations with their expertise in this branch and you and I together can always circle around and if we have a problem with it, we could speak to that --

Dutton Well, let me ask you this way, then. Wouldn't it be better if the Supreme Court, in adopting those rules, came back to this legislative body for us to approve those, given that is such a huge departure from what we've done in the past?

Creighton We'll have our own opportunity anyway to – based on my last comment – to make changes in that way, sort of offer a de facto approval, but --

Dutton How would we do that?

Creighton -- we used to be – well, because once those rules are in place, we could offer suggestions or --

Dutton Are you aware that under 12(b)6 under the federal rules since you're adopting those, when those rules were adopted, they were actually approved by the U.S. Congress. They weren't just approved by the Supreme Court.

Creighton Sure. We have a motion to dismiss practice that's under Federal Rules of Civil Procedure and we have --

Dutton Yes.

Creighton -- and we have 42 other states, state governments that have also done the same, and I want to enjoy the success of both. I'll --

Dutton And I'm not arguing with that at the point, I'm just saying that the process is always included, at least the legislative body approving the change in those rules and, what I'm asking is, whether or not, as I look at your bill, it doesn't

contemplate that.

Creighton — Well, I appreciate your suggestion. I'm, you know, again, the Supreme Court in very capable ways made their suggestions on the Texas Rules of Civil Procedure and I believe in the integrity of the Supreme Court and their expertise to be able to --

Dutton — Well, are you aware that in previous cases and some cases previously, we've actually had as this body had to be the final step in the approval process for a change in Supreme Court rules.

Creighton — We've done that in the past in some cases, yes, I believe, but I'm – our or my attempt with this bill is to rely on the expertise of the Supreme Court to --

Dutton — And I'm not – I'm not suggesting we take that away. I'm just saying that one of the parts in the process – as we – well, let me put it this way. You recognize that today what you're doing is granting the Supreme Court the permission to make the rules. What I'm saying is that if we're going to grant them that permission to do it, we ought to have at least some oversight so that when the rules are contemplated that we ought to have some say in whether or not we believe those are the rules that actually do what we have suggested they do in House Bill 274. And it seems to me that the best way to do that would be for us to at least put into place the – a provision that requires the legislature to approve those rules given the fact that we are going to turn it simply – we're granting the complete authority to implement, to develop the rules, implement the rules – to the Supreme Court, to the Texas Supreme Court. I believe that if you'll check some of the other states, in many cases that I'm aware of, the legislature when granting the judiciary the authority to do that also kept in place an opportunity to improve that and that's all I'm asking at this point, is whether or not and I suppose – I guess what you're saying is, you disagree and you don't believe that we ought to have that right as a legislative body. But it just seems to me that this legislature ought to stay in the loop so that we can at least give some idea or some approval other than just de facto for the adoption of these rules. I suspect one of the things you indicated that they were going to take some input from the State Bar. Is that right, you are asking the Supreme Court to take some advice or consent from the State Bar in terms of these rule changes?

Creighton — Yes, Representative Eiland and I, after my clarifying amendments, are going to exchange some intent to where that would be the case, that they may do that, and again, you know, you mentioned the Federal Rules of Civil Procedure, Representative Dutton --

Dutton — Yes.

Creighton — -- you know, those rules came into being by recommendations from the U.S. Supreme Court, our summary judgment practice as it exists in Texas has come into place by recommendation through the Texas Rules of Civil Procedure

recommended by the Texas Supreme Court. And all I'm asking here is to be consistent with that.

Dutton — Well, yeah, except those rules you named in some cases were approved by the legislature. Are you aware of that?

Creighton — In limited circumstances, correct, but I --

Dutton — Well, this --

Creighton — I'm comfortable with the Supreme Court making these recommendations. I really respect your opinion and I appreciate--

Dutton — Alright. Well, I, you know, I guess we'll have to kind of talk about that a little bit further because I have an amendment up there to require this body to approve any rules that are adopted under 274 by the Supreme Court, Texas Supreme Court, because I think it's ultimately the responsibility falls on us, particularly where we're making such a huge change in our system of jurisprudence.

Creighton — Thank you for your comments, Representative Dutton.

Mr. Speaker, will the gentleman yield for a question?

Chair — Craig, do you yield?

Creighton — Yes. Oh, sorry.

?? — Brandon, I'm curious about page 2, lines 8 through 14.

Creighton — Okay.

?? — It says the Supreme Court may not adopt rules under this subsection that conflict with the provision of dot, dot, dot. Is it your intent to say that if a section of the law is not on that list that the Supreme Court can't adopt rules that conflict with statutes?

Creighton — They can, but I, you know, these are the provisions we have that are the exception to establish and the Supreme Court under expedited claims for claims of – through my clarifying amendment which will be $4-500 up to $100,000, we've got these subsections.

?? — So we're letting the Supreme Court override statutes?

Creighton — Not override statutes, but they're – they're gonna promulgate rules that are consistent with what we're asking here.

?? — I'm just asking for your legislative intent about these lines 'cause you say they can't adopt rules that conflict with the listed statutes. I'm trying to figure out if

by implication you're saying that they can adopt rules that conflict with other codes.

Creighton — No, I don't have any intention for them to adopt rules that will conflict with other codes.

?? — Thank you.

Creighton — Yes sir.

Chair — Mr. Allen, for what purpose?

Allen — _____ the amendment and the amendment to the amendment _____ ten

Creighton — Right. That'd be great.

Chair — Following amendment. Clerk, read the amendment.

Clerk — Amendment by Creighton.

Chair — Can I ask this of representative Creighton? I have an amendment. Following the amendment to the amendment. Clerk, read the amendment.

Clerk — Amendment to the Amendment by Creighton.

Chair — Chair recognizes Representative Creighton.

Creighton — Mr. Speaker, Members, I have a clarifying amendment that was a result of a lot of hard work through the committee process, the subcommittee process and working with stakeholders from many areas on this bill to get it to the form that it is today. This amendment under the expedited civil action section, we had a floor on what this section does again is for smaller claims up to $100,000 and it just limits the discovery process where you can get your day in court faster. Saves costs for both parties and saves resources for the court. We're going to lower that floor of $10,000 in this amendment down to $500 and the reason why is that aligns state district courts, county court at law courts and probate courts to all be in sync with this expedited claim provision. That way, no matter which court you're in, there's not a conflict there. That was the suggestion of several stakeholders and parties involved. It also amends the expedited _____, that's complete there.

For the controlling question of law section, on interlocutory appeals, I worked with Representative Davis and Judge Lewis and Representative Hughes on some suggestions there where I had cost shifting or some fees that were due if, during an interim question or on interlocutory appeal, let's say at the trial court, if there was a question of jurisdiction, the original committee substitute has costs that were involved with making that request. I've removed those costs. For the recovery of attorneys' fees, I'm clarifying that if documents – if

attorneys have already – for both parties – worked out who owes attorneys fees in their documents, in their contracts which, by and large, most contracts that are executed will have that in place – that governs over this bill. So, if you've worked out attorneys' fees and cost shifting in your documents, that controls. If it's not mentioned in your documents, then even then this is permissive by the trial court to allow cost shifting if there is a breach of contract in the case.

Last, under recovery of attorneys' fees in the same section, I'm just adding language that says the amount owed to make sure there is only cost shifting or attorneys' fees if the court clearly says they are owed. I worked with Representative Eiland on a little bit of cleanup language in the same clarifying amendment and from that, we'll move forward. I move for adoption.

[background talking]

Chair — Representative Creighton sends up an amendment to the amendment. If the amendment to the amendment is acceptable to the author. Is there objection? Chair hears none. The amendment is adopted.

Chair — Back on the Creighton amendment, as amended. Chair recognizes Representative Creighton.

Creighton — Mr. Speaker?

Chair — Mr. Eiland, for what purpose?

Eiland — Will the gentleman yield?

Chair — Mr. Creighton, do you yield?

Creighton — I yield.

Chair — Mr. Creighton yields.

Eiland — Mr. Creighton, as you have referenced, I do have some legislative intent tonight we're going to discuss. But first, you and I met on this bill, both with yourself and with outside lawyers of your choosing, to go through it, right?

Creighton — Yes.

Eiland — And I had a bunch – I had several amendments to the bill that were not acceptable, correct?

[unintelligible]

Creighton — You had one amendment that was acceptable and then, from there, I'm doing my best through working with many stakeholders through subcommittees and committees and all through this session to keep this bill as clean as possible so the Senate can have a good bill to work with. And from there, I didn't accept any more than that one that you and I visited on.

Eiland — Right. And you know that one of the concerns is, unlike back in 2003 on House Bill 3 and 4 wherein when we set up the offer of settlement section of the Code in Chapter 42 of the Civil Practices and Remedies Code, in 42.05 we gave lots of legislative intent but I don't really need to ask you any questions about that, but one of the concerns about your bill whereas back at that time we did give some specific legislative intent on the offer of settlement. In your bill, under section 1, we basically give an instruction to the Supreme Court, go make up a motion to dismiss practice and give no restrictions, no guidelines, no limitations. Right?

Creighton — That's correct. This bill is obviously not of the magnitude that House Bill 4 was in 2003, but I'm – you and I are going – to be going through some intent now and I think that will ease some of your concerns.

Eiland — Right. And so, one of the things is, unlike the Federal Rules of Civil Procedure and especially after the U.S. Supreme Court case of *Twombley*, we have a notice pleading under Chapter 45 of the Texas Rules of Civil Procedure. Is it your – and it's your intent that nothing in this bill be construed to change your impact and notice pleading requirements of Texas Civil Practice – Rules of Civil Procedure 45, correct?

Creighton — Correct. I don't have any intention to change any of the pleading requirements under the Texas Rules of Civil Procedure 45.

Eiland — And the Supreme Court has previously set up a Rules Advisory Committee which, usually before they adopted any rules, they will either propose a rule to the Rules Advisory Committee or ask the Rules Advisory Committee to propose a rule. And that's not a requirement in your bill that that be done, but as I understand it, it is your intent that the Supreme Court will utilize and refer any proposed rule to a Supreme Court advisory committee.

Creighton — That's correct. That is my intention and, you know, I'm assuming from the legislative branch to the – asking the Supreme Court to promulgate these rules that they'll use the Supreme Court advisory committee anyway. But yes, that's my intention.

Eiland — And then, since we do give no guidelines, there was considered, as I understand it, adopting the California rules, the New York rules or something similar to the federal rules and while that has not been placed into your bill, it's your intent that the Supreme Court consider the California rules, the New York rules and the federal rules since they have often established body of law and practitioners know how to operate under them.

Creighton — Yes.

Eiland — And, then, I had an amendment that would exempt out from this motion to dismiss area, the Tax Code, the Family Code, the subtitle A, Title V of the Labor Code which is the workers' comp laws, and then Chapter 21 of the Property Code which is eminent domain and class actions, because all of those items or codes have their own internal mechanisms and that amendment was not acceptable, however, it is your intent that when the Supreme Court adopts these rules, that they not preempt existing law that provides for a process to be followed in the bringing of a suit such as the Tax Code, the Family Code, Workers' Comp, eminent domain and class action. Correct?

Creighton — Yes, sir. I don't anticipate any conflict there with the rules that they promulgate, but I certainly have no, I'm comfortable with expressing intent to not conflict with the following.

Eiland — And then Sharon Smithee had an amendment in this same area because there is no real guideline to the Supreme Court about motion to dismiss and I believe that there is two his elements that are agreed to with regard to intent and that is a

motion to dismiss must be filed, no I think that the only one they, ya'll agreed to is that the non-movant must have an opportunity to replead if repleading can cure the issue. Is that correct?

Creighton — That's correct. If it's determined by either party that there is no remedy at law, those counsel should understand by assessing the case and there should be no problem at all requiring that to be the first responsive motion.

Eiland — Ok and then finally, an area that I brought to you as a concern is a concern of mine that in cases where money is not the only object, like libel or slander, or false imprisonment, or a suit for money and specific performance, a suit for money where the offer would include a confidentiality clause, that, you could not agree with any intent as it relates to those items. Correct?

Creighton — Is your question there based on repleading the cured issue that's outstanding?

Eiland — No. Sorry about that. Now I'm moving over to section 5, where we talk about the shifting of the cost and the loser pays or the offer of settlement area and I had concerns that we discussed and I expressed about when it's not just about money, that somebody may have to pay and we could not agree to any intent language in that area.

Creighton — I don't really want to speak to any intent on offer settlement provision itself. I mean we are simply making one small change there that levels the playing field for both parties and I'd like to rely on the Supreme Court there, Representative Eiland.

Eiland — Thank you. Mr. Speaker.

Speaker — Mr. Eiland, for what purpose?

Eiland — I would move that the intent language of Mr. Creighton and myself be placed in the journal with unanimous consent of the body.

Speaker — Members you have heard the motion is there objection. Chair hears none. So ordered.

Speaker — Mr. Hughes for what purpose?

Mr. Hughes — Mr. Speaker, in light of all the matters being delegated by this statute and all the discussion going on, I'd move that all the remarks, all the questions and answers between the front mike and the back mike on House Bill 274 from the initial lay out through the end, be reduced to writing and placed in the journal for legislative intent.

Speaker — Members you've heard the motion, is there objection? Chair hears none. So ordered.

Speaker Members question occurs on the adoption of the Creighton amendment as amended, is there objection? Chair hears none. Amendment is adopted. Following amendment, clerk read the amendment.

Clerk Amended by Eiland.

Speaker Chair recognizes Representative Eiland.

Mr. Speaker, Members, this amendment makes sure that everybody knows what are the impacts of the bill. And I'm going to tell you why I'm bringing it. At the beginning of this session, Mr. Zedra came to me with an issue of a constituent of his. And it related to House Bill 3 or 4 from 2003. When we passed the medical malpractice act, liability reform act, Mr. Nixon told us repeatedly that we were only limiting the recovery for individuals that suffered a malpractice in pain in suffering. We were repeatedly told that there would be no limitation on recovery of economic damages, specifically loss or medical bills. And that was a big concern for many people, however that was true almost the whole way, except there was one provision that said unless you have malpractice from public hospital and in that case it is limited and capped at one hundred thousand dollars complete total maximum, no exceptions, doesn't matter if you're rich and you have a horrible malpractice and lose lots of money, it doesn't matter if you have a whole lot of medical bills, and that happened to one of Mr. Zedra constituents and he came up to me and said this can't be true, this isn't right. And I said, it is not right, but it is true. Because he had a high wage earner who lost a lot of money on loss wages and lost, had a whole bunch of medical bills but because it was in a public hospital, his maximum recovery was one hundred thousand dollars, maximum no matter what. So here's a guy who lost three or four hundred thousand dollars of lost wages and had a couple of hundred thousand dollars of medical bills and his maximum recovery is one hundred thousand dollars. That was in the bill and apparently people didn't understand it, so what I want to make sure everybody knows in this bill, while we make call it the loser pay bills, it is the loser pays and sometimes the winner pays too. And let me give you an example. If you have a suit for one hundred thousand dollars. And your demand is for one hundred thousand dollars, if you're offered eighty thousand dollars and you say no, and you go to a jury trial and you win seventy-five thousand dollars you'll have to pay the defendant's lawyers fees even if they are more than seventy-five thousand dollars. So not just the loser pays the winner can pay sometimes. And in our law currently it was passed and drafted by Mr. Nixon, there is a floor to make sure that never happened, but so that everybody knows and you go home and tell the story to the rotary and everybody, make sure that the business men know that it was one of the first things that's going to happen this summer in the legal seminars is how do we draft Mr. Smithee how do we draft our attorneys fees contract to make sure that we give notice to our clients that they may win, and still have to pay the other side money and I can give you a prime example of this. For many years, I had, it wasn't very big, but I had the largest verdict in Harris County for false imprisonment. I had a gentleman, an African American associate pastor

and deacon at a church who was accused of shoplifting. We brought suit against the store. They made a settlement offer before trial of money. And it was in this range of eighty thousand dollars and we demanded like one hundred twenty five. But what they required of us was a confidentiality agreement. They would not admit that they were wrong. This gentlemen was removed from being able to take up the collection plate, which obviously if you have somebody accused of stealing you don't want them to collect the offering at church. He lost all kinds of privileges at his church. It was not just about the money for him. It was about clearing his name and being found that he did not shoplift and he could prove it to everybody. So there offer of settlement of money and no liability and confidentiality was not acceptable, so we rejected it. We ended up winning seventy-five thousand dollars and he was found completely innocent. That was a good day for them. Under this bill, he would have had to turn around and pay the store's attorneys fees to clear his name and I don't think that that's right and that's what this bill does. It removes the floor that we passed in 2003, so this is not just the loser pay bill, this is the loser pays and sometimes the winner pays. And what I, the amendment that I proposed last week, or Saturday that was not acceptable would have taken that away. Because think about libel, slander, breach of contract, it's not always just about the money. But this bill makes it just about the money.

Deshotel Mr. Speaker.

Eiland So.

Speaker Mr. Deshotel, for what purpose?

Deshotel I have a question. Are you open for questions, Mr. Eiland do you yield?

Eiland Yes, I yield.

Deshotel Mr. Eiland, if you could review again, I thought it quite interesting about this bill on the scenario where the winner actually ends up paying the losers attorneys fees.

Eiland Yes.

Deshotel If I'm a small business man and I sue a supplier for instance for one hundred thousand dollars and there is a counter offer of eighty thousand dollars.

Eiland The bill, the trigger is if you do not beat the offer by eighty percent then the provision kicks in where you have to pay the other sides attorneys fees. So if you are suing or the demand is for one hundred thousand, the offer is for eighty thousand, and you recover anything less than eighty thousand, you gotta pay the other side's attorneys fees even if there higher than what you recover.

Deshotel So the jury could find that I was correct in filing the lawsuit, the jury could find that I was wronged by the defendant, but because they awarded me seventy-

none thousand dollars as opposed to eighty thousand, I end up having to pay their attorneys fees, even though they are more than the award to me was?

Eiland — Correct. So this is not about frivolous lawsuits, this is about valid, justifiable lawsuits and it's not just about slip and fall, this is about business deals as well.

Oliveira — Mr. Speaker

Speaker — Mr. Oliveira, for what purpose?

Oliveira — Will the gentleman yield?

Eiland — Yes, I yield.

Speaker — Gentleman yields.

Oliveira — Mr. Eiland you have poked my curiosity to also inquire about other types of lawsuits, like employment law. Let's say you are wrongfully terminated, accused of theft and there was no theft, and part of your recovery is not just your lost wages for all that time, but maybe one of the things you want is an apology, or maybe you want to be reinstated, which are things that can happen. If those are involved in these offers are saying that an injured employee or an injured businessman even in a slander and libel suit, maybe the same thing, wants, look I want the world to know that what you did to me was wrong and I want more than money.

Eiland — There is an example from Alaska which has the only other loser pay bills in the States, where a woman sued for unemployment benefits and ended up having to pay and it's a bad situation. And I say that because if you look at 42.002 Applicability and Affect. It says, the settlement procedures provided in this chapter apply only to claims from monetary relief. Alright. Only claims for monetary relief. The bill says that if there's a settlement offer to settle all claims in an action between the parties, and therefore claims means claims for money and sometimes it's not about only money, it's about more than money.

Oliveira — Well, often it's not. Well let's take money out of the picture, where you have a client that doesn't care about the money and is willing to pay you your hourly rate or your expenses or both to get what they want is justice and justice may not even mean a dollar or a million dollars to that particular individual, just ice might be saying that I was wronged, I was hurt, you destroyed my company with what you said about my product, my work, my life work in my company. You destroyed it. What you're saying is if the dollar proposal goes in favor of the defendant even though the dollar proposal was insignificant to the plaintiff, they have to pay.

Eiland — Yes. If sometimes you want to know it wasn't me that breached, it was that guy or that girl that breached the contract. So with this Members, I withdraw the motion to name the act the Loser Pays and Sometimes the Winner Pays because

I want to make sure that everybody understands the impact and implications of this bill when we go home and talk about it. So…

Mr. Speaker.

Speaker Mr. Solomons for what purpose?

Solomons Can I ask a question of Mr. Eiland?

Speaker Mr. Eiland do you yield?

Eiland Yes.

Solomons Not that I do a lot of trial work by any means but I know lawyers that do but what concerns me about this is you can win the lawsuit and then you can end up paying I mean I think you do have you picked a number of lawyers' interest who may not do a lot of trial work in connection with that but I guess the question I have is what if it comes back and I get 79.5% of pay, you pay. You don't – it's not like a range with any sort, it's you came very close to the 80%, you won, but you only got 79.5% and then you would end up having to pay? There's no leeway?

Eiland Nope. Not now. Not under this bill and without your amendment.

Solomons Right. Well, it's . . . .

Eiland No, I didn't have an amendment. I was just specifically trying to name this _____ for what it actually is. There's no amendments because they were not acceptable on Saturday.

Solomons Oh, that's right. We're not doing that, okay, but I guess my point and even when I think TLR came to my office to explain it and I asked that question about what would happen if in fact only got 79%, you know, I mean, I won.

Eiland You didn't win by enough.

Solomons Alright. Thank you. Oh, I forgot to ask one other thing. This doesn't go to the declaratory-type action or anything. It's just really offer _____ for damages. Correct?

Eiland I believe so, but you better be sure. There are exemptions in the bill or as originally filed. It says this chapter does not apply into class action, shareholders derivative actions, action by or against the governmental entity, the family code, worker's comp code, something at JP court, and so those are the only exemptions that we put in the law back in 2003 and this doesn't add or subtract to whom this chapter applies.

Solomons — Okay, thank you.

Speaker — Representative _____ and tell them the time expired _____ thank you this _____. Representative Eiland withdraws the amendment. Following the amendment _____ for the amendment. Amendment by Lucio. Chair recognizes Representative Lucio.

Lucio — Thank you Mr. Speaker, member. If I could just have you attention for a moment. For those of you who have been through a divorce or had someone very close to you that have been through a divorce, a love one. You understand the emotions involved and how this practice is very, very different than any other practice that this bill speaks to you. There's usually kids involved, the welfare of those children, how – where they're going to go to school, child support, all sorts of matters that are on comment to any other area of the law. I spoke with the author of this bill earlier today regarding his intentions and whether or not he intended to apply it or apply them, excuse me, to the family law. I don't think he intends to, but I – this amendment will clarify that especially in regards to attorney's fees and motions to dismiss. You can only see a case where someone knows that their child is in a poor circumstance with the parent who has custody but is afraid to file a motion for modification because if they lose that motion, either they're going to have to pay the other side's attorney's fees. There's just all sorts of scenarios we could come up with about someone who's in an abusive relationship and wants to get of out, a divorce but now fears, not only can they not pay their own attorney's fees, but if whatever reason something goes wrong in the case and one of the provisions of this bill is applied to that scenario, now they have to pay additional attorney's fees. Many, many folks that go through the divorce process have to take out savings, have to take out, get into debt to afford to get a divorce and to make it more costly or more prohibitive. That is not something we want to do in the family law context, so I ask for you consideration of this bill. I think it speaks very specifically to the author's intent and I hope it's acceptable to the author and if not, I hope for your vote. Thank you.

Speaker — Chair recognizes Representative Creighton in opposition.

Creighton — Mr. Speaker, members. I want to move to table this amendment. Family law cases sometimes involve tort and questions of law. Is the mike on? Okay. I want to move to table this amendment and I appreciate Representative Lucio messing with me just here the last few minutes on some of the merits of it but we've worked with many stakeholders on this bill throughout this process and subcommittee and committee back to subcommittee and in committee and we've got, we've got a bill that we feel like we can work with, again with family law cases, they sometimes do involve tort in questions of law that deserve review, so I'm going to move to table this amendment.

Speaker — Chair recognizes Representative Lucio to close

Lucio — Thank you. Mr. Speaker, members, if you look very specifically, for instance, that the award of attorney's fees that speaks in my amendment on page 1, Section 30.021. Not in a divorce context, but in a Motion to Modify the Parent/Child Relationships, so let's say you're the parent who did not get custody of your child and you ex-wife or ex-husband has custody of that child and you file a petition to change so that you can because for whatever issues, gain, regain custody of your child. Under this bill, the way it is structured, if you lose that case, you have to pay for that attorney's fees, so if you come from a poor family and you know that you child, you know, you don't have custody of that child for whatever reason, but you know that child is now on a poor circumstance because you ex has now married, remarried and that new person is bad to your child, or for whatever reason they're neglecting your child and you don't have the means to go and file a lawsuit because you can't find, you can't hire an attorney and afford an attorney, but now couple that, but you're going to have to pay for the other person's attorney that is, I think, a big injustice. Number one, number two in regards to torts, we are talking about torts in the family law context. If you're getting a divorce and you've been abused or there's been an assault against, we're not talking about frivolous lawsuits that this body has time and time again voted to circumvent. We're talking about family matters all very close to us. Think about how this would affect you personally, how it would affect your child, your sister, your son, and how you would want this to be different. You don't want to close the doors to family law matters because it's cost prohibitive and this bill makes it very clear. Anything in the family law context should be excluded from frivolous lawsuit labels, so with that, I ask you to please think about it and vote your conscious. Thank you.

Speaker — Representative Lucio sends up an amendment. Representative Creighton moves to table. Question is on the motion to table. Vote I, vote name _____. Mr. Creighton voting I, Mr. Lucio voting no. Have all voted? Have all voted? 80 I's, 65 nays, motion to table prevails. Following the amendment, declare for the amendment. Amendment by Lewis. Chair recognizes Representative Lewis.

Lewis — Thank you speaker and members. This amendment has to do with the responsible third-party rule. Basically, since 1870s, Texas has had a Statue of Limitations. There's an amount of time by of which any party has an ability to come and bring a lawsuit and if they don't they just can't bring it. It is absolutely part of the bedrock of our law and has been since at least the 1870s, probably before then. The problem is in 2003, there was an exception made in the law and it is all but killed that for all practical purposes of the Statute of Limitations. It allow the Statute of Limitations to be totally gained. Here's what happens – if a plaintiff sues a defendant and that defendant says, Well, I'm not responsible, or I'm only partially responsible. These other people are really responsible and it files a designation for responsible third parties, the defendant does. Then the plaintiff can sue those other people who weren't sued by the plaintiff first and then the plaintiff can go in and sue them within 60 days and if that happens, the Statute of Limitations for those later added parties is gone.

They can't even claim the Statute of Limitations, so what basically has happened is that we have cases in which a plaintiff sues a defendant and then the defendant enters into a settlement agreement with the plaintiff and part of the settlement agreement is, you know the plaintiff says, "I'll let you out cheap, but you name these parties that I didn't sue within the Statute of Limitations as responsible third parties and when you do, I'll be able to sue them and I'll let you out cheap, or I'll let you out for free, and that's what's occurred. This amendment is acceptable to the author.

Unknown Mr. Speaker

Speaker _____ for a purpose.

Unknown Will Judge Lewis yield, please.

Speaker Judge Lewis to yield.

Lewis Chairman, of course I will.

Speaker Thank you Representative Lewis. You and I discussed this and we talked about working on a bill together which I don't think has been able to come out of committee yet. The one thing though that we did talk about was I agree with you that there needs to be some kind of cutoff. This indefinite open period just makes litigation go on and on and on and then the parties are brought in just to contribute token amounts to a settlement or to – to – well, it borders on harassment I think. We agreed on that.

Lewis Yes, sir.

Speaker Did you allow any time after the two years Statute of Limitations, any little window of time where parties could be brought in, but eventually it's cut off?

Lewis No, sir. What I've eventually decided chairman is that the Statute of Limitations is a statute . . . .

Speaker I'm sorry Representative Lewis, could you speak up?

Lewis I'm sorry. Chairman, what I eventually decided is the Statute of Limitations is a sufficient period of time that people, you know, it's enough for the plaintiff to decide who should be sued and not sued and so I've left it at the Statute of Limitations as it has been for over 100 years. Well, and I guess the problem with that is we discussed as you go through the discovery process, you might eventually find another party particularly in a manufacturing case or something like that where there's other folks that were involved and what came about in making the final product, would you be amenable to an amendment that cut it off after one year like we discussed in my office? Chairman, I would accept an amendment like that. I mean, ultimately the thing is, all this does is leave the law like it's been for over 100 years and I've practiced under and you've

practiced under until 2003 in which the system couldn't be gained. It just, you've two years to bring your lawsuit, you've got two years to find out who you think, at least two years to find out who you think . . . .

Speaker But isn't it . . . .

Lewis . . . _____ and what they did.

Speaker If I'm understanding then, then if you bring your, your lawsuit one year and 300 and whatever one days before the end of this 364 days . . .

Lewis 364 in accordance of . . . .

Speaker . . . and then you do some discovery in the first six months and you find out that there's other parties other defendants might want those parties in as well and the plaintiff should have an opportunity as well. I agree there has to be a cutoff. I think that is a problem with current law and that's why I'm a little surprised that you won't now consider it an amendment when we discussed this and you seem very amenable before, and I had some talks with some stake holders, chairman, about these kind of issues and that we might be able to do and, on the other side, I might say, but it just, we couldn't get it close and, you know, what, there's always an amount of time. What is that amount of time? What's reasonable? I . . . .

Lewis Six months

Speaker . . . . going back to just, two years or a year, but some amount of time should be allowed and I though in good faith we had had that discussion and we were coming to an agreement, if fact just a few days ago I asked you, were you going to run with an amendment to this you said, "No."

Lewis Was I going to run with an amendment? No, sir.

Speaker You don't remember that?

Lewis Not if we understood each other at all, no, sir.

Speaker Well, you know what? I've heard the word stake holders all session long and sometimes I think the most important stake holders are the 150 members of the house.

Lewis Yes, sir.

Sheffield Thank you, chairman. Chairman, I might say, it wasn't until this bill came up that I thought about, I mean, came up for here that I decided to try to file an amendment, so that would have been last Friday or Saturday, no, we haven't talked since then.

Speaker — Representative Sheffield raises a point of order that _____ time has expired. Mr. Workman for what purpose?

Workman — Can the _____'s time be extended? I have one question.

Speaker — First, the extension of time is your objection, _____ is done.

Workman — And I will yield Mr. Speaker. Okay, are you repealing the – the ability to have a designation of a responsible third party? Is that what this is doing?

Speaker — No, sir, no sir, not at all.

Workman — Okay. The designation responsible third party stay just it is, okay.

Speaker — What do you . . .

Workman — The only thing that changes in this amendment is that the ability of a plaintiff to sue the people who have been designated is responsible third parties after the Statute of Limitations is gotten, and they can add them, but those people still have their Statute of Limitations defense. That's the only change.

Speaker — Alright, thank you.

Workman — Thank you, sir.

Speaker — Thank you, move, I believe it's acceptable to you all. Representative Lewis sends up an amendment. The amendment is acceptable to the author's objection. Representative King for our _____.

King — Mr. Speaker, while _____ they won't accept this part of _____ inquiry.

Speaker — State your inquiry.

King — Earlier, this is nothing bad, earlier there was, are we operating under the, somebody made a motion that every word that was spoken from the front and back, to the back mike on this piece of legislation be transcribed and placed in the journal for generations to come?

Speaker — That's correct Mr. King.

King — Now, everything that is spoke from my _____ mike is already recorded in the Texas House of Representatives, isn't it? In video.

Speaker — Mr. King it is on audio and video, yes. And that's also there for generations to come. Would you read . . .

King — And that's also in the permanent record, is it not?

Speaker Yes, it is.

King And so, when we make the motion and accept on this floor on these pieces of legislation, it really, the lawyers are on the only ones that care about to a great extent and we're asking some state employees to do this transcription rather a court reporter that those lawyers would have to pay at some point down the road. Is that correct?

Speaker We're asking that the journal clerk make a permanent record.

King So, in effect what we've done when we do that is some court reporter who is probably a single parent supporting three kids at home is deprive of an opportunity to transcribe this entire proceeding. Is that correct?

Speaker Chair is not advised, Mr. King. Thank you for you questions. Representative Lewis send up an amendment. Mr. Creighton moves to accept the amendment. There has been an objection and a request for record vote. Clerk, ring the bell. Mr. Creighton voting I. Have all voted? Will be 100 I's and 45 nays. The amendment is adopted. Following the amendment, the clerk for the amendment.

Unknown Amend Harvey Hilderbran.

Speaker Chair recognizes Hilderbran.

Hilderbran Mr. Speaker, members. This is amendment, there was bill that Mr. Barman and Mr. Webber and others joined authored with them House Bill 911 to basically disallow the consideration of foreign laws in our courts only when they violate our constitutional rights. So in other words, if a foreign, if an international law happened to allow brutality or someone to be able to beat their children or wife or mutilate someone and it was somehow permissible by their foreign law that – that would obviously violate our constitutional rights and it wouldn't be allowed and so it only apply – only limits foreign laws applications or our courts in the case of those laws that violate our constitutional rights. Move passage.
Mr. Speaker

Speaker Mr. Jackson what purpose?

Jackson Gentlemen, yield for just a second.

Speaker Mr. Hilderbran to yield.

Hilderbran I didn't hear you say this but I believe it, you know, it's only family law.

Unknown Only family law.

Hilderbran Thank you _____. We did that based on your work and your committee to narrow bills so it wouldn't affect Mobile Commerce so it's only family law, so a perfect example if someone used his offence that their religion

and the laws they were under allowed them to beat their wives or their wife or children were chattel, it wouldn't, we wouldn't allow that because it would be a violation of our constitutional rights.

Speaker Thank you Representative Hilderbran.

Hilderbran _____ passage.

Unknown Mr. Speaker.

Speaker _____ for what purpose?

Unknown Will the author of the amendment yield for a minute? For questions.

Speaker Chair Representative Hilderbran.

Hilderbran Be happy to.

Unknown Hilderbran, what if you had, it's just, let me ask a couple of question so I understand this, this only relates to family law.

Hilderbran Right.

Unknown Would it impact prenuptial agreements in a family law context?

Hilderbran Say what?

Unknown Would it impact prenuptial agreements in a family law context where, for example . . . .

Hilderbran Well, a prenuptial agreement, a prenuptial agreement and allowed behavior that would violate yours or mine or the defendant party's constitutional rights, then yes. That would be my assumption because here's what we should be for. Obviously there's a place for foreign laws to be considered in the courts but when they violate our constitutional rights, those should not be allowed.

Unknown So if, I _____ want to make sure I understand this straight, Harvey. It impacts prenuptial agreements if, let's say there was a party from the UK and a party from the US and as part of the prenuptial agreement they wanted UK law to apply, how does your amendment impact . . .

Hilderbran I don't know for sure, but since . . ..

Unknown . . . . seems to be a _____ law that . . .

Hilderbran Let me tell you this. Jim Jackson's committee looked at this very closely. The bills that were brought to the committee were much broader and the bill came of committee as only applying to family law, so that is the case . . .

Unknown I understand

Hilderbran . . . . and I, and if any time . . .

Unknown _____ to the family law in context, especially when you have _____ . . .

Hilderbran I don't want anything _____ consider that a violation of constitutional rights.

Unknown No, I understand well, and so, I don't – I'm aware of no cases where the U.S. Constitution as it is applied by U.S. courts is not supreme, but I don't understand.

Hilderbran _____ there's some crazy judges once in a while that do stupid things.

Unknown Well, then they usually get reversed on appeal, but . . . .

Hilderbran But we don't want then considered in the first place.

Unknown Right, right, and I don't think any of our Supreme Court judges you would call would call crazy, maybe you might, but what I, I want, I just want to understand because this appears to be a pretty broadly drafted amendment. Would it apply in a case of a UK citizen and a U.S. citizen where they have contracted with respect to the application of the UK law and a family law in context, would this amendment impact that arm's length negotiation?

Hilderbran Let me yield to the author, one of the author's of the bill.

Speaker Chair organizer _____ representative is affirmed.

Unknown I yield, now Mr. Berman, based on the way the language of the amendment is drafted, we had a U.S. citizen and a UK citizen, there was a prenuptial agreement between the two parties in the family law context and the parties agreed that the prenuptial agreement would be, would apply to UK law, how does your, how does you amendment impact that? Because it appears to be very broadly written and you have U.S. courts that where parties in an arm's length negotiation should make a choice of law of something other than U.S. law. A U.S. court will apply to the best of their ability, so talk to me a little bit about how this very broadly worded amendment would apply to that fact pattern.

Berman Well, this is going to happen in many cases and as long as it doesn't violate our constitutional law that prenuptial agreement is fine, is no problem and we specifically eliminated the word religious because, for example, on a Jewish, Jewish couple that has a divorce, the man has to give the woman what is called a let and a let allows her to remarry. That doesn't interfere with any part of the family code, _____ code, but . .. .

Unknown Right, right, no, but that's a little bit different than the question I'm asking, so let's say you had two high dollar movie stars, right? One was, you know, one was from UK and was from the U.S. and they had an agreement . . .

Berman Yeah

Unknown . . . to apply UK law and the lawsuit is filed in U.S. court applying UK law. I just want to make sure that there are no unintended consequences adopting something like this because this appears to be a little bit broadly worded.

Berman There is no . . . .

Unknown If you can assure me that that would be okay.

Berman We can this as intent. It's not our intent . . . .

Speaker Representative Sheffield raise the point of order, _____ time has expired, point of order is well taken – sustained. Anyone wishing to speak on, for or against the amendment? Chair recognizes Representative Creighton.

Creighton Mr. Speaker, I'm going to leave this amendment to the will of the house.

Speaker The question occurs on the adoption of the Hilderbran amendment. Clerk, ring the bell. Have all voted? Show Representative Granger voting no. Have all voted? Being 112 I's and 31 nays. The amendment is adopted. Members waiting for an amendment to be drafted.

Following the amendment declare for the amendment.

Unknown Amendment _____ Gutierrez.

Speaker Chair recognized Representative Gutierrez.

Gutierrez Thank you Mr. Speaker, members. Members, if I can get you all to listen up here. This is the taxpayer relief amendment and I know that many of our colleagues do like the idea. I hope that they can sign onto it. This the taxpayer relief amendment. Under current law if you get a contested tax property tax case, if you win as a taxpayer, let's say, you know, the tax appraiser district gives you an estimate that well above the 10% that they're allowed and you go there and say, no, wait a minute, that's not the valuation you're contesting, you win. Under current law, you're _____ 10% of your cost. What this amendment says, and you can look at it on your _____. What it says is that in an action contesting a tax appraisal and a taxpayer who prevails is entitled to an award of costs and attorney's fees. If the appraisal district or taxing authority prevails, the appraisal district for taxing authority is not entitled to costs and attorney's fees. Now, why is that? Because they have their attorneys. They are already there working and they're doing the things they're supposed to do and they're out there trying to fight these cases against hard-working taxpayers and

they're there already. They don't need to go hire outside counsel. So this is the taxpayer relief bill, right here. It says that if you do want you want to do and go out and challenge these very high property taxes that these folks like to impose on us, that you should have full relief and you should get your full attorney's fees after you've prevailed, so with that I move, I move passage.

Speaker Representative King, speak I opposition.

King Okay, Mr. Speaker, members. Although, any personal level having done some of these cases and including my own, I would love for the Central Appraisal District to have to pay my attorney's fees if we prevail, but in a pragmatic level, this would put a tremendous burden that they are not expecting on our Central Appraisal Districts which ultimately just ends up us paying more taxes at the county level, so with that, I would move _____.

Gutierrez Mr. Speaker, _____

Speaker Mr. Gutierrez for a purpose.

Gutierrez Representative, you and I have been working quite a bit, you and I have been working quite a bit together in this session and I really appreciate that spirit of bipartisanship and so in this particular point, you're suggesting that ultimately the taxpayer would have to pay to fight these things and so on and so forth because of the current limitations, however, but these offices already have these people working for them already. It's not like they're paying outside counsel, are they?

Unknown Well, you know, most of them use an outside counsel and they haven't arranged with outside law firm where they work on a percentage basis for the taxes they recover, but this would such, and don't get me wrong, at the fundamental level, I really like this, because right now, you can only recover about 10%, I've lost that before and I understand that situation, but it's such a gigantic change, it's the type of thing that you would need to do, I think, through interim discussions and a different approach where your CTAs are brought into the discussion because it is going to at the bottom line, they're going to end up paying out a bunch of money, the taxpayers, because we're all going to line up to a field end, because if we win even a nickel under you bill, if we even get them to reduce our appraised value a nickel, which we will, then they're going to have to pay a lot of attorney's fees, so I thin, although the intent is very, very, good a practical impact will be very, very bad.

Chairman I'm glad that you like my idea, however, this seems to be the change for legislations. These are the sessions for big legislations, but why are we going to give the guys the collect taxes on us a pass to the detriment of our taxpaying as citizens?

Unknown Here's the problem, if you appeal a property tax case and you get them to lower you appraised value by one dollar, then they're going to have to pay your

$10,000 in attorney's fees and that's going to be hard on your local taxpayers, they're going to have to send the money to do that to the Central Appraisal District. I think we a gentleman who wants to ask questions.

Chairman — And I would just move the table and _____ to mike. President Phillips for a purpose. Representative King, you know, I have a lot of people call my offices to say, hey can you represent me? Not as state rep but as – and they called and they asked and they'd say, and I go, I don't know anybody who will take the case because you can't afford to appeal it because the amount of taxes you'll save far exceed the attorney's fees and so there's really no incentive ever for anybody to take these cases unless you've _____ and I've done it for some nonprofits and some organizations just free to try to help them out. What I understand, all this amendment is doing is saying that the taxpayers have a right here to have some help to have some relief in court because quite frankly they can't afford to go to court right now, it's only the appraisal district and with that question there needs to change without any question because you can go in and you get them to lowing $5,000 and you pay $5,000 attorney's fees to get that done and they raise it back up the next year. I get it, it needs to be fixed . . .

King — Don't you think with this place a little parity that maybe the appraisal district is going to actually work with the citizens who come in and contest, because you know right now many of them level the playing field, you know, it's amazing how I have somebody call and the appraiser say, you know, I've got this property, you appraise very high, would you give me some relief and they go, well, we'll give you a little relief but if you push this too much, don't forget, you've got three other properties that could reappraised too. And that's the kind of abuse that we've seen across the state. I'm keeping my blood pressure down pretty good about this, but this is one of the number one calls I get and probably most of us, is the appraisal district not working with their citizens and when you have appraisers hanging up on senior citizens because they don't understand and that happens, and I'm sure it happens _____, we need to stand up for taxpayers and I think this amendment does that, I mean, I know you're trying, you know, you're not against the idea of helping taxpayers, but I think this would be the best way for us to it. Thank you. And I thank you and, you know the, again I'm the guy that's always filing the bills to abolish the property tax system because I don't like it, I think it's unfair. Be glad again if you lower the value by one dollar, they're going to be _____ and start up the lawsuit mill.

Speaker — Mr. King, do you yield?

King — I yield.

Unknown — Mr. King, I'm not an attorney, I don't deal in this area litigation wise, but it's my understanding that, are you telling me that the recovery of attorney's fees is limited under current law?

King I believe it is, yes.

Unknown To what amount?

King You know, I'm sorry, it's been a while since I've done one of these, but I think it's 10% of the recovery.

Unknown Okay, and don't most attorneys that represent taxpayers in this area a lot of time take these cases on a contingency based on a percentage of whatever they are able to save them from what the appraisal review board did?

King That works real well with the large commercial cases, but when you're trying to deal with the residential, you've a $300,000 house and they raised, you can't justify they attorney's fees to take the case on a residential property on a contingency.

Unknown I understand that. Let me ask you this. If this were to become law, this amendment, would attorneys, I mean you're saying what we're talking about here then is a concern for the homeowner.

King Well, yes, because the bottom line is, I think the way he's written it is so broadly that literally if you appeal the case, get him to lower the appraisal one dollar, they can, well, I can always get them to lower than a dollar and they get to recover all the costs and I'm concerned the way it's written it's going to create a lawsuit mill. I know that's not his intent and I agree with Mr. _____ on his intent, but I just think the amendment is not drafted quite right.

Unknown I a case is taken to district court and it's settled and it doesn't go all the way through the trial and a decision. In most cases, don't the appraisal district and the property owner agree upon a settlement of attorney's fees in some manner?

King They do. I've had one go all the way and we, you know, I think we recovered like two or three thousand in attorney's fees and the client paid like 15 or something, so it was a small recovery.

Unknown Okay, alright, well, I've just been handed something. Are you aware that the Court may award up to $15,000 or 20% of the tax owner's liability?

King 20% - that was the number I was looking for. Okay, thank you, thank you. I'd really like to walk away from the mike and just vote on this unless . . . .

Speaker Mr. Hardinet _____

Unknown Gentleman, here for a quick question, I'll certainly yield.

Speaker Phil, I'm sure a lot of us appreciate what the representative is trying to do with this amendment but if you look at line 17 of page 4, his statute only applies to getting attorney's from an individual or corporation, so even if we put this

amendment on it, we'll serve no purpose because he's trying to get attorney's from a governmental entity and so, you know, chairman, that is an excellent point, so we're not accomplishing anything with this amendment. That's an excellent point.

Unknown Mr. Speaker, Mr. Jackson, Mr. _____, Gentlemen yield. I think, I think author has an amendment to his amendment so if it's alright, Id like to step away from the mike and let him dot that.

Unknown I have one question.

Unknown Yes, sir.

Unknown I'm not an attorney, as I keep telling everybody, but if I recall correctly, venue is always in district court.

Unknown I think it is on these.

Unknown Venue is always district court on an appeal of a tax suit and it's just impractical to appeal 100 dollar or 500 dollar or a 200 dollar change to a district court. This is not the place for this amendment. Venue is the problem for the homeowner, not this solution.

Unknown This is a problem that needs fixing. I just don't think this amendment is right way to fix it. I yield the floor.

Speaker Following the amendment to the amendment. Clerk read the amendment.

Gutierrez Amendment to the amendment by Gutierrez.

Speaker Chairman representing Gutierrez.

Gutierrez Collings, now just to be very clear here that was had filed, I'd filed both of these amendments and one came in before the other in the wrong order and so the amendment that you now see before you in the _____ clearly says an action contesting a tax appraisal. A taxpayer who prevails is entitled to an award of costs and attorney's fees. The appraisal district prevails and they are not entitled costs and attorney's fees, so that's what before you, that what I suggested to you is before you. What you ended up getting was the previous amendment which was subsequent to, which just simply says that this adds this as an enumerated suit, an appeal to the court under Section 1143 tax code or an appeal to the court of a determination of an appraisal review board no a motion filed under Section 1145 of the tax code which may actually solve Representative Hardinet's problem in that this would also apply in a tax code appeal and so to that end what all this does is the prior amendment that I thought was the secondary amendment is allows this bill to have jurisdiction and venue and so on. And this section, this subsequent one, simply says, what we're asking that if a taxpayer exercises his duty to challenge his property tax

valuation that he should not pay attorney's fees and the appraisal district damn well should. Thank you.

Speaker — Representative Gutierrez ends up an amendment to the amendment, the amendment, as the amendment is acceptable to the author's objection. There is none. The amendment is adopted. Back on the Gutierrez amendment as amended.

Gutierrez — Mr. speaker, members, again, I've just again move to table.

Speaker — Chair recognizes Representative Gutierrez closed. Members, this is not about partisanship. We need 100 votes on this bill. We need 100 likes on a Motion to Not Table, so I'm asking for all those people in your community, for everybody that calls you and complains about tax relief as they damn well should because our taxes have gone way too high. For everybody that's out the calling you, in your constituents, this is a vote for them. A vote to give them a relief that they need and send the tax appraiser where he needs to go, so I'd vote not to table.

Gutierrez — Mr. Gutierrez sends up an amendment as amended.

Speaker — Representative King moves to table. Question is on the motion to table the clerk ring the bell. Chair Representative Martinez Fischer voting no. Chair Representative Creighton voting I, Representative Gutierrez voting no. Have all voted. Have all voted. 62 I's and 80 nays. The mot to table veils. Members now the vote is on the Gutierrez Amendment. Vote I, vote nay on the Gutierrez Amendment. Clerk, ring the bell. Chair, show Mr. Martinez Fischer voting I. Have all voted. Have all voted. There being 100 I's and 45 nays. The Amendment is adopted.

Chair recognizes the representative sheets.

Sheets — Thank you Mr. Speaker, I move to reconsider the Lucille Amendment.

Speaker — Mr. Sheets moves to reconsider the vote by which the Lucille Amendment was adopted. Failed to adopt. Members are there any objections? Chair is none. Chair lays out the Lucille Amendment and the floor Amendment No. 4.

Unknown — Amendment by Lucio.

Speaker — Chair recognized Lucio.

Lucio — Thank you Mr. Speaker. Members, after extensive conversation with the stakeholders and with the author and all those helping the author of this bill, I think they agreed with the intent of this amendment, I believe it's acceptable to the author.

Speaker — Representative Lucio sends up an amendment, the amendment is acceptable to

the author. Is there is objection, chair is none, the amendment is adopted.

Members, that's all the amendments. Anyone wishing to speak on for against the bill. Chair recognizes Representative Raymond to speak on the bill.

Raymond — Members, just real quick. This is not a bill that I support. I'm not for this bill, but I want a minute because the other night this bill got caught up in the process of points of order and sat on the committee this bill came through as does Chair Thompson. Chairman Jim Jackson chairs that committee and what I wanted to and I watched that come down the other night, I know he felt bad because when you're a chairman you will _____. Members, there was an amendment we were not aware of.

Speaker — Following the amendment, clerk read the amendment.

Dunton — _____ Dunton.

Speaker — Chair recognizes Representative Dunton.

Unknown — Mr. Speaker and members. The bill requires a rather substantial change in how Texas as conducted its system of jurisprudence and what this body is doing today with 274 is we are giving the authority to develop rules to comply with 274 to the Supreme Court. There's nothing wrong with that, but I think for all practical purposes, this legislative body ought to retain its right to review those rules before they go and get implemented. What this amendment simply does it says that any rules adopted by the Supreme Court under this subsection will be approved by the legislature. That's all it does, we've done this on several occasions where we have had rather dramatic _____ from what the current standards in our system of jurisprudence and this just requires that the legislature stay in the loop. I suspect that one of the things that will happen is the Supreme Court will actually ask for comments and sure, we'll have an opportunity to comment, but I think the legislature ultimately ought to have the right to approve or reject any rules that are adopted with respect to this and with that I would move _____.

Speaker — Chair recognizes Creighton opposition.

Creighton — Mr. Speaker, members, I'm going to oppose this motion or this amendment. Under Article 5, Section 31, the Supreme Court of Texas is responsible for the administration and promulgating rules necessary for the efficient uniform administration and within the various courts. Representative Dunton mentioned that we're veering from our standard practice, we certainly are not. The Supreme Court in promulgating these rules, they have the expertise to get into the details that will instruct a motion to dismiss practice or whatever we may be asking them to do whereas in statute here we do not get into those details. As the legislative branch, we can always review their recommendations, so for that, I'm going to move to table. It's very consistent with what we normally do and

I'd appreciate you staying with me on this motion. Move to table.

Speaker — Anyone wishing to speak on for or against the amendment. Chair recognizes Representative Dunton to close.

Dunton — Mr. Speaker, members thank you. The reason we are giving the Supreme Court the opportunity to do this speaks for itself, because this body, the Supreme Court couldn't do it unless we give them the authority to do it. What I'm asking is that this body though in doing that, ought to at least reserve its authority as the body that's most representative of the State of Texas to maintain its responsibility to Texans by making sure that we have the right to at least review an approve such rules. I think the Supreme Court, if you ask them, would probably tell you themselves that's a good idea because the reality is is that while the Supreme Court is in Texas, the highest court for civil actions as a state, they don't do so without us, they can't do that without this legislative body and one of the things we provide to them is guidance and oversight. That's why we come here and that's why most of these buildings that we pass end up getting interpreted by the Texas Supreme Court to a large extent and sometimes members it can't help, it can't hurt rather, if we keep us in the loop so that we provide some oversight when it comes to whether or not a rule ought to be adopted. Even the Texas Supreme Court recognizes that sometime members, because the Texas Supreme Court will propose rules and then have all the members of the bar vote as to whether or not those rules ought to be adopted or not. Now the Supreme Court says that I don't know why it would be so difficult for us not to adopt the same policy, but if we're going to give them the right to implement these rules and to establish these and develop these rules, we still ought to maintain every responsibility we can with regard to whether or not those rules are acceptable to all Texans and the only way I know that to do that member is for us to not obligate our responsibilities to Texans and maintain some oversight. This amendment, all it does is says that any rules adopted by the Texas Supreme Court do not take affect until approved by the legislature. Doesn't matter whether the legislature is a body made up of all Democrats, wouldn't matter if it was made up of Republicans, in fact it wouldn't matter if it is was made up of all Martians. The problem would still remain the same and that is that we ought to maintain the responsibility for the rules in this bill which allow people's right under the access to courts to be cut off, for example, there is a, and I know this is probably not, or some or you having difficult over this because it relative to lawyers, but in the ultimate test, it doesn't relate to lawyers, what it relates to are those people in your districts who need and find themselves with the need to file a lawsuit because they seek so many addressed to an injury that has occurred. If the Supreme Court is going to adopt rules so that the people in your district don't get their say in court, you ought to be prepared to at least have some responsibility to maintain or to say that the Supreme Court has adopted these rules with the approval of the legislature and with that Mr. Speaker and members, I would ask you to vote no on the motion to table.

Speaker Representative Dunton sends up an amendment. Representative Creighton moves to table. This is on the motion to table. Clerk, ring the bell. Show Mr. Creighton voting I, Mr. Dunton voting no. Have all voted. Have all voted. Be 95 I's, 51 nays. Motion to table prevails. Following the amendment, clerk, read the amendment.

Unknown Amendment by Dunton.

Speaker _____ amendment by Dunton. It is quick.

Dunton Mr. Speaker, members, again in another section of the bill if you'll look at on page 1, line 23, at that section, it empower the Supreme Court to adopt rules which I believe ought to be approved by this legislative body. Perhaps as 95 of you don't feel that way, but I'm just suggesting to you that you ought to pay attention to this because the people in your district are the ones most affected, not you, not the lawyers, not the Supreme Court, not the judges in the state. The people who are most affected are going to be the people who we represent, members, and I believe we owe an obligation and a duty to them to make sure that any rules that adopted fall within the guidelines that we have given the Supreme Court. The only way we are going to do that is if we maintain some oversight and with that, I would move pass it.

Speaker Chair Representative Creighton opposition.

Creighton Mr. Speaker, members, the const – Texas constitution already directs and allows the Supreme Court to do exactly what we're asking for in the bill and again, just like Mr. – Representative Dunton's former amendment I move to table.

Speaker Chair Representative Dunton to close.

Dunton Well, I can ditto to but I'm talking to the 95 of you who voted against the last amendment. The Texas Supreme – the Texas constitution – if the Texas constitution gave the Supreme Court the authority to do this, then why do we have House Bill 274? It wouldn't make sense. We wouldn't need House Bill 274. The Supreme Court could do this, then why are we telling them under House Bill 274. It simply makes no sense, and what we're really doing, member, is advocating our authority to the Supreme Court to make rules that benefit the people in this state. Yes, we've designed a system and most of you probably, you know, it doesn't make a lot of sense to you right now, but in some point, it will, because what's going to happen is when someone from your district comes to you and says, "Well, wait a minute. I had a legitimate lawsuit, it got dismissed, and I want to know why." And the lawyers says, "Well, go see you state representative." And you say, "Well, we gave the Supreme Court the authority to do that." That's the wrong answer. That's the wrong answer. You ought to be able to say that, yes, I gave the Supreme Court the authority to do that, and with only _____ that they come back to us and come back to me to get it approved. That's all this amendment does, members, and so, I would ask

you to vote, no on the motion to table.

Speaker — Representative Dunton sends up an amendment, representative Creighton moves to table. This is on the motion to table. Clerk, ring the bell. Senator Representative Creighton voting I, Representative Dunton voting no. Have all voted. Be 97 I's, 15 nays. Motion to table prevails. _____ the amendment. Clerk, read the amendment.

Unknown — _____ by Dunton.

Speaker — Chair _____ Representative Dunton.

Dunton — Thank you Mr. Speaker, members. Under the actions which don't apply to 274, what this amendment does is, actually adds only employment discrimination cases. Let me tell you why that is because employment discrimination cases are unlike most other cases. They already have a body of law regarding attorney's fees. And so, I don't believe that this House Bill 274 ought to apply into labor cases because they simply are a different breed of animal such that if you're adopting it under the federal code, for example, excuse me, at least under the state statute. What's only thing that's going to happen is people of plaintiffs will not just bring their cases in federal court. You won't have any of these cases in state court if you apply House Bill 274 to labor cases and so that's the reason I bring this amendment and I would move adoption to the amendment.

Speaker — Chair Representative Creighton in opposition.

Creighton — Mr. Speaker, member, again I want to move to table his amendment and we – this is an exhaustive process this bill to _____ subcommittees and standing committee working with many stake holders and want to keep the bill in its present form and I move to table.

Speaker — Chair Representative Dunton to close.

Dunton — Speaker, members, you all are getting me all choked up. But let me tell you why, because most of you are not voting on the merits of this bill, or these amendments. Most of you are voting because, well, let me just put it this way, just as Julius Ceasar said before he went back to the castle, he said, "You know, cowards die many deaths. Only a valiant man dies once."

Speaker — Representative Dunton sends up an amendment, Representative Creighton moves to table. This is on the motion to table. Clerk, ring the bell. Vote I vote no showing Representative Creighton voting I, Representative Dunton voting no. Have all voted. 96 I's and 50 nays. Motion to table prevails.

Chair recognizes Raymond to speak on the bill.

Raymond — Very quickly members, I'll be brief. In fact, as I said earlier, I'm not for this bill. I oppose it, but what I really want to do is tell you that Jim Jackson who

chairs this committee has been extremely fair to us and I wanted to make that point because this is his first time as chairman and if you were here when Jim Jackson first got here, you remember he was a little rough around the edges and maybe that's what happens when you've been on the Dallas County Commissioner's court for a long time, but it has been great to work with him as I know Chair Thompson agrees. On that committee, he's fair to everybody, he's fair to all of us. He ran a great committee and I just wanted to compliment him and thank him for that.

Chair recognizes Rep. Eiland, speaking in opposition.

Eiland — Members, the only reason I'm speaking is because Mr. Solomon has asked me to to make sure that everybody's clear that you could win your lawsuit and still have to pay the other side's attorney's fees. So let me tell you exactly where that is. That's on page 7 of the bill, line 26 and 27. What happens is we remove 42.004(d) and (g). 42-4 d and g is where from the 2003 Mr. Nixon's bills, there was a floor put in during that tort reform session so that you could never go below zero, so that you would never have to come out of your pocket to pay somebody else's attorney's fees if you won. And so when Mr. Creighton said that he didn't change any of the percentages, he is correct. You still – the defendant has to make offer, you have to not beat it by 80%. If the plaintiffs make an offer and beats it by 120% after the defendant invokes this chapter, then those numbers don't change. However, what is being taken out in this bill is the floor. So once the floor is gone, you could win the lawsuit – the jury said this is a valid, legitimate business dispute – but if you don't meet the offer by 80%, you could have to pay the other side's attorney's fees. And that is the case of the small business versus a big business, a breach of contract and any other thing. So, I want to make sure, and Mr. Solomon has asked me to make sure, that you understood by taking out d and g of 42.004, that legitimate lawsuits where a jury determines that you are in the right, you could still have to pay the other side's attorney's fees if you don't meet their offer. And his point was – what he was asking – a $100,000 demand, $80,000 offer, you win 79.5, you have to pay their attorney's fees. With the floor in there, you would never go below zero, but in this case, if attorney's fees are $100,000 and you only recovered $79,500, you gotta come out of your pocket with $20,500 to pay the other side's fees, even though you won your legitimate lawsuit. That's what the bill does, there's no dispute about it. And I want to make sure everybody is clear. If you don't agree with that provision but you love the rest of the bill, white light it and put a statement in the journal and say I love the rest of the bill, but I don't like that part, I can't vote for something where people with legitimate lawsuits have to pay at the end of the day.

Unknown — Mr. Speaker, Rep. _____ for what purpose?

Unknown — Will the gentlemen yield?

Eiland — Eiland will yield.

Unknown — Mr. Eiland isn't it true under the current law that we have an offer of settlement rule?

Eiland — Yes, that's all we're amending here.

Unknown — And is it true under the current law that if a defendant invokes this rule and wins the case outright – in other words there's a take nothing judgment – he doesn't get the benefits of this provision at all?

Eiland — Under the current law?

Unknown — Under the current law.

Eiland — Yes.

Unknown — And doesn't this bill fix that problem?

Eiland — It over-fixes it. Not only does it work in case a defendant wins, it works if the plaintiff wins. Because the plaintiff has to come out of pocket if they win the lawsuit. Period.

Unknown — Is that the case in the current law right now if the plaintiff invokes the rule?

Eiland — And plaintiff cannot . . .

Unknown — . . . and the judgment is more than 120% of the offer?

Eiland — Let's make sure not to mislead anybody at all. This provision – the provisions of this bill since 2003 until today and it continues – the plaintiff can never invoke this chapter.

Unknown — Can't the plaintiff invoke this chapter once the defendant has?

Eiland — Only the defendant can invoke this chapter. Once the defendant invokes this chapter, then the plaintiff can respond. And if the plaintiff responds and in the trial wins more than 120%, then the plaintiff can recover under this bill. And it's on invitation.

Unknown — [garble] . . . on the defendant . . . uh, part of your concern is the defendant will low-ball in their offer when they invoke this rule. Isn't the provision in there for the plaintiff to protect the plaintiff so if it is not a reasonable settlement offer, the plaintiff can then reciprocate?

Eiland — My concern with the bill is that you could win your lawsuit, it's a legitimate lawsuit, and you would still have to end up paying the defendant's attorney's fees.

Unknown	[garble] . . . reciprocal true currently? Couldn't the defendant win and not get the benefits of this provision at all? So it makes this rule – the current rule – ineffective, doesn't it?
Eiland	No.
Unknown	Really? How many times have you seen this rule used?
Eiland	Very little, because . . .
Unknown	Wouldn't you agree that's because the current rule is ineffective?
Eiland	No.
Unknown	So why would I, as a defendant, invoke this rule if I can't recover my attorney's fees if liability is not found?
Eiland	I don't know.
Unknown	So doesn't it make the rule ineffective?
Eiland	No.
Unknown	I disagree with you sir.
Eiland	Okay.
Female Unknown	Mr. Speaker?
Speaker	Representative _____ for what purpose?
Female Unknown	Yes will the gentleman yield for a question?
Speaker	Mr. Eiland, do you yield?
Eiland	Yes.
Female	Rep. Eiland you were mentioning the inequities of being able to win and still lose, and it's all premised upon what the offer of settlement is. And isn't it true that a jury never knows that there were offers of settlement? So a jury can't make it right because they've known what the offers are.
Eiland	Correct. The jury never knows whether or not an offer has been made, and if so how much, and if there is even insurance that applies to the case.
Female	Thank you.

Eiland — So members please vote yes, no or white light if you don't like all the provisions.

Speaker — Chair recognizes Rep. Creighton to close.

Creighton — Mr. Speaker, members, the best that I can understand from Rep. Eiland's comments is that he is encouraging you to white light the bill. The math that Rep. Eiland is referencing is from the current law as passed in 2003 in HB4, not from this bill. This bill is still under offer of settlement, 80% to 120%, and this bill encourages the plaintiffs and defendants together to work out a settlement in genuine negotiation efforts to reach a compromise and move forward. So with that, I appreciate your patience on Saturday and today and move passage.

Unknown — Yes, if Rep. Solomon has a question.

Speaker — Mr. Solomon, to what purpose?

Solomon — Just to clarify and ask a question of the gentleman.

Speaker — Yeah.

Creighton — Gentleman yields.

Solomon — Thank you. And since you know I did talk to Craig about it to try and understand it since I don't do a lot if trial work, by any means. But I know a lot of folks that do and also I'm concerned about taking this floor out. I don't – I think you're incorrect and he is correct in the sense that if you are taking out the floor – if I win a lawsuit and it's pretty close to the thresholds that we've got, somehow it would appear that if my attorney's fees are high enough, I could end up paying loser's attorney's fees and pay my attorney's fees. And that just doesn't quite seem right. I'm not sure how to fix it. I'm not sure the members here really understand that. I certainly have some thoughts both ways on it. So the idea of me wanting perhaps a white light to make sure the clarification on that on a bill that we're sending off this floor, I don't know if that's necessarily bad or not. I mean, do you?

Creighton — Rep. Solomon, I respect your point. But that is the current law as it stands, it's not . . .

Solomon — Thresholds are, but are you not taking out the floor? Are you taking out the section d that I was shown by Mr. Eiland?

Creighton — We're taking out the cap.

Solomon — Right. You're taking out that floor. So if in fact I get back 79 – you know, I get an award for 79.5%, my attorney's fees are going to be $65,000 and then I still owe attorney's fees on top of that to you, then in fact, I've got my attorney's fees, plus you're attorney's fees but I still won the lawsuit and I got pretty darn

close to the cap. So at the end of the day, I'm for the bill in a lot of ways for what it's trying to do about making settlement offers work, but how do I feel comfortable about paying attorney's fees for somebody who's going to lose? And lost the case? And by the way, since juries don't know what the settlement offers are, and they have no idea about how to work this, it seems to me that we need to be very careful about what we're doing. And it may be that it will get resolved over the senate, I hope it does. And I'm not going to vote against the bill, but I am going to white light the bill.

Creighton Move passage.

Speaker Question occurs on final passage of HB 274. It's a record vote. The clerk ring the bell. Have all voted? 96 ayes and 49 nays. HB 274 is finally passed.

Members, it's the chairs intention to take a lunch break.

MAY 16, 2011

SENATE STATE AFFAIRS COMMITTEE
DEBATE- HB 274

Ready.

Yes.

Chairman — Alright, Senate Committee on State Affairs will come to order. As many of you know who have been around the Capital a bit, in May, especially in the last two weeks of May, deals are coming down to kind of the final, final days of crafting and re-crafting. And so, often times Committee hearings, at least I'm at will be recessed in order so we can try to reach some resolutions among the members and that's certainly going on and just about every committee that I'm on. We will lay now the Chair will lay out House Bill 274 by Creighton Senate sponsor Huffman relating to the reform of certain remedies and procedures in civil actions and family law matters and Senator Huffman is out and I have been working together to, reviewed very closely the house bill and they've done final work. We're looking at doing some final work here on the Senate as well. Senator Huffman.

Senator Huffman — Yes. Senator Duncan and I were just saying thank you so much for working with me on these important issues and I actually do not have a bill to lay out right now.

Chairman — So, do it anyway.

Senator Huffman — Working on a substitute and so I would like to tell all those listening we are working very hard on this issue and I believe that you're going to entertain testimony. Is that correct?

Chairman — You bet.

Senator Huffman — We'd like to listen to what those who are here today would like to tell us, but I just wanted to reassure you that the bill that you will see the Committee substitute that comes out, it's not going to necessarily look like what you have seen before. And I've heard from a lot of people and I've listened to many and there's many concerns and I certainly appreciate those concerns, but I just want to make sure that we're all on the same page. Because many of you have looked at the house bill or perhaps the original senate bill or some may not have seen the committee substitute that came out of the house, but I believe that what will come out of the senate will look different as well. So, we want to, I believe that Senator Duncan is very happy to, for us to hear from you today and we will, if you get on an issue that we know perhaps is not going to be in bill, perhaps Senator Duncan and I will let you know that if we know ourselves. But I anticipate that we will have something within the next couple of days, at least Senator

Duncan is going to have a hearing either on Wednesday or Thursday.

Senator Duncan — We have a hearing on Wednesday and Thursday and I would assume that we'll have something for people to look at before that, and lay out and then see how we do with it.

Senator Huffman — Yea, and as soon as we have a committee substitute, I will make available to anyone who wants it can contact my office and I'll make sure that you get a copy of that. I make that pledge to you.

Chairman — I think Senator Van de Putte is first.

Senator Van de Putte — Thank you Mr. Chairman and thank you Senator Huffman. Given that we do not have a committee substitute, I was wondering if you could just kind of lay out some of the tenets since the statement is that it's not going to be what passed from the house, I think it would help us if as we're listening to testimony today to know what parts that you've discussed and are not going to be in the substitute or what will and maybe you, do you still know at this time or you don't know?

Senator Huffman — I feel uncomfortable making commitments at this point because we are still in active discussions, so we are moving in the right direction.

Senator Duncan — I would say right now if there's going to be testimony, it should be on the house bill that passed over and is pending in the committee. Because that is the document from which Senator Huffman and I are negotiating. And so it doesn't do a lot of good to go back and if you've seen the house version of the bill as it was filed or the Senate version, the base from what Senator Huffman and I are discussing from the Senate side is the house bill that passed off the floor. The house did some very good work on the bill and so we're not discarding all of that, we're just looking at it and trying to basically resolve specific issues in there where both of us have either concern or disagreement about. So that's how we're doing that, so with that Senator why don't you lay out just briefly, just do your brief lay out of your bill, what's in the house bill as it came over and then we will go ahead and began testimony.

Senator, I've got a quick question on process. I'm assuming that you'll leave the hearing open so whenever a substitute does come up we'll be able to hear what's substitute.

Ok. That's good.

Thank you.

Senator Huffman — I can lay it out again, this is what came over from the house. Mr. Chairman and Members, (yes, ok) I'm very pleased to lay out House

Bill 274, the Omnibus Tort Reform Bill and this Bill is continuing to be negotiated at the request of Chairman Duncan and other stakeholders who have expressed concern and interest about the bill. The purpose of the bill is to increase judicial economy and make the Texas Civil Justice system more efficient and more accessible to all parties. There are several provisions of the bill that I would just generally, again this is generally lay out. Article one of the bill directs the Supreme Court to adopt rules to provide for the dismissal of certain actions and defenses that should be disposed of as a matter of law. Either party in a case would be able to submit a motion to dismiss a claim that they believe was brought in bad faith and without sufficient legal merit. Additionally, on a motion to dismiss as a matter of law, a court may award cost and attorneys fees to the prevailing party and this is some language that we're working on following a determination that a claim was groundless and brought in bad faith and again language we're working on, the section would not apply to actions by or against the State or other governmental entities. Article two provides a plan for the Supreme Court to adopt rules to promote a quicker and more efficient resolution of civil actions where all claims for damages are under one hundred thousand dollars, particularly the Supreme Court will address the need for lowering discovery cost and expediting these actions. This section would not apply to med-mal suits, the family code, the property code, or the tax code. Article three makes minor changes to the law governing interlocutory appeals or issues that can be sent to a higher court for clarification during the middle of the trial. Article four makes slight changes to a current procedure by which some parties who decide to settle may recoup some of their attorneys' fees in limited situations. The changes to, that we are looking at will be different than the house version. Those are being negotiated and talking about so don't, I can't go really into the specifics at this point. And, that's kind of where we are at this point. As I said there's still some other discussions being had, but this is the basic premises of what we're looking at now.

Chairman

Members are there any questions? Alright. Chair hears none. Let's go ahead and open up public testimony and we will call up, I think panels of three at the time, that works best on our set up there. And this committee has a standing rule that we will limit testimony to three minutes. They way that works is you'll get a green light and that means you can put on the gas, you get a yellow light that means just like when you're going through the intersection, put the gas down harder so you can get through the intersection. And then when it gets to red, that means that you should wrap up or be stopped at that point in time. We put those limits on so that everyone has an opportunity to testify, so make your testimony succinct. This committee prefers to be talk to and not read to, so if you've got testimony we would prefer, if you've got written testimony its fine, you can submit that and we will

pass it out to each member of the committee if you would like, but we would prefer you to visit with us or dialogue with us as opposed to read to us. So having said that, I'll call the first three witnesses. Carolyn Wright, Chief Justice-Dallas Court of Appeals. Ryan Brannon, Texas Public Policy Foundation and Mr. Jeff Mosely, Greater Houston Partnership. Chief Justice Wright is a resource witness. Ok. Let me ask are there any questions of Justice Wright. Alright. Thank you. Stand by, we may have some for you later. Ok.. Mr. Brannon and Mr. Moseley. First Mr. Brannon.

Mr. Brannon — Ryan Brannon with the Texas Public Policy Foundation. Earlier today I submitted written testimony that I hope has gotten around to everybody. It's a research paper that we've done on the subject. And just wanted to let the committee know that we are in favor of the Tort Reform Initiatives that are currently in place and would feel it premature to talk about, I guess, the specifics of the bill at this time. But just wanted to congratulate Senator Huffman and everyone else who has worked diligently to make a good bill and look forward to seeing what happens.

Chairman — Very good. Thank you. Are there any questions of Mr. Brannon? Thank you Mr. Brannon. Mr. Moseley.

Mr. Moseley — Good afternoon. Chairman, Members, my name is Jeff Moseley. I'm a resident of Harris County. I serve as president and CEO of the Greater Houston Partnership and I'm here this afternoon on behalf of our organization to support what has been submitted to you as House Bill 274. I understand Chairman you and Senator Huffman are working on a substitute. But our board passed a resolution that supports the idea that there would be an ability to create early dismissal option for frivolous lawsuits and we're also would be very pleased to see that there are some type of protection where new laws cannot create causes of action unless it expressly established by the legislature. And the last point being that we are very pleased on a bill that would set up expedited trials and limited discovery for lawsuits with claims between ten thousand and one hundred thousand dollars. Thank you Chairman and Members for letting me come today.

Chairman — Thank you Mr. Moseley. Are there questions for Mr. Moseley? Senator Van de Putte.

Senator Van de Putte — Mr. Moseley are you (thank you Mr. Chairman), are you familiar with the House Bill and the language in it?

Mr. Moseley — I've read through it, but I don't know that I'm say familiar.

Senator Van de Putte — Well, you know, because the partnership is very powerful and has a lot

	of weight with a big _____ in the legislature, I was just wondering if you had a chance to look at what the house had done to it, floor process and see if the partnership was uncomfortable with any of the provisions that they've put on. I think that would be helpful both Senator Huffman and Senator Duncan strive to present a committee substitute because of the weight of the partnership has.
Senator Duncan	Senator the one provision that was added by the house Representative Gutierrez' amendment related to the appraisal districts was not contemplated by our resolution language. So this resolution was passed prior to that amendment being added.
Senator Van de Putte	The partnership has not taken any action on that, but what do you think would be the reaction for a loser pays provision for folks both commercial properties and residential properties being able to litigate and have loser pays for the appraisal district or taxing units?
Senator Duncan	You are exactly right, that was not discussed when our board debated the merits of the bill, so I really don't have the authority to speak on behalf of the board on that topic.
Senator Van de Putte	And does the partnership have any, since Houston is home to four hundred plus international companies, the, any threat or any danger of paying a huge amount of exorbitant amount of attorneys' fees for multi-national companies on this at all?
Senator Duncan	That did not come up as a concern.
Senator Van de Putte	So it was never discussed that in the case. I mean I know that San Antonio has some, but these multi-national corporations would be benefiting in having their claims paid for. Correct?
Senator Duncan	That just did not come up as part of the board.
Senator Van de Putte	As part of their litigation _____. Ok. Well, thank you. If you come across anything else I think it would be helpful for us.
Senator Duncan	Thank you Senator.
Senator Van de Putte	I don't have any other questions.
Chairman	Okay, any other questions. Ok. Thank you gentlemen and Justice. Mr. Trabulsi, Texans for Lawsuit Reform, the reform Brad Parker, TTLA and Mike Gallagher, TTLA. I do, I'm sorry
Unknown	Okay, I need to redo my card.

Chairman	No?
Unknown	I think ____
Chairman	Oh, you're not testifying. I'm sorry, I missed the check. If you want to
Unknown	_____
Chairman	Okay, very good, I'll change it.
Unknown	
Chairman	Alright, Mr. Trabulsi, you're first.
Mr. Trabulsi	I'm Mr. Trabulsi, Texans for Lawsuit Reform and I'm in favor of the bill. We think the bill adds efficiency the litigation system and rather than trying to add anything to the Senator Huffman's layout, I'm just available for questions.
Chairman	Very good. Senator Van de Putte did you want to address the questions Senator Van de Putte had?
Unknown	Senator Van de Putte, I'm . . . .
Senator Van de Putte	It's on the Gutierrez Amendment and on multi-national corporations.
Chairman	I did not fully hear your questions. Do you mind restating it?
Senator Van de Putte	Absolutely, thank you Mr. Chairman. My question, since we don't have a committee substitute at this point and, we'll have one in a few days, so the testimony today is, with the house floor version and given the fact that over the weekend and last Friday I had heard, I had multiple phone calls and emails over the Gutierrez Amendment that was placed on the floor that would allow for both residential and commercial property owners to also receive the benefit of the _____ phase when they're challenging appraisal district a valuation of their property and I've been inundated with messages from county commissioners, city council, college districts about this and so was wondering if, if _____ you personally have had a stance on that and also given the fact my question was on the Houston side that since Houston and many of our larger metropolitan cities are corporate home for hundreds and hundreds of _____ multi-national companies, if there was any concern about the type of loser phase litigation now with the fees being paid to a huge number of multi-national corporations.

Chairman — Thank you. On the first question concerning the _____ phase provision, that was added on the house floor concerning appraisal districts _____ Taylor's position is the villa the legislature on that. In other words, we don't have a position on that provision. On the question of cost shifting in general and the offer of settlement provision, we believe that since the committee substitute in the house will move the way from true loser pay and put it only within the context of offer, counter offer, that this is something that can work to the benefit of either plaintiff or defendant once the defendant invokes the statute because the _____ in only occurs when a party turns down a fair legitimate offer and doesn't yet result significantly better in the offer so that if a defendant offers $100,000 and the plaintiff thinks that too low and offer and counters it $200,000 and ends up recovering after the defendant refuses the $200,000, ends up recovering more $240,000, 20% above the offer, then the defendant is going to pay plaintiff's litigation costs. So we think it serves a very good purpose causing both parties to valuate the validity of the lawsuit and the worth of the lawsuit.

Senator Van de Putte — And I understand that the testimony with – relative to litigation between company's corporate what a small company versus a large one or two multi-national companies. My question in particular is, how would this work with the house version for victims of violent crime and I'm asking specifically because of a very tough case in my district where a dear friend's daughter was raped and murdered and of course the family went after a cause of action, a civil action. From what I understand the parameters of the way it was constructed in the house, this family even with the person caught who raped and murdered their daughter, they would have had to pay the fees because of the amount that was given was not the amount or apparently within that band, so if you could explain to me how a victim of violate crime could end up having to pay the attorney's fees for a rapist and murderer that was already in jail and convicted. How – and that's my concern on that. How does that work?

Mr. Trabulsi — Well, but of course, there's a practical consideration there. Is the convicted criminal, does that person have assets that are worth pursuing?

Senator Van de Putte — In this case the person had plenty of assets.

Mr. Trabulsi — So, if the defendant in that case evoked this statute and put $100,000 offer on the table and the plaintiff thought her case was worth $1 million, and she countered at $1 million, any recovery above $80,000, if she refused the $100,000 offer would result in costs shifting to the defendant and the defendant would pay $1 million plus her attorney's fees, so would really work to her benefit. Now, if she refused the

	$100,000 and recovered less than $80,0000 then she missed significantly the value of the lawsuit, but as a practical matter, it doesn't seem that it would work that way. It would seem that she would recover enormous damages and so if she countered at $1 million, the defendant is making a real mistake if the value of that case is $1 million by refusing her offer because he has just exposed his risk not only to whatever damages there but costs and _____ litigation costs.
Senator Van de Putte	Well, thank you. I think in this case the mother and father of – it wasn't about the money.
Mr. Trabulsi	I understand
Senator Van de Putte	This is about rape and murder of their child.
Mr. Trabulsi	Right
Senator Van de Putte	Their daughter and it really wasn't about the money, it was about making a statement but as I understand what happened in court, they would have had to pay the fees.
Mr. Trabulsi	They did not . . ..
	They did not set . . ..
Mr. Trabulsi	Well, but only if they ultimately recovered less than 80% of the offer.
Senator Van de Putte	I know _____ did. They recovered less than 80%.
Chairman	Of what? Of an offer?
Senator Van de Putte	Of the offer.
Mr. Trabulsi	Was the existing statute evoked in that case. Is this _____ actual percent?
Senator Van de Putte	I'm not sure. All I know is that the family contacted me as this legislation was going through and it was about, and again, it wasn't about the money. It was about the value of their daughter's life and the torture that she went through in that murder and rape.
Mr. Trabulsi	Well, I'm sympathetic to that as any of us would be Senator and I would just make sure that she wasn't responding to the _____ bill as it was filed whether it was a _____ pay.
Senator Van de Putte	Thank you.

Chairman — Thank you. Very good. Any other questions for Mr. Trabulsi?

Unknown — Thank you Senator, for Mr. Trabulsi. Mr. Parker.

Parker — Thank you Mr. Chairman, senators. My name Brad Parker and I'm here today on behalf of the Texas Trial Lawyers Association testifying against House Bill 274. I would like to use my time just talking in policy and answering any questions, but this whole bill seems to premised on the notion that our courts are clogged and clogged not with just legitimate lawsuits but frivolous lawsuits and I would submit to you that that is anything but the case and as evidence of that I would refer you to the 2007 Baylor Law Review Study which in fact had a survey of Texas Trial Court judges and they had a 78% response rate to that and of 86% of those trial court judges who responded, they saw no further need in Texas for legislation to handle frivolous lawsuits. This is a Baylor Law Review study. That's – I would suggest to you as a result of the HB4 provisions that were done in 2003 as well as the fact that we have three different statutes on the book already that will deal directly with frivolous lawsuits but _____ if you would look at the office of court of administration study that came out in August 2010, they observed that overall filings in Texas for lawsuits over the last 20 years is down 16%, does not include family suits or criminal suits, but just those involved in damages, civil damages. Those files are down 16% and yet our state has increased in population by 35% over that same period of time. Those two studies would suggest that not only would we not have clogged courts, they are actually lower than what they were, but the frivolous lawsuits are being handled, at least the trial court judges, the front line solders, if you will, that have handled these matter don't believe that there are an over abundance of lawsuits but Senator Van de Putte to go back to your example just a moment ago. In your situation, if the family was offered, let's say, $1 million, but it was to remain confidential and they couldn't tell anybody that they got the money or the apology, the vindication from having succeeded, and they said, no, we can't do that, we have to go to trial and jury, for whatever reason, comes back with $750,000, less than 80% of that million, the family gets their vindication because they won. They won on $750,000, but under this bill, they will now pay the defense costs in addition to what they've just had, so if the _____ cost exceeds the $750,000, they will actually have a judgment against them for whatever that difference is. This bill is bad – my time is out.

Unknown — That's a good ending, I guess, Senator Deuell was first when he said was a . . . . .

Senator Deuell — Thank you for being here. It would seem to me that the merits or de-merits of a loser pays would be unrelated the number of cases in our

court.

Parker — Well, I agree with you to one extent. It is unrelated to the number of cases but there are a lot of different provisions in this bill that want to have expedited trials and Motion to Dismiss. Those types of things which I would suggest that is relevant to . . . .

But I, but I . . . .

Senator Deuell — But the concept of loser pay however it's _____ and that can mean a variety of things to a variety of people and it can be done in different ways and it is done different ways but it to me it should seem that the merits, pros and cons of loser pay would – the amount of how our courts are clogged or whatever is – they're not related in my mind.

Parker — Well, and I don't – that's silly, we disagree with you on that point. My real point was that the judges in the State of Texas, according to the Baylor Law Review study, didn't see any need for further legislation from their point of view.

Senator Deuell — But loser's pay is not – it's related to fairness to the litigants in the case not to how many other cases are in the courts.

Well, it's either fair or not fair in terms of plaintiff, defendants and you understand what I'm say . . .

Parker — I think I do and I would, I'm, sorry, go ahead

Senator Deuell — No, I mean, you don't, it may be a benefit to the court's system on terms of number of cases by – it reduces lawsuits. I'm just assuming that, you know what I'm saying is that, to me, loser pay is not related to how many cases are in any given court how clogged up they are or how not clogged they are, but we need the bate loser pay's base, is it fair to the people involved who would either defend or file a lawsuit.

Parker — If you engage you in that debate, I would say, absolutely is not fair in any shape form or fashion to the average family or the small business.

Senator Deuell — We'll debate the merits, but what I'm saying is, is that the state of our courts, whether they're clogged or not clogged, has nothing to do with the fairness or unfairness, I'm not asking you to concede because I know where you'd be and I understand there's a committee substitute coming in, but the state of our courts in terms of how busy they are how clogged they are, whatever or whatever, is not related to the fairness or unfairness at this point to loser pay. We do not agree with.

Well, I say if loser pay is not fair, the state of our courts, it's irrelevant

to the fairness or unfairness of loser pays.

Parker — I would tend to agree with you to a certain extent, but it has a huge bearing on the rest of this bill. This bill does more than just loser pay. It has the interlocutory appeal, it has the expedited trial, it has the Motion to Dismiss. Those issues, I think, are directly relevant to the _____ . . . .

Senator Deuell — But you don't dismiss the case because you docket's busy. A judge deciding to dismiss a case does not dismiss the case because he's got a – he or she, excuse me, as a full dock, I would certainly hope not.

Parker — Absolutely.

Senator Deuell — Yeah. The judge dismisses the case because the merit of the case says that you dismiss the case. The judge does not dismiss the case because docket is empty and he or she doesn't have anything to do. Well, I need to hear something, so I'm going to let this case go on. The decision to dismiss the case or to allow it to go on is based on the merits of that case.

Parker — Absolutely, yeah.

Senator Deuell — That's the point I'm . . ..

Parker — Yeah

Senator Deuell — Or we can debate the merits, unfairness, fairness of loser pay, but I don't think it should be, maybe some people disagree on both sides, but I just think that, how full our courts are is irrelevant to the merits, it's either fair or not fair to the parties involved. It that . . .

Parker — I don't . . .

Senator Deuell — That's _____ to disagree with that. Okay.

Unknown — Thanks. Thanks for being here.

Unknown — I don't know if this has any – it's important in the data, but I would assume it does is that, we've done some terribly significant reforms in the civil justice system in '87 and '95 and then again in 2003 and those reforms have been meaningful to the extent they have reduced the number of civil filings in regard to personal injury and things like that.

Parker — There's no doubt about that.

Unknown	I know especially now, because I can tell you personally about that, seeing that practice in _____ go down quite a bit. If there's a clog in the courts it's the family law and Judge Huffman may know - affirm this family law and criminal law, I mean, that is where we are seeing our courts spend a lot of their time. I've looked in the civil records and you can look in the civil records in any and on the paper and law book it's most of the new suits that are filed are family lawsuits.
Parker	It would certainly be the case for our practices at Tarrant County and the Dallas County.
Unknown	Okay
Unknown	Senator Lucio
Senator Lucio	I was following your testimony and wanted to make a last _____, could you – wanted to say _____.
Unknown	I was going to mention that your example was somewhat like what Representative Eiland testified to or spoke about on the house floor about a client he had who had been arrested for, they accused him of not paying for everything that he got from the building supply and held them there for two hours against his will and in that case it was very similar that they offered him $100,000 or some amount and the client said, "No, if I take the money, I want to be able to tell the world that my name is restored and they wanted it to be confidential. The jury comes back in that situation that they only aware $75,000. Well, the person, the man who was defamed and held against his will for two hours at the hardware store. He's won his case, he's restored his good name, but the defense costs are $150,000. He's not only going to lose the $75,000 that he was awarded by the jury, but he's going to have a judgment against for another $75,0000.
Unknown	I just want to reassure you that that part about where you might owe than you collect is not going to be in committee substitute, okay?
Unknown	Okay, alright.
Unknown	Just so we're all on that page.
Unknown	Okay, I appreciate and I didn't know, so I just wanted to testify if the bill is credible.
Unknown	Alright
Chairman	Thank you.

Unknown — Okay, pretty good. Any other questions?

Chairman — Thank you for your testimony. Thank you very much for your time. Okay, the next panel will include a Richard Bundt. I'm sorry, okay. Include Sean Thompson with American Civil Liberty's Union and Ware Windel, Director of Webbs of Affairs for the Texas Watch. You are Ware Windel of the Texas Watch.

Unknown — Is Sean Thompson in the room? Sean Thompson.

Unknown — Okay, Mr. Windel, you're going . . .

Windel — That's correct.

Unknown — Go ahead and begin.

Windel — Thank you Mr. Chairman and members, again my name is Ware Windel. I'm the director of legislative affairs for the citizen, advocacy Texas Watch representing over 15,000 _____ suits borders across the state. We are strongly apposed to the _____ version of house votes 274. The senate is the saucer that should cool the coffee and we all know that the pot boiled over on the house and we appreciate you getting careful and consideration to this spill which will have a sleeping effect and devastate many Texans. Due to the politics of the issue, we have lost site of the victims here. The human costs of this bill and that's what I would like to focus my comments on. Justice is about more than the money. You are exactly right, Senator Van de Putte. It's about standing before the smallest most representative form of government that we have, a jury of our peers and having the truth come to light. It's about a public accounting. Let's take the corporations and the lawyers of this. Let's talk about the people and this will effect them. My wife and I are fortunate enough to have a nine-month old daughter, so this example hits close to home, but let's say you send your kid to daycare, and you later learn that one of the daycare workers is a pedophile who sadistically molest your child. The daycare hires the biggest _____ of law firm they care, that's their right, they put $100,000 on the table. That family now, is faced with a terrifying drama, it's terrifying. Do I take the hush money, am I intimidated into silence, do I never hear and admission of liability, do I never gain an understanding that the daycare has made the changes and their policies and practices to ensure that this never happens to another family or do I continue on with my case and risk bankrupting myself and my child's future, and I understand Senator Huffman that that part of the bill has been changed. Another part of Chapter 42 also looked at the amount of the judgment, that could be used in the offset and so a jury which doesn't know the effect of their answers may fight for the plaintiff but financially ruin them. The same fate would befall

the grandmother who was raped in a nursing home. The police officer who was shot in the line of duty by a drug cartel, a small business owner who's contract was intentionally violated by a large foreign and corporate _____, the policyholder, insurance companies denying and delaying your claim, the workers who are exposed to _____ explosions. These people and businesses will be victimized twice. Once by the perpetrator and then again by the process. That's not the public policy that we should be embracing in our state. I've distributed a memo from 16 other organizations by demonstrating the _____ and devastating effect that this bill would have on Texans from all walks of life. Some of the information in the house will ride upon telling _____ in a specific research institute, I would caution you against relying on that, it's been widely discredited, happy to get you more information. My time has expired, I'm happy to answer any questions.

Chairman — Well, _____ I thank you.

Windel — Thank you, Chairman.

Chairman — Are there are questions of the witness? Alright, here's one.

Unknown — Thank you.

Chairman — Okay, we have three witnesses here, David Thompson, Texas Association School Boards, Administrators in Houston ISD, Lauren Cook, Equity Center, I feel like I'm in school finance. You all are in the wrong committee, and the Tommy Atkinson, Bexar County.

Unknown — Hello.

Chairman — What do you think about Senate Bill 22?

Unknown — _____ ship these _____.

Chairman — I think so. That what it look like. Mr. Thompson, go ahead.

Thompson — Good afternoon, Mr. Chairman and members of the committee and senators. I signed up on behalf of TASVTAS stating Houston _____ the opposition to the bill as it came over from the house. We do have three specific concerns we certainly hope and look forward to working with you and hope these can be addressed in the substitute and that would resolve our concerns. _____ very quickly is Article 9, Section 9.1 of the bill that makes appraisal disputes subject to attorney's fees and costs. We believe this is an unnecessary provision of the Texas Tax Code 42.29 already provides a mechanism at the disgrace of the local court for the award of attorney's fees in the case who a property in the case of the successful

appeal and there limits already prescribed in law and we believe that's working well and again that's 42.29 of the tax code, so we, that was added on the floor and the house and we do ask that that article be removed and that's our primary concern in terms of the opposition. Two other sections as it relates to schools and governmental entities more probably that we ask you to take a look at. In Article 5, Section 5.1, 5.01, I'm sorry, that extends a potential recovery of attorney's fees to oral and written contracts, and in the case of governmental entities where there is no such thing as a parent authority, the whole concept of an oral contract is kind of a, it's a touchy issue to begin with and who has the authority to actually create a binding contract, but I think our real point is over the last couple of sessions, the legislature worked pretty hard in creating in the local government code Chapter 271, Subchapter I, Section 271, 151 and following. There's already a detailed mechanism for a recovery of first of all for waiver of immunity in terms of written contracts for governmental entities and there's already a loser case provision. Whoever prevails on the contract has the opportunity to recover attorney's fees, so we ask that governmental entities be clearly excluded from Section 5.01. Very quickly 5.02 of which creates a potential recovery of attorney's fees in a case of a successful appeal of an exemption under 11.43 of the tax code. We think, frankly, I would recommend if you're address that, the best way to address that, and again, these are exemptions where the property owner has to apply in order to receive the exemption as opposed to some t hat are automatic. I think that's the kind of thing that could be addressed in 42.29 of the tax code _____ exactly the same way that is currently available if a property owner appeals a value dispute, so those are the three provisions we ask you to take a look at. Our biggest concern obviously is the appraisal issue that was added on the house floor.

Chairman — So, good to see it. I used to be a member as to be having served on the school board.

Thompson — I do remember, thank you.

Chairman — There were several instances when I served on the school board. Are you only opposing the appraisal part of this?

Thompson — Our opposition is really about the appraisal and if that issue addressed, I will, I won't say on the record, our testimony will be on opposition.

Chairman — We, yeah, our particular school board, but I though the board members from other school districts and there were several instances where we were faced either being a defendant or a plaintiff where we were told by the lawyers, if you win, you'll have these court fees where I loser will not, you will not be reimbursed and if you lose, you will have

these lawyer and court fees, and you're going to pay theirs.

Thompson — Right

Chairman — It was a one-way street, so I assume that in other regards that you would be for the concept of a loser case.

Thompson — Yes, and again in the contract dispute, Chapter 271 of the local government code, it actually is a two-way street. What's in there now and what's the legislatures cracked it open . . . .

Chairman — One instance, and I thought this twice, I talked about this today. We were being employed to go to single-member districts.

Thompson — Right.

Chairman — And, we were told that we probably could win, but it would cost us a half million dollars, 25 million dollar a year budget, if we lose, it was going to cost us that half million plus we would have to pay the fees of the entity that was going to be suing us. It didn't seem quite fair, but we capitulated because we didn't feel as good stewards of taxpayer dollars that it was worth it. This bill would probably change that.

Thompson — I don't see this particular, I think the main focus of this bill now appears to be on contact disputes. I'm not sure this would affect a federal voting rights act lawsuit.

Chairman — Yeah

Thompson — I think that would probably . ..

Chairman — Senator _____ would it, or probably not.

Thompson — No, I think that would probably be governed by federal law as opposed to this _____.

Chairman — There was some other cases not involving that but

Thompson — Right

Chairman — Okay

Thompson — Right

Chairman — Thanks. Alright, thank you Mr. Thompson.

Thompson — Thank you

Chairman	Lauren Cook
Cook	Hi, good afternoon. Mr. Chairman and members, my name is Lauren Cook and I am here on behalf of the Equity Center in the 694 school districts we represents and we are here to testify on the bill at specifically under the provisions that Mr. Thompson just mentioned only the provision about the County Appraisal District. First, he did an excellent job talking about the legality and statutory effect. I'll just make a couple of notes on, kind of the ground level impact of what that would do to our member school districts and we do think that the threat of high cost litigation would lead County Appraisal Districts to under value properties and especially those of large corporate interests, those who can afford to fight against property evaluations. We do think that would lead to a shift of the tax burden to honor small businesses and residential property owners, first of all. We also think that, one thing that hasn't really been taken into consideration, especially in the fiscal note for this bill is the possible state impact of undervaluing property. With school districts, which is not the same case of counties and cities, but with school districts, as long as the undervaluation stayed within the margin of bearer, technically called the confidence interval established by the comptroller's property valued study, then the state does have to make up a difference of what a school would lose and its property value, so for example, if let's just say statewide average, if the undervaluation were 5%, that would be a cost to this state of about $800 million to replenish that lost property value to school districts, so whereas the fiscal note is, has no impact, we do believe there would be a state impact to under valuating property. If the undervaluation were to fall outside the bounds of this confidence interval, then it really would leave the districts on the hook to make up the lost value themselves which would be the worst case scenario because we know that, especially at this time districts have limited options as to how they would make lost property value and namely by raising tax, _____ tax rate or by cutting programs and doing the kind of budget tightening that districts are already doing, of course right now in the budget shortfall they're facing, so we do think that the options for districts are very limited in the case that County Appraisal Districts to start under valuating properties so again, we are only testifying on this one issue and we do respectfully ask that it be addressed on behalf of the school districts and we would be happy to work with Senator Huffman and others on this specific issue. Thank you.
Chairman	Alright, thank you. Any questions, Senator Van de Putte
Senator Van de Putte	Since I have the two education folks here, I wanted to ask a quick question. We know that in particularly with the higher number diagnosed students with special needs or developmental disorders that

individuals with Disabilities Education Act allows for a parent to the ARD and the individual, the IVA, the what they're called, their individual plan. When parents are not, when they go through that process of the ARDN that _____, we have had litigation for parents for when they are not faced with the school district. Can you please comment on what sort of effect this would have with the litigation with when parents to school districts particularly on students with disabilities act and not meeting their requirement.

Unknown — Okay

Atkinson — Senator, I don't see House Bill 274 is touching that particular issue one way or the other. Our firm represents many, many school districts in those types of concerns. I think, you know, first of all, the legal issues are primarily governed by federal law, there are some state law, but IBEA is a very _____ federal act.

Senator Van de Putte — Sensitive of _____

Atkinson — The – and there are provisions of federal law allowing successful parents to recover their attorney's fees and that actually is the current practice and there have been a few circumstances again under federal law where an unreasonably litigious person wound of having to pay fees to a school district but that is a very rare circumstance.

Senator Van de Putte — Yes.

Atkinson — I don't see this act as really touching because that's a federal claim governed by federal procedures. I don't think this law touches it one way or the other.

Senator Van de Putte — Thank you very much. I appreciate it.

Chairman — Got any other questions? Thank you Mr. Atkinson

Unknown — Thank you very much Mr. Chairman and members, I appreciate your taking our testimony here this afternoon. I've always known as many of you do that counties are unlike municipalities are the arm of the state and by the time that the legislature is _____ with some of the more financially stressed times it's been going through. I know that you want to look for strong partners at the county level and the recent amendments in the house do bode well for the strengthening of our tax base at least in our judgment in Bexar County. We have cut or attain the tax rate over each of the last 12 years, actually about 16 years I've been there 12 and this is my 13th year in the court and we've been able to do that because of relative strength of the tax basis of the various counties and certainly in Bexar County over these years. 65% of our revenue comes from property taxes at the county level. We do not

have a sales tax and we do not get past due revenues from a utility such as our city, the city of San Antonio does, so we're interested in making sure that, that the existing law be retained wherein at least this regard and we're not really, I'm not here to speak to the other matters, the primary thrust of which your bill, senator is addressing, mainly the house amendments. We believe a Chinese feast should be a discretionary cap as they have been under Section 42.29 of the tax code and they must be proved to be reasonable and apparently they exclude recovery of litigation costs and so we would like to make sure that our appraisal district has a free and unfair ability to defend the tax role in a fair and forthright manner and at the amendments in the house do not litigate well in that regard and even from my days in the house I was always told that the worst place in the world to make laws on the house floor and that is proven time and time again in the final days of the session but I appreciate you're giving me a chance to speak.

Chairman — Thank you. Thank all of you for being here. I appreciate your input.

Unknown — Thank you all very much, appreciate it.

Chairman — John Robinson had to step away a minute. I've got Jim Robinson, Chief Appraiser, Harris County, Appraisal District would like to testify, Craig Noack, Texas Creditors Bar Association would like to testify and Frankie Hogan, Business Owners and Residents, I think he can clear that up or she can clear that up. We've got two of you. Who's not here? Frank?

Frank — I'm Frank.

Robinson — I'm John Robinson.

Chairman — Alright and then you're . ..

Noak — Greg Noak

Chairman — Okay, is Frankie Hogan here? Well, we'll start with you and Mr. Robinson, state you name and who you represent, three minutes, please.

Unknown — Before Mr. Robinson starts, let me make a little housekeeping announcement. We have several pending bills. I think we'll be able to be finished here by 4:30 so I'm going to announce the time certain voted for 4:30 on the pending bills.

Unknown — _____

Unknown 4:30

Chairman Well, I just heard there might be a time conflict on that, so let me re-announce that we will take a vote at 5:45, I mean 4:45. Okay, I'm going to make it clear now, 4:45 will be the time certain vote on pinion bills. Okay? Go ahead, I'm sorry, Mr. Robinson.

Robinson Thank you Mr. Chairman, members. My name is Jim Robinson. I'm the Treasurer for the Harris County Appraisal District and also Chair of the legislative committee of the Texas Association of Appraisal Districts. I'll not repeat the testimony of the previous witnesses but attorney fees are already liable under Section 42.29 of the tax code simply to add that that was a very well reasoned formula that was developed in cooperation with appraisal officials, taxpayers and legislatures a good many years ago to ensure that the system could operate and not bankrupt itself. I think it's important for you to understand that valuation is not an absolute science. Value is a range. The International Association of Assessing Officers in fact their standard goals that if you're within 10% of the actual market value, you have done an excellent job with appraisal. We have a lot of litigation in Harris County. I would say that the current attorney fee provisions have not limited that. We have one particular tax consultant that files an excess of 3,000 cases a year and very often the nonsuits shows on the day of trial after we've spent money to get ready. One of the things that drives litigation for appraisal districts is that many commercial properties in particular are represented by contingency base tax agents. Their contingency fee become larger if they take the case to litigation, so we have cases where the appraisal review board never hears any of it. The tax agent simply comes in and says the value is too high. It goes to litigation, we never even see their evidence until we're I the discovery phase and yet had they been required to represent evidence at the ARB that would have never been litigation in the first place and I think the inclusion of unlimited uncapped attorney fees is simply going to encourage more of that and we'll see more and more cases simply going into litigation, it'll be just another bite of the apple for contingency agents. I'd be happy to answer any questions.

Chairman Members, are there any questions for Mr. Robinson? Chair hears none. Thank you Mr. Robinson.

Unknown Thank you Mr. Robinson.

Robinson Thank you.

Chairman Mr. Noak?

Noak	Thank you senator. My name is Craig Noak. I'm here on behalf of the Texas Creditors Bar Association and I'm here to talk about very briefly Article 5 of the proposed bill which changes the law regarding contract cases and it's, as it stands right now, and I, obviously I don't know what version it's in, but it would create some unattended consequences to Texas businesses and borrowers. The TXCBA represents all _____ creditors and from companies, the financial institutions and regardless of the position of the bill, I submit that it caps too wide a net in amending 38.001 and . . .
Unknown	You know what? The stats going to come out so.
Noak	Okay
Unknown	So, I can just tell you, don't worry about it, because it's coming out. How does that sound?
Noak	That sounds good to me. Well, then I'm happy to answer any questions.
Chairman	That's it?
Noak	That's all I'm here for.
Unknown	I don't mean to interrupt you, but I figured that's probably all you wanted . . ..
Noak	You know, they taught in law school to shut up when I'm, when I should shut up.
Chairman	How's that for power of the people?
Unknown	Didn't mean to.
Chairman	It's your presence shows up. Okay.
Noak	Thank you, sir.
Chairman	Thank you both for being our members, _____ are any questions. Did Frankie Hogan come? We've got some more cards, though. Okay, retired Chief Justice Linda Thomas. Always good to see her now representing the Texas Family Law Foundation, William W. Morris, Texas Family Law Foundation and Steve Gresnic, Texas Family Law Foundation and . . .okay, Justice Thomas, it's great to see you. How's retirement? It doesn't sound like you're taking it easy.
Thomas	Well, this is my first opportunity to see you this session, so it's good. My name is Linda Thomas, I'm the retired Chief Justice of the District

Court of Appeals in Dallas. I'm here today on behalf of the Texas Family Law Foundation testifying in opposition to 274 and asking this committee to exempt family law from these provisions. They are exempt from certain of the provisions but not expedited cases nor are they exempt from the interlocutory appeals and I would just point out, you know, it's one thing say the federal courts have had this interlocutory appeal provision for many, many years. It has not created a problem, thus it should create a problem here. I would point out that federal courts do not have family law jurisdiction and therefore we don't have a track record of what the affect would be. I would also point out that last this school year 376,366 new cases were filed in the family courts in this state and therefore if only one percent of the cases were to be captured in this interlocutory appeal we would be dumping 3,763 new cases onto the intermedia courts of appeals. I realize that the trial court there is a provision that the trial court first has to certify but if they're working on motions as to whether they certify and send these cases to the courts of appeals, they're not working on getting rid of the divorce. I would also point out that the courts of appeals would have to spend judicial resource time and sit on panels just to decide if they were going to take the cases, so it is a huge number of cases that could potentially clog up. I would submit that for instance the 5th Court of Appeals in Dallas could not absorb say the 600 new cases that could expect under something like this, so we would ask family law is exempt in certain provision but not others and we would just ask they be exempt totally.

Chairman — Thank you Justice Thomas. Welcome b ack.

Thomas — It's good to be back senator.

Chairman — Then _____

Thomas — I missed you all.

Chairman — We missed you. The biggest concern I've had about the interlocutory appeal is that we don't fund our courts adequately to carry even the back log o or the _____ cases, especially the intermediate of _____ courts. You all don't have any discretion over the types of appeals on the merits of cases, criminal civil cases, you all have to take them and review them, unlike the Supreme Court, is that correct?

Thomas — That is correct, sir.

Chairman — As so many times these cases will have records that are that thick, _____ thousands pages of testimony as well as exhibits and especially commercial cases where you have very complex and sophisticated fact situations and it just takes a long time to go through

those things and get it right, doesn't it?

Thomas — And I would submit to you that if the trial courts again are going to be studying whether these cases go up to the court and interlocutory appeals and the appellate courts are going to be studying whether we're going to take the cases, they're just not enough time to actually handle the criminal cases and the big civil litigation cases on the merits because it's just adding additional work.

Chairman — Before you, if this provision goes in, there's definitely going to be some consideration for the appellate courts against, especially the intermediary appellate courts to handle these cases.

Thomas — Absolutely and like I say . . . .

Chairman — Correction, they don't have to take them. The Supreme Court doesn't, I mean they've got all kinds of way to avoid the jurisdiction on these, but this, and I believe now, do you believe that the provision and the bill that gives the court, the appellate court the discretion to take the case, too, do you think that _____ one of the check and balance on that?

Thomas — Not in this instance because it, the appellate will have to spend judicial resources to study and look at whether or not it's going to take the case and I think they're going to have to make that decision by constituting a panel of judges to say. It's not something that clerk can say, "Oh now, we're not going to take that case, you're going to be spending judicial resources looking at these cases and again, if only one percent get by the trial courts, you're looking at 3,700 plus new cases in the courts _____.

Chairman — Thank you, any other questions?

Unknown — Quick question. I, when you started your testimony, did you have concerns of the family code being exempted from more than one provision of the bill or was it just interlocutory appeal?

Thomas — I'm thinking the family code should be exempt from the bill period.

Unknown — Okay, because I think that we've clarified that as it applies to expedited civil actions and it's not specifically stated in interlocutory appeals but we feel that there would that many that high a number that would go up if it was clear that the interlocutory appeal would only go for controlling issues of law.

Unknown — You don't think it would be that many with a dual gate keeper like we have it with the trial judge and appellate court.

Thomas	All I can say in the past three weeks of the nine family law mediations that I've handled is six of the nine would qualify because they had some controlling issues and could have qualified under this bill to go up and I think I would submit to you there's a reason why throughout the Texas Family Code they provide no interlocutory appeals and it is because in the old days we used to have them and nothing ever got accomplished because there were going to appeal everything and you can only drag out a divorce so long and so I see this as another opportunity to go back to what you only have fixed in the family code and now you're going to undo it in this and insofar as the other one that appears that perhaps family code is our on the expedited it should say that the Supreme Court can make rules so long as they are not in conflict with the family code and I would submit that there's a lot of mess that could happen without _____.
Chairman	Let me ask, I have a question, a _____ question of law for the interlocutory appeal.
Senator Huffman	We actually have cleared out some of the new language I'm working on for expedited but I'm interest. Thank you for your input on the interlocutory billings and I will let your family _____. Thank you.
Thomas	Thank you for your time.
Chairman	Any other questions? The Chief Justice Thomas. Thank you. Steve Bresdon.
Bresben	Mr. Chairman, do you mind if Bill Morris goes first? You'll get more out of it.
Chairman	Probably right. Mr. Morris, thank you.
Morris	My name is Bill Morris and I'm a family law practitioner. My concerns are only with Section 2 and 4. I'm not here to talk about loser _____. Under Section 2 and the language that Senator Huffman is talking about made sure it is addressing procedural issues while the family code substitute. In 1 and 3 it says: actions under family code are exempt and I think that would appropriate language there without you can expedite the cases but you really don't know when they're claim doesn't exceed $100,000 because it could be a child issue, no money involved so it's less than $100,000 or it could be an estate with millions of dollars of real estate tied up with millions of dollars of debt, so it could like a $50,000 net estate but still be very complicated. On the appeal side as a practitioner and former associate judge, I can tell you that if that appeal is available as a tool, I as a lawyer who has a duty as a zealous advocate for my client, I have to look at every case to see whether it can be appealed. That adds time and expense to my

client and then each and every case in which a motion is filed the Court has to take its time to review that motion to see if it should grant that Motion to Appeal and that takes time away from hearing the temporary orders and the final hearings in those cases and rarely, if ever, it may be a controlling issue but it does not _____ the case, because you still have to come back down and plug that issue into the child suit and/or the property issue and then try those issues to reach a just and right decision. Thank you for your time.

Chairman — Thank you very much. Any questions of Mr. Morris? Chair hears none, Mr. Bresben.

Bresben — Thank you, Mr. Chairman, I'm Steve Bresben here on behalf of Texas Family Law Foundation. I'd just like to talk about process just a little bit. The – in the six years that I've represented family lawyers, what I've discovered is is that in family law there's a system of temporary orders that are used to managed the affairs of people whose lives are coming apart. That's what happened with the kids, what school do they go to, whose house are they on this night, property, whose, what do you do with credit cards, what do you do with cars? All this kinds of things, so our primary concern I think on this interlocutory appeal provision is that if you get a bunch of appeals going up on temporary orders, you're not going to be able to manage the case and get to the end of it and have people leading their lives. On the larger process, the family law section of the bar will start working in June of this year on a legislative program for next session. Very diligent, there's about 30 people involved that goes through the whole bar process and all the way up through the whole bar process. The family code really reflects that. It's a pretty tight, well organized system there. It works well, people kinda know what the rules are and they're taking care of business. Although there's a lot of cases, as you said. If we're going to approach something like this for family law, we'd appreciate maybe starting way out in advance of the legislative session, working through these issues. And please don't do something willy-nilly that will throw a wrench in the works where we've tried to work very diligently with the legislature and be very methodical about what we've been doing. That's the sum total of my testimony, Mr. Chairman.

Senator Huffman — I think I can assure you it was never our intention, or my legislative intent, that you would have an interlocutory appeal on temporary family orders. I mean that's not what we're trying to accomplish here. To that extent, I'd be happy to work with you on language that reassures you.

Bresben — How . . . .

Senator Huffman	That's not at all what we're trying to do.
Bresben	I understand and we had some family orders come by your office last week. They felt like they had a great meeting. I sent your staff an amendment that would take care of our problems and so um, thank you very much for working. It's really the house version that I'm commenting on.
Senator Huffman	Okay thank you very much.
Bresben	Thank you.
Chairman	Chair calls Paul Simpson, Grant Harpold and Donna Lee. Mr. Simpson.
Simpson	Thank you Mr. Chairman, thank you committee. My name is Paul Simpson. And I am a practicing attorney, and I'm also a licensed engineer in the state of Texas, have been for over 30 years as a petroleum engineer. I have practiced oil and gas law, or a variation thereof for much of the last 25 years. I'm a partner in the firm of McGinnis, Lockridge & Kilgore (sp?). I want to make clear though, I'm not here on behalf of my firm or on behalf of any particular client. At the outset, just to tell – let the committee know, I and several other attorneys last week with the litigation section in the oil and gas section assembled a document – I think you received it now and I think it's something we've supplied you previously. It's entitled HB 274 Attorney's Fees and Contract Actions – Analysis and Alternatives. This and my remarks are directed strictly to Article 5 of the bill HB 274 as it came out of the House. And without repeating everything that's in the write up, what we do address in there are what we believe are some philosophical problems with the bill as well as some procedural problems and the way it's written and the conflicts it has with the existing statute and then some alternatives that we suggest the committee might consider. I recognize there's a committee substitute that's in the works, but we were throwing some additional ideas out here. And I want to talk just briefly about the unique circumstances of oil and gas. I know everybody who would come and tell you how unique their circumstances are, but under Texas law, oil and gas leases really are unique animals. They're often signed by middle class individuals, you know, folks who vote, good citizens who own property and they sign contracts. Often times they'll inherit from the interest, their grandfather or grandmother signed a lease and so they have contract rights, but unlike a typical, commercial lease or a typical contract. They had conveyed their minerals, they conveyed their mineral interests for an indefinite period of time. And so for the duration of

	that lease, they have no control over the operations, the information or what happens with their lease. And it is already an imbalanced relationship and to further imbalance it, I submit, would create too awkward, and excuse me, too imbalanced of a relationship and almost cut off the ability or incentive of those royalty owners to force their rights. And that's what's important here. This really ultimately isn't about attorney's fees, it's about the outset of being willing to enforce their rights. The only way they have to enforce their rights under a lease is by filing suit if they can't reach a settlement. They can't evict someone from an oil and gas lease. And so the only way they can do that is to file suit. But I've represented hundreds and hundreds of middle class folks over the years, and people of all levels, under their oil and gas leases. And if I had to tell them at the outset, you may pay the oil company's fees, they will never bring suit. It's just impossible, they will not be willing to do so and I don't think that's a wise course for the state of Texas to follow. Alternatively, there's some other suggestions that we've got in here, but we'd be happy to address them if the committee has questions.
?	You said "they will pay your fees" but what? I didn't hear the last part? you said . . .
Simpson	I'm sorry? When I was describing . . .?
?	You said "they may pay you" . . . you're talking about the companies paying people's fees, and then you said something else and I didn't pick up?
Simpson	Maybe I was speaking too fast.
?	Watson, the red light. You have a red.
Simpson	The point being that the relationship is such that I have represented hundreds of people and I can describe the relationship as there's individuals usually against somebody that's well capitalized and well-funded. They're out there drilling oil wells. And the operator has the access to all the information, controls the operations, owns the minerals for the duration of the lease. If someone said, if someone wanted to file a lawsuit to enforce their lease, which is the only way they could do it. Then, the first question they're going to ask is will I have to pay the other side's fees? And you have to tell them yes, they're never going to enforce that lease because . . . .
?	Okay that's what you said.
Senator Huffman	Yes, and Mr. Simpson again, I just want to reassure you that it's my intent to remove that provision, which is that part of article 5, section 38.015, that would change the law in oral or written contracts from the

house version. That will not be in the committee substitute.

Simpson — Thank you, Senator. It's good to hear. And yes, I think that's true, it is a change in the law. In case I wasn't . . . .

Senator Huffman — Yes, exactly. Understood. It was a change in the law.

Chairman — That's a provision I think in the bill that does really impact the ability of middle class or small business to resolve their disputes with the more well-funded larger entities.

Simpson — We're not aware of any . . . we put in the paper . . . outcries about a commercial litigation crisis. So . . .

Senator Huffman — Of course it was never the intent to hurt small business or the individual who was wronged by large corporations or royalty holders or whatever. It will be taken care of.

Simpson — Thank you Senator.

Chairman — Okay, Mr. Harpold.

Harpold — My name is Grant Harpold. I'm a lawyer in Houston Texas in private practice. I've been practicing for 23 years. I'm board certified in civil trial since 1997 and I represent and still do, the big companies, small companies in business in real estate disputes. What I want to talk about is Senator Duncan will remember, back in 2003, the legislature created the responsible designated responsible third party which before had never been on the books. As part of that legislation, a defendant could have almost an unlimited time period up to 60 days before trial to designate a party, a responsible party, but the party's not actually a party to the lawsuit. I mean they are there in theory but they're not a named defendant in the sense that somebody's coming after them. And so what the legislature did is say okay, if we're going to give the defendant the right to do that, we have to give the plaintiff the right to add that party to the lawsuit so the plaintiff can seek remedy from that party if the defendant so names it as a responsible third party. Well, my understanding when the bill 274 came over is that there is an amendment – amendment number 5 – I think from a Representative Lewis perhaps that says okay, you can, well essentially eliminating subpart E of that provision in the Civil Practices and Remedies Code, and subpart E says what I just said that that defendant names a responsible third party and the statute of limitations has already run on the plaintiff's claim against that responsible third party, the plaintiff can still go ahead and add that third party to the lawsuit. Meaning that it would have to be fair – it would be unfair to the plaintiff if the defendant can say, okay, here's a responsible party and the plaintiff says, okay, thank you defendant – even though it's a year

or two in the case I'll come after that party too and add them to the lawsuit, maybe even dismiss the other party. And the legislature said yes, and even if the statute of limitations is past, you can still add that party.

Well, this amendment took out that part that says if the limitations has run you can no longer add that party. Now the defendant can still say, there's the responsible third party and designate them as such, but then the plaintiff can't come in and say I need to add that party if the limitations has run. So what they're doing is they're lifting or extracting a very material part out of that legislation that was debated and going back and forth back in 2003. And it totally turns it upside down, unfair to the plaintiff and I would also say, unfair to the defendant in the sense that sometimes when you're on the defending side, you want that other party in the lawsuit. You want the plaintiff to bring them in, if in fact they are really a responsible party. So I guess in closing, what I would say is that that amendment, amendment 5, should not be part of the bill because it totally turns that whole part of the legislation that was done in 2003 upside down, unfairly against the plaintiff, and I would say against the defendant. Or if it's going to remain there in the bill, it needs to . . . if the plaintiff can't add the party, then the defendant then can't say that's a responsible third party if the limitations has run. So it should apply to both of them. Not just to the plaintiff. And I know that was a long-winded practical aspect, but that is a serious practical aspect of this bill that is an everyday decision. I have it come up. I have it pending right now in a case between two big corporations where that very issue exists.

Senator Huffman — Well, actually there's been a lot of discussion about that and we haven't' figured it out yet, but we're working on it.

Harpold — Okay, thank you.

Senator Huffman — Thank you Mr. Harpold for being here today.

Chairman — Donald Lee?

Lee — Thank you Mr. Chairman. My name is Donald Lee and I'm the executive director of the Texas Conference of _____ Counties. And I'll reference the testimony of David Anderson earlier about three different provisions in the engrossed bill that we are opposed to and with addressing of those issues then we have no issues in the bill. I think that one of them is easy because I think you're saying that you're taking out 5.02, the 38.015 changes, and that refers to oral written contracts and oral contracts are indeed very problematic in county government, as you can imagine with the plethora of different independent elected officials. We need not have oral contracts in

county government. Section 9 of the bill, Article 9, Section 9.01 – current law provides for a true loser's pay in property tax appeals. And this turns it on a head to a one-way loser pay. It's just for the tax payers and for all the tax payers when they are on the other side of individual taxpayers. In Midland County in this last week, they have lost an appeal - the County Appraisal District has – on a case that went all the way to the supreme court. And the County will pay $600,000 for attorney's fees in that case under the existing statutes. Under this provision, it would have been $1.8 million that the taxpayers of our county would have to make up. We think the existing 43.29 provisions in the tax code are the appropriate ones.

And then section 5.01, again, we think that is an area that if you need to address – determinations of exemptions – I just want to point out some of those are extremely complex, extreme ambiguity, court cases are going in different directions, and where the chief appraiser has to make a decision on which way to go on that, and if he loses subject to attorney's fees in those cases, the 42.29 provisions would give the court discretion and would be the appropriate way to address that issue.

?

Thank you very much. Any questions? There appears none. Next panel. Thank you gentlemen. Next panel is Bill Lewis, Rafael Favna, and George Carson.

Chairman

Bill Lewis

Lewis

I'm Bill Lewis and I'm representing Mothers Against Drunk Driving and we're proposing this bill based on the house engrossed version – you know we preach about the consequences of driving while intoxicated and this bill reduces some of those consequences. What a drunk driving victim, or their survivors learn that that they could very well end up on the hook for the drunk driver's legal bills or maybe a bar who over-served a drunk driver's legal bills, as well as their own – the practical effect of that is that the drunk driving victim is just going to say look, we're not taking our chances on this. Let's just forget about it and move on. And they pass up on the chance to hold a drunk driver or a bar responsible for the accidents that harmed them. As you've heard earlier, it's not always about the money. Some of the issues involve holding people responsible.

As you deliberate this bill, it seems to me that there's a very straightforward way to cut crime victims and drunk driving victims, in particular, out of this bill is just to add them to the exceptions that are already there. And we'd be happy to work with you on those issues. I've got some suggestions for them but that's in your offices and I'd be happy to discuss that with you. That's all I have and I'll try to

answer your questions.

? Alright Bill, thank you very much. Any questions for Mr. Lewis? Alright Chair, there is none. Thank you, Mr. Lewis, we appreciate you. Rafael?

Carson I'm George Carson.

? You're George? Okay hang on just a minute. Rafael Favna? Let me just see if he's here. He's not in the room okay.

Carson Okay, I asked them to hand out my resume so you know who I am. I'm here because 48 years ago I took an oath that I would preserve, protect and defend the constitutions of the United States and of Texas. This bill is going to be the most significant vote of all your history in serving this state. Because let me explain. 2,005 hundred years ago in the little country of Greece, democracy and popular courts were established. The whole idea was that all of the citizens would participate, and that, if you know classical history, Greece broke out into the birth of western literature, poetry, drama, philosophy, art, and is considered to be the pinnacle of human achievement and largely responsible for the shape of the Christian religion.

In 1787, democracy and self government existed almost nowhere. There were kings, emperors, tsars, princes, sultans, Mongols, feudal lords, oligarchies and tribal chiefs ruled the world. Our constitution, the federal constitution, is the supreme law of our land and it is considered to be the most important text in world history. And we all should study and explore it and know what it says. The main thing it says is that over 800 years the British legal system had this loser pay, and those like Thomas Jefferson and James Madison sat down and said we're not going to have a loser pay in the United States of America. As Madison said, the right to have a jury trial is as essential to secure the liberty of the people as any one of the pre-existing rights of nature. Loser pay is not for the United States of America. The right to a civil jury trial is a fundamental right. HB 274 is a barrier to our citizens to be able to have a right for a jury trial. There's a slow but accelerating erosion of the 7th Amendment in the United States. I noticed who those were for the bill that testified. And they were all great expansive corporations. I could not understand why Chevron . . . [beep] Am I through.

? You need to wrap it up.

Carson Okay I need to wrap it up. I will say that after 175 years in Texas since in 1836, name me one corporation that left this state because of our judicial system. And loser pay is going to keep out the people that

really need to have it. Greece was destroyed. The destruction of Greece democracy was the gradual destruction of the popular law courts. And that's where we're headed to destroy the law courts.

? Thank you Mr. Carson. I appreciate it. You have an impressive resume and we appreciate your appearance here today. Senator _____?

Senator D____ Well I thank you being here, and I agree with you on the significance of the United States Constitution but I would remind you that at the time it was written, women were not allowed to vote and people of color were not allowed to vote. So obviously it wasn't a perfect document and changes needed to be made.

Carson No one said it was a perfect document but what they did was they were classical scholars and they went back to understand why did Greece, this little country that western civilization is on. And they studied it and I gave it to you, classical scholars said because they allowed the people to be part of it and the juries. And once that was done, Greece fell.

Senator D It seems to me again, I know we're working to try to come up with a very good substitute that improves on what the House did. House did a good job of improving the bills. And it seems that what we're really trying to do is work around the edges of where lawsuits need to be resolved earlier on and so we're working on that and basically – but I understand your concerns, I think you've raised some interesting points and things that we certainly are keeping in mind as we go through this legislation.

Carson In Bexar County, 80% of the cases filed are family law. Now I've had a diversified practice. When I started family law you had a 4 page divorce decree. Now it's 45 pages. And all this is a fact that they were talking about, you can appeal to the court. And I've handled maybe two or three hundred divorces. What you do is you've gotta number 1, work it out. You gotta discovery what the husband has and they go do it. The people cannot afford all that . . .

Senator I think that I'm in agreement with you in that this shouldn't apply to family law.

Female It's not going to apply to family law.

Carson Family law people said it, but I'm going to tell you this. This vote ya'll are going to have, you are going to determine whether we are going to have a jury system in this state.

Senator D	I agree with you and we're going to work hard and make sure . . .
Carson	And I'm going to tell you, the bar association fell down on this. When I read in the Wall Street Journal that the governor wanted loser pay, I've been after it _____. But the fact is, when the people out there are going to find out that if you foreclose them to be able to protect themselves, that's when the backlash is going to happen. And there are not going – we're independent people. What are they going to do? They are going to run to the collective system and they're going to join unions. They need the protection. They had the protection under the law and ya'll are taking it away from them. That bill is the worst piece of legislation I've ever seen. I've asked every district judge in Bexar County to read it, and they said it's horrible. So ya'll make up your mind. But you've gotta . . . why would Chevron, General Electric – we have companies here, Southwest Airlines, American Airlines, we have Dell. They're nobody running out of this state. Only the people that want this loser pay are those that have not respect for the common person. And when that happens you're going to have what happened in Greece – a big division between those and those that haven't. And I cannot understand after 48 years of practicing law how we could get to this point and forget those people. Because they are citizens that went and fought in wars to protect our bill of rights and ya'll now want to throw the bill of rights out the window.
?	Thank you Mr. Carson.
Carson	And this is going to be said to the entire state if ya'll pass this because it's not going to stop here.
?	We're working on a resolution and we appreciate you.
Carson	Forget all of the loser pay out because I've talked to people and friends of mine. Let me just tell you.
?	But you've exceeded your three minutes.
Carson	I studied Canada and Great Britain and what I was told there, the problem in our . . . now if Obama Care goes through there's not going to be any lawsuits for medical. The government is going to pay for everything. And they say in Canada and in England, the government pays for everything. And if you want your taxes to go up, pass this.
?	Mr. Carson, we've heard your testimony. You've made a good point and we're listening to you. So thank you.
Carson	I hope ya'll will sit and think. And take that loser pay out.

?	We're trying but we need to be able to . . . we appreciate your testimony.
Carson	Well, you'd better do it for the little people.
?	We appreciate your passion for the issue too as well. I agree, well it's an important issue. Yanis Banks, Gary Bledsoe and Robert Noxson (sp?). Alright, Mr. Banks.
Noxson	Good afternoon, I'm Robert Noxson.
?	Okay, let's go with Mr. Banks first.
Banks	Good afternoon. How are you guys doing today? My name is Yanis Banks and I'm here representing the Texas NAACP and we are against the current form of 274. I know you said you have a substitute you will be submitting and we'll be glad to look over that and see the differences and the changes. But right now our concerns are that the way it's currently worded, it would discourage people from bringing up discrimination lawsuits. I'm not a lawyer by trade but I do work with and for too, I would say pretty good lawyers on my left and right, and I know how hard they work when they do get those kinds of discrimination lawsuits and what it takes to find out if they are being discriminated or not. It definitely takes a lot of work. And you don't want to have somebody discouraged from bringing that up to say well, I'm being harassed at work or they're doing this to me, letting me go because of my age, this, that and the other. I have some proof but I guess my understanding with this kind of law is that always the strongest or what have you. So you have some proof but you want to bring it up but your fear is that if I do lose this and this is a high powered corporation, with high powered attorneys, I would end up bankrupt trying to pay them back if we lose. Now factor in if I lose will, is it worth it for me to just continue to be harassed or do I try to stand up for my rights that I'm supposed to have where I can go to work and not have any issues? **Tape at 4:06:58** You know, I want to make sure I have my house, and take care of my family and not to have worry about having to pay hundreds of thousands of dollars and basically going bankrupt just because I was tired of being mistreated and now I can't afford the rights I'm supposed to have. There is times when we have talked to people, we do get calls from folks and they'll tell me on the phone this is happening to me at work but I don't want to say anything because I

don't want to get any trouble or I don't want to have to deal, they have all the power and there's nothing I can do about it. Well people are already feeling that way, and you don't want to encourage even more, more of, some people who may want to send up a signal, it's not about me it's about money. It's about what's right and what's wrong. And we don't want to discourage them from that and just reading this bill and seeing. I mean, just the thought of somebody having to pay excess of hundreds f thousands of dollars if they lose, _____, it just may be that their attorney was not as good as the company's attorney or whatever attorney that have the fire power to back them up. And they loss because of that, not because they weren't being harassed or discriminated or what have you. The attorney does _____ enough. And all they wanted was a chance and _____. I know Senator Duncan, I guess he either faxed it or mailed it to you from Mr. John F. Melton and he speaks in his letter how he talked to _____ Mr. Republic _____ not just a one, it's not a democratic liberal, it's an all people thing where everybody is worried and concerned about this so. In closing, I would just like to say that right now in current form it's something that we can't support but we are looking forward to seeing what you have to offer. Thank you.

Chairman — Thank you Mr. Banks. We appreciate it very much.

Mr. Banks — Thank you.

Chairman — Mr. Norton, or Noxson.

Mr. Noxson — Noxsom, yes sir. I would like to bring up six topics, at least the framework and then Mr. Bledsoe and I will probably split them. What actually happens in federal procedure, federal Florida law that, when Florida attempted this in 80s. The fact that this bill is unfair, frivolous actions are already addressed. Gamesmanship is going to happen if this law goes into effect and I couldn't really find a trigger in here as to when the recovery is allowed and to what extent in the bill. On the federal procedures side, the, what's available is the court's make us make an offer back and forth, and if the defense does not make, if the defense makes an offer and the plaintiff does not beat that offer at trial with a recovery, then the attorneys fees from the point at which the offer was made forward would be forfeit by the plaintiffs and so that's the way that exist that allows for the reduction of litigation and the fairness of getting the matters resolved without actually attaching attorneys fees against the plaintiff for the defense. It's a way of recovery. The Florida law, Florida tried this in the early 80s on medical malpractice suits, the result is after five years the settlements were down, the increase cost so what happened, it was a complete failure and they repealed it after five years. This law patently unfair.

When the result happens, if the plaintiff wins, the defendant has to pay because there was violation of law. That makes sense. But if, let's say, the defendant makes a poor offer, let's say if they make a small offer, there's no penalty for them, the only penalty is against the plaintiff. Follow me. If the defense makes a ten thousand dollar offer, like happened to us, Gary Bledsoe and I, and we got a one point two million dollar verdict, there's no penalty to the defense. They don't have to make an offer. They don't face any penalty at the back end. That's patently unfair. Frivolous actions as was addressed in Mr. Melton's offer to you, Senator Duncan and to the Committee, it's already addressed in both Texas and federal law. The gamesmanship that is going to occur is the defense can then make offers based upon the relative wealth of the plaintiffs. Instead of making a real offer, based upon the value of the case. They make an offer based upon how much pressure that they can put on the plaintiff instead of addressing the actual issue.

Chairman — Thank you very much. Senator Huffman.

Senator Huffman — Thank you. Just briefly, I'm sure that you're aware offer of settlement is already in the law and it, even now, it's triggered by the defendant, that wouldn't change. So do you understand that?

Mr. Noxson — I understand that. I don't see where the recovery then is mandated.

Senator Huffman — Well, and let me just say, different from the house and _____ version, we're still working on the offer of settlement language. But I've just heard a lot of testimony this afternoon. Offer of settlement is current law. We are trying to tweak it to make it work a little better and be more of an effective tool in settling cases if that's possible. If we can get to that language, we'll try to do that, it's just there's been a lot of talk about we're implementing new loser pays and these new huge provisions and it's something that's in current law.

Mr. Noxson — Well, I think what's not in current is the attachment of attorneys fees to litigation cost.

Senator Huffman — That's what we'll work on, some of that language as well. So, we'll see how it ends up.

Mr. Noxson — Ok.

Senator Huffman — Thank you. Thank you Mr. Chairman.

Chairman — Alright, Mr. Bledsoe.

Mr. Bledsoe — I just want to say Senator, if I might, thank you all for allowing me to

come and speak with you. Several points I'd like to make.

Chairman — State your name and who you represent.

Mr. Bledsoe — I'm sorry. Thank you Senator. Gary Bledsoe with the Texas NAACP. First of all, there's not really a problem in this regard that needs to be addressed. I think that our Chief Justice Wallace Jefferson has been very much in touch with the issues around this state and I think that issues like this should come through the Supreme Court or Justice Jefferson to get some leadership on this issue because I think that the way that this bill is currently designed it will have a truly chilling effect on people and will discourage them greatly from wanting to exercise their rights and make this a better society. Now, I think one of the other things that's clearly likely to happen and that is that the kind of conduct that is intended to be deterred by the laws that being litigated that that kind of conduct will greatly increase because I think that those that have a larger weapon so to speak will be able to be a little bit more self assured in their positions and I think they will seek to obviously position themselves in that way. I think that's one thing that that Emery Law Journal analysis of the change in Florida talked about. I think that what happens is you feel embolden when you're in a certain position and that means obviously that you might low ball and give very quick offers of settlement for the sake legal positioning and not for the sake of resolving a lawsuit. Because the desire obviously will be to continue and litigate and to generate fees. Now I do plaintiffs' work and I do defense work, so I've done both and I can see it from both sides, but I think it will clearly have an intimidating effect. Now, I think that when we look at what's behind these laws, I think that what we're, the whole thrust, the whole impetus is coming from some desire to change our legal system and to make it to where businesses are more competitive. I think that it does just the opposite. It doesn't do that. But it's going to increase the kind of conduct that is intended to be prohibited, but I think that the problems with corporations or the exodus of jobs to other countries will not be changed in any way by this bill. But I know that there are some think tanks that have come up with research that might suggest this, but the research is flawed because this will not stop the movement of jobs or what have you. All it will do is muddy up the legal system and I think what Mr. Noxson was eluding to earlier, there's not a standard at all to guide when the judge may do this or may not do this, and so yet the vagaries of a particular judge which could be particularly problematic. I think that it has constitutional issues because of that.

Chairman — Thank you, Gary. Are there any questions of Mr. Bledsoe? Alright. Chair hears none. I appreciate your testimony today. Members that concludes the public testimony portion of this bill. I think we indicated early on, Senator Huffman, when we get a substitute, we'll

try to reopen the live testimony and comments on the substitute. Thank you very much for your work on this. I appreciate all the hard work you're doing. The committee now will stand at ease until 5:00. I want to get this right, I can't read that clock up there. We will stand at ease until 4:45 pm at which time we'll reconvene to take up and consider pending bills that we've already heard testimony on. This bill will still be on the table until we get resolution and a substitute. So we'll be at ease until 4:45.

(Silent through end of tape)

MAY 21, 2011

SENATE STATE AFFAIRS COMMITTEE
DEBATE- HB 274

Chair	Okay, we're about to start. I think Senator Ellis is on his way and I think we'll have a quorum, so I'll go ahead and call the committee to order. The Senate Committee on State Affairs will come to order. Let's establish a quorum, please. Clerk, call the roll.
Clerk	Senator Duncan – present Senator Deuell – here Senator Ellis – [unintelligible] Senator Fraser – [unintelligible] Senator Huffman – here Senator Jackson – [unintelligible] Senator Lucio – [unintelligible] Senator Van de Putte – [unintelligible] Senator Williams – [unintelligible] Okay
Chair	Okay, a quorum is present. Members, Senator Huffman has been working tirelessly for the last week and a half to try to come to a bill that represents – a tort reform bill that represents good jurisprudence and solves some problems that have been recognized, so, I'm going to recognize Senator Huffman to lay out House Bill 274 by representative Creighton since Senator Huffman –
?	[unintelligible]
Chair	Yeah. – relating to the reform of certain remedies and procedures in civil actions in family law matters. Senator Huffman, you're recognized on the bill.
Huffman	Thank you Mr. Chairman. And Mr. Chairman and members, I'm very pleased to lay out the omnibus tort reform bill and send up a committee substitute at this time to House Bill 274.
Chair	Okay. Senator Huffman sends up a committee substitute to House Bill 274. Senator Huffman, you're recognized to explain the substitute.
Huffman	Thank you, Mr. Chairman. Members, this bill has been exhaustively negotiated and includes input from the major stakeholders. The purpose of the committee substitute to House Bill 274 is to increase judicial economy and make the Texas civil justice system more efficient and more accessible to all parties. Members, there are several provisions of the bill, so if you will bear with me, it's kind of a lengthy bill and so I'm going to go through this and I'd like to take a

	moment – a few moments – to lay it out. Article 1 of the bill directs the Supreme Court to adopt the rules to provide for the dismissal of certain actions that should be disposed of as a matter of law. Either party in a case would be able to submit a motion to dismiss which would ask a court to dismiss a claim that they believe has no basis in law or fact. The trial court would have to rule on the motion 45 days after the motion is filed. Following a motion to dismiss, a court shall award costs and attorneys' fees to the prevailing party. This action does not apply to actions by or against the state or other governmental entities and exempts actions governed by the Family Code. Article 2 provides a plan for the Supreme Court to adopt rules to promote a quicker and more efficient resolution of civil actions where all claims for damages are under $100,000. Particularly, the Supreme Court will address the need for lowering discovery costs and expediting these actions. This section would also not apply to medical mal suits, the Family Code, the Property Code or the Tax Code. Article 3 makes changes to the law governing interlocutory appeals or issues that can be sent to a higher court for clarification during the middle of the trial. A trial court may send only a controlling question of law to the appellate court either on its own motion or that of a party. The parties do not need to agree to send a question to a higher court. The appellate court may accept the appeal. A stay of the proceeding in the trial court may only be issued if the parties agree or if the trial or the appellate court judge orders it. And this ruling may be appealed to the Supreme Court. Article 4 makes slight changes to a current law by which some parties who decide to settle may recoup some of their attorneys' fees in limited situations. The changes to Chapter 42 and Article 4 are different from the House version of House Bill 274. Under current law, the defendant in a lawsuit may declare that they are electing to proceed under a Chapter 42 settlement negotiation. This is not the automatic procedure for every matter in which there is a settlement offer. A defendant would have to elect to take this route. Nothing prevents the parties from settling on their own without invoking Chapter 42. But, once a defendant has chosen to go this route, either party may submit a settlement offer that complies with the procedure outlining statute which can be served on another party. Under current law, once a conforming settlement offer is rejected by the adverse party, litigation costs can be awarded by the court in the following situations, and I'll give you an example. Suppose that a defendant offers the plaintiff a settlement of $100,000. The plaintiff then rejects this offer. The parties continue the trial and the trial concludes and litigation costs would be available as follows. The plaintiff recovers at least $120,000 or 120% of the rejected settlement offer, the defendant could be made to pay the plaintiff all litigation costs. This is current law. Let's give an example where the plaintiff recovers at most $80,000 or 80% of the rejected settlement offer. The plaintiff could be liable for the defendant's litigation costs up to the amount reached by

	adding together 50% of the economic damages awarded to the plaintiff, 100% of the non-economic damages awarded to the plaintiff and 100% of the exemplary damages awarded to the plaintiff. Again, this is current law. If the plaintiff recovers nothing in the lawsuit, the plaintiff owes no litigation costs to the defendant. This is current law. The changes made in Article 4 in the new committee substitute only amend current law slightly by changing the formula for an award of litigation costs for either a defendant or a plaintiff. As in current law, if a plaintiff recovers more than 120% of the defendant's settlement offer that was rejected, the plaintiff has a right to recover their litigation costs in addition to their recovery. In this committee substitute, the amount that can be recovered by the plaintiff would be equal to the amount of the plaintiff's recovery. This could amount to as much as a double recovery for a plaintiff. As in current law, if a plaintiff recovers less than 80% of the defendant's settlement offer that was rejected, a defendant has a right to recover their litigation costs as an offset of the recovery. In committee substitute to House Bill 274, if this situation occurs, the defendant would only be able to recover litigation costs up to the amount of the plaintiff's recovery. This amount that the plaintiff would be required to pay is offset from the amount of recovery, as in current law. The plaintiff will never be forced to pay out of their own pocket – only out of the amount that they have won in the suit. So, the plaintiff may recover less than they awarded, but will never be subject to a judgment under the section. The changes make the recovery of attorneys' fees more equitable between plaintiffs and defendants when, under Chapter 42, reasonable settlement offers are unreasonably rejected or when unreasonable settlement offers are made. Article 5 amends the procedure by which a party to the lawsuit can designate an outside actor as a responsible third party. This portion of the bill was developed over the past several days with input and agreement from several stakeholders including governor's office. Responsible third parties are persons who are not a party to a lawsuit that can be named by a defendant as someone potentially responsible for the injury to the plaintiff. However, the designation as a responsible third party [thank you] does not make the responsible third party or the RTP a party to the lawsuit or make it liable. Instead, the jury may allocate a percentage of fault to a RTP so that defendants named in the suit are only given their proportionate share of liability. Under current law, if a party is designated, a responsible third party or RTP, that person can be brought into the lawsuit by a plaintiff, even if the statute of limitations has run. So, even those potential defendants who would have a legitimate defense to a lawsuit because the statute of limitations has run out, may be dragged into a case. Floor Amendment 5, added in the House by Judge Trial Lewis, attempted to reconcile this problem by creating a deadline of the statute of limitations for plaintiffs to bring RTPs into the lawsuit. And we agree – I agree – with the spirit of Judge Lewis' amendment. However, I also believe that defendants who fail to responsibly name RTPs in a timely manner should not have the ability to frustrate the plaintiff's desire to bring a RTP into a lawsuit. That is why we've included a provision, Section 5.02 of the Committee Substitute, which would prohibit defendants from naming RTPs in a suit if the defendant did not disclose knowledge of that RTP under the Texas

	Rules of Civil Procedure. Stated simply, a defendant cannot name a RTP in a suit after limitations has run, which would give them someone to share liability with, if they fail to disclose any knowledge of the RTP as was their obligation. Defendants who use RTPs to gain in the system should not get the protection that RTPs would afford. Again, this article of the bill was created following specific and lengthy negotiation. I feel it balances the needs of both plaintiffs and defendants while keeping with the spirit of Judge Lewis' amendment. Members, as you can see, this was a collaborative and extensive process and a lot of working parts. It was and is my goal to pass a bill that accomplishes the original intent of this legislation to increase access to Texas civil justice system, to increase judicial economy and increase savings to the Texas taxpayer. And I will attempt to answer questions and Senator Duncan's going to be assisting me with that as well. It's a pretty complicated process. So, thank you for your atten- ... I know that was lengthy, but it's a lengthy bill.
Chair	Thank you, Senator Huffman. Senator Huffman, I know, has been working ever since last Sunday, every day, and for several hours every day, trying to resolve this issue and I think has done a masterful job of bringing this to you as a bill that we believe is a consensus bill. Are there any questions of Senator Huffman? Senator Ellis.
Ellis	Mr. Chairman, I know from talking to you and Senator Huffman out in the hallway, that you believe it is a consensus bill and I believe that from talking to the parties that I've talked to. Because it is a House Bill and you all have put so much work into it, I'm going to follow the lead of the two of you and I plan to vote for it _____ come on committee, but I want for the record to get some sense of how this works. I don't want to vote to bring it up on the floor and then it go to the chamber and exchange and we go to conference, _____ I don't know what he sent. Our colleagues on the other side have been involved and I want some sense – essentially a commitment, at least in terms – I'm going to vote _____ today but, before I will vote to bring it up on the floor and encourage others to vote to bring this bill up on the floor, I want to get a sense of, you know, can you stick with this bill the way it has been worked out and agreed to by all sides, and I hope they're going to say that for the record.
Huffman	Well, my –
Ellis	Stick with it.
Huffman	I'm going to stick with it. It's my intent it's been carefully crafted. Believe me, every word has been agreed to and it's my intent – and I've spoken to the House Sponsor and he understood the work we were going to be doing here and I believe that he's onboard and I believe that all other parties are onboard for that. And that's my commitment.

Ellis	Okay. Which House _____
Huffman	Brandon Creighton.
Ellis	Okay. So, and you mentioned her earlier, I'm sorry. So, if beyond his control, it just gets – you know, if they reject it in Senate Conference and try to change stuff, will you not bring the bill back up?
Huffman	I will not present a bill to the Senate Floor that is not exactly this language.
Ellis	Okay. I want to give my flag. You want to just – can I leave my vote with you?
Huffman	That's your call.
Chair	Are there any other questions?
Ellis	[unintelligible]
Chair	Are there any other questions for Senator Huffman? Okay. I want to bring up the persons who helped negotiate this bill with Senator Huffman and I guess – do you have the card, we don't have any cards – let me just bring everybody up as I see them in the room. Mike Gallagher, Lee Parsley, Allen Waldrip and David Chamberlain. And Jeff Boyd with the Governor's office.
	[unintelligible] comments and laughing from room
Chair	Okay. I think – I don't have cards for everybody. We need to get cards filled out, so I assume everybody's – other than Mr. Boyd, I think – can't testify for or against, but he can be on. So, what I'd like to do is – where did he go? – oh, there he is. We just don't have a chair – I bet the clerk will loan you his chair and you can – Clerk, --
Clerk	Right here.
Chair	I know Mike Scofield has also been involved in the negotiations, as well. And Mike Hall actually helped at the very end of the day. Good Texas Tech lawyer helps solve a problem at the end of the day. Why don't we just go ahead and start with you, Jeff, just your – as a resource witness – and let me just ask you, have you read the bill?
Jeff	[unintelligible] was part of the discussions that took place all week and it does reflect a lot of work on the part of the people sitting here at the table _____. We are also grateful to the Chairman and Senator Huffman for their hard work this week, as well.

Chair	Very good. Do you believe this is a bill –
	[unintelligible]
Chair	I'm sorry, Jeff Boyd, general counsel for the Governor's office. Do you believe this is a bill that the Governor's office can support. I know the Governor, you don't – the Governor's not here, but as far as the concepts that we've reached in the bill, do you believe this is a bill the Governor can support?
Boyd	I do.
Chair	Very good. Okay, Chair calls – why don't we – David Chamberlain. David, state your name and who you represent.
Chamberlain	Thank you, Mr. Chairman. My name is David Chamberlain and I'm the co-chair of the legislative committee in Texabota. Texabota is the association by invitation only of trial lawyers in the state made up of about 50% plaintiffs' lawyers and 50% defense lawyers. I happen to be a defense lawyer practicing almost exclusively in defense here in Austin, Texas. And, we have worked very hard. We actually started – well, we started at the first of the session, of course, but specifically in our working group, we started in earnest last Sunday afternoon and worked until the evening hours and then we worked full days or almost full days every day this week and I can tell you we have been in every argument that you can imagine. We haven't been happy with each other on occasions. We've been angry with each other on occasions. We went home some nights with things totally unresolved, even going backwards. But at the end of the day, and I do mean today, we have reached agreement on what I believe to be a much, much improved version of the House Bill. And on behalf of my organization, I would particularly like to thank Senator Huffman. She has been with us every step of the way, giving us her guidance and calming us down when we got angry with each other occasionally. And, of course, you, Senator Duncan, for the fine guidance that you gave us, particularly from a historical perspective and the guidance that you gave us to try to keep us calm, as well. And thank you very much.
Duncan?	[unintelligible] Thank you David for your work. David had pneumonia and had to take a couple of days off in the middle of the process. I don't know who made him sick, but somebody did. I'll call on Mike – yeah –
Gallagher	I think what David said is accurate and, after seeing the House version of this legislation from the perspective of the trial lawyers, not necessarily a plaintiffs trial lawyer –
Chair	You got to state your name.
Gallagher	Mike Gallagher.

Chair	I know you represent –
Gallagher	Represent TTLA and myself. After seeing the version that passed out of the House, I, as a trial lawyer, felt like that there was very little room for negotiation and that perhaps this was just something that was going end up having to be resolved on the floor of either House without our being able to participate much and provide much in the way of advice. Subsequently, we got a phone call from Senator Duncan and, surprisingly enough, without repeating what David said, we were all able to come to an accord. An accord requires give and take, which is what we had to do, and there are areas of the bill with which I'm – about which I have questions. But there's nothing about this bill that I feel, as a lawyer representing the constituency that I represent, does violence to the rights of my clients to have free access to the courts and I want to thank both Senator Huffman and Senator Duncan, with whom I've work personally for the last 25-30 years maybe, doing this. For helping us participate in the resolution of what I thought was an insolvable situation. I also want to thank Corey Pomeroy for the long hours that he spent working on this issue and also, Jonathon Enroe, who worked with Senator Huffman during the closing days of this and, all in all, it took everybody's involvement for us to get this accomplished. Thank you very much. I appreciate it.
Duncan	Thank you, Mike, I know you have been in on a lot of these negotiations and they're always down to the last minute and they're always tough, but I appreciate your input and your expertise and wisdom as we went through this.
Gallagher	Thank you.
Parsley	Thank you, Senator Duncan. Members of the committee, I'm Lee Parsley and president and general counsel of the Texas Civil Justice League. Maybe I should start by thanking the Academy because I think that's the only person unthanked so far. The Civil Justice League has appreciated the opportunity to participate in the discussions Senator Huffman, Senator Duncan. We appreciate the work you all have done and we think it's a good bill and we are supporting it.
Chair	Thank you, Lee. Allen?
	Walter?
	[unintelligible]
Waldrip	Thank you, Mr. Chairman. I'm Allen Waldrip. I'm here representing Texans for Lawsuit Reform. I've represented Texans for Lawsuit Reform throughout this process and I just will echo what my colleagues have said. I agree with all the comments that have been made. It has been a very interesting path this week, but it has been a very good path. I think, on behalf of Texans for Lawsuit Reform, I think it's produced a good bill and we support the bill and we very much appreciate the hard work of both you and Senator Huffman and your staff

	members. It has truly been hard work. I mean, it has really been something to watch. We really appreciate it and we appreciate the *way* the situation has been handled. Thank you very much. And thank you for working through this process.
Chair	Senator Lucio.
Lucio	Thank you, Mr. Chairman. As a non-lawyer but a member of this body, I certainly am interested in justice and access to the courts to the people I represent. But I'm taking in everything that I'm hearing right now – my hearing aids are working perfectly – and I just wanted to ask this question in particular. Obviously, we've come up with a pretty good document here that everyone – the stakeholders – everyone involved might be able to live with. We've looked at every word. We looked at every angle with this piece of legislation and you all's opinion be something the rest of the country could use as a model as they address tort reform issues in those states. Anybody?
	On behalf – how do we fair with the rest of the country is what I – and would those other states be looking at maybe this piece of legislation as middle ground or a point of compromise where everyone could work – in a more harmonized way.
Gallagher	Mike Gallagher. Again, I'm what everybody calls a plaintiffs trial lawyer. I'm a little more proud of that fact than a lot of people would think given the criticism that plaintiffs trial lawyers get on occasion. As a trial lawyer, I came to this process hoping that there was some way that I could – that we could end this without your constituency having access to the courts limited so that we live in a country in which the Bill of Rights and your right to trial by jury is not available only to the very wealthy or the extraordinarily poor, but to every citizen from every socioeconomic bracket in our society. And I think what this committee has done is that regardless of whether you're a rich man, poor man, middle class individual, you can still go to the courthouse and be assured of the fact that because of the work of this body, you will never be confronted with the circumstance in which you're having to face the prospect of ruination by pursuing a constitutional right and to me that was a terribly important aspect of what we were doing. And, in this particular circumstance where we're dealing with the potential loser pay issues, while there are other legal issues that perhaps are more complicated, this is a very fundamental issue that everyone can understand. And it was not only the term loser pays, more appropriately Senator Lucio, it could have been winner pays. And that was a circumstance that had to be addressed and I'm happy to say that it was.
Carona	I was – and come of us here, I know were around back in '87 in either the House or the Senate – have addressed tort reform issues. I know I have since '87 and some of you have followed that. And I certainly feel that along the way we've had some pretty good reforms including a little frivolous lawsuit bill that I carried in '95. So this probably – in listening to all of you who are truly the experts in

	this particular issue, perhaps might be a milestone that we can look at and use in the years to come without having to come back every two years and address this issue. I hope that's the case anyway. Thank you very much for you all's hard work.
Chair	Senator _____
Female	Thank you, Mr. Chairman. Thank you Senator Huffman, Senator Duncan. My question to the gentlemen is that I know you have seen draft after draft and you've poured over words, commas, semi-colons. Have each of you seen the final draft that has been presented to us as the committee substitute for House Bill 274?
	Yes.
	Yes.
	Ad nauseum.
Female	And, so, do we expect as Senators any of the parties to come forth before we get to the floor and say, oh, but we thought this and it wasn't in here. Or, oh, but we thought this but it wasn't in here. So, I just want to get it on record that if you've seen everything and everybody signed off on everything, that the expectation is that is correct and that's why I wanted to make sure that everybody – that ya'll – that everybody that, you know, open hands … if that's going to happen.
Male	Matt Gallagher will really have to be the one to – if you look –
	[laughing] Have you looked at his time?
Female 2 Huffman??	Senator Van de Putte, I have a document with their signatures all – a
Female	Okay. Alright. And --
Male	Senator, our expectation is this is the bill that should hit the floor and we have all looked at it. This is a group of very experienced lawyers that have done this a lot. I don't think you can – I think you can safely say these groups aren't going to come back and say no, wait a minute, we didn't mean it.
Female	Thank you. Well, I just wanted to make sure and I will save my questions. I know there are members here that need to catch a flight. I will ask Senator Huffman a little bit later the definition of reasonable deposition costs because I am not an attorney and don't know how that – the rules and guideline fix that but, that's fine. In the interest of time, Mr. Chairman, I have no further questions.
Chair	Senator Williams, do have questions?

	[unintelligible]
Chair	I know you've been a little lively today down there. Is there – are there any other –
??	[unintelligible]
Chair	Okay. [laughing] Every once in a while you need to have a Kumbayah on a tort – after these guys have been cooped up in a room together, I was – I remember when Waldrip – and we did the Y2K bill – you talk about some weird lawyer talk, sitting around the table talking about what ifs – it really wore both of us out – but that's the way these bills get done and I think the negotiated bill is the best way to do this simply because you have good jurisprudence and you do no harm, but you solve the problems that need to be solved. So, I appreciate these men spending time out of their day working on this and getting the job done. And I also appreciate the organizations – each of the organizations that went something to this. Are there any other questions?
	I just have one comment.
Chair	Sure, _____.
?? Male voice	And I appreciate everybody's work and I'm just so glad that I didn't have to be in there with you. But, wouldn't it be ironic – it's been reported in multiple media presentations over the last two or three days that this day may be the end of the world and if we got this group to agree --
	[laughing]
Male voice	-- and that happened – that's all I have to say.
Chair	Alright. Are there any other questions? Okay, the Chair hears none. Are there – is there anyone else who would wish to testify for or against or on the committee substitute for House Bill 274? Chair hears none. The public testimony is closed. Senator Huffman moves that we adopt the committee substitute for House Bill 274. Is there any objection? Chair hears none. It is so ordered. Now, Senator Huffman moves that House Bill 274 does not pass, but that the committee substitute in lieu thereof be recommended to the full Senatore. The Clerk will call the roll.
Clerk	Duncan. Aye. Deuell. Aye. Ellis. Aye. Fraser. Aye. Huffman. Aye. Jackson? Aye. Lucio? Aye.

	Van de Putte? Aye. Williams? Aye. Nine ayes.
Chair	There being nine ayes and no nays, the committee substitute for House Bill 274 be reported to the full Senate. There being no further business to come before the committee, we'll stand in recess. Call the Chair.