

## Texas Looks to “Rejuvenate the Courthouse” With New Rules for Expedited Trial, Permissive Interlocutory Appeal and New “Loser Pays” Provisions Potentially Creating Strategic Options for Claims Handling and Resolution

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### Introduction

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In 2011, the Texas Legislature passed House Bill 274, directing the Texas Supreme Court to promulgate new rules reducing the expense and delay of litigation. House Bill 274 calls for early “dismissal of causes of action that have no basis in law or fact” and for “expedited actions” when the amount in controversy does not exceed \$100,000.

Two of those sets of rules, governing permissive appeals and offers of judgment, were completed in September 2011. New Rule 168 of the Texas Rules of Civil Procedure allows for permissive appeals of interlocutory orders. Existing Rule 167 of the Texas Rules of Civil Procedure was amended to refine and expand the “loser pays” rules when a party refuses a reasonable settlement.

By its order of November 13, 2012, and **effective March 1, 2013**, the court promulgated: (1) new Rule 91a of the Texas Rules of Civil Procedure providing for early dismissal of meritless cases, and (2) new Rule 169 of the Texas Rules of Civil Procedure providing an expedited litigation path for cases involving less than \$100,000 in controversy. New Rule 169 is further augmented by amendments to Rules 47 and 190 of the Texas Rules of Civil Procedure and Rule 902(c) of the Texas Rules of Evidence.

Taken as a whole, these rule changes work together to provide new strategic ways of handling cases. Texas Supreme Court Justice Nathan Hecht characterized the new rules as “rejuvenating the courthouse.”

### New Permissive (Interlocutory) Appeal Provision

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#### Gravamen of Rule Change

Previously, Texas law allowed for interlocutory appeals only in very limited circumstances, as detailed in Texas Civil Practice and Remedies Code Chapter 51.014. Under this statute, interlocutory orders could be appealed only in narrowly defined circumstances or if both parties agreed to the interlocutory appeal, which happened rarely. Thus, in the vast majority of cases, the rulings of the trial court could not be reviewed until the controversy was finally decided — **after trial and the incursion of all costs incurred in preparing for trial.**

New Texas Rule of Civil Procedure 168, adopted effective September 1, 2011, along with corollary Rule 28 in the Texas Rules of Appellate Procedure, allows for the interlocutory appeal of any trial court order either on motion of a party or by the court’s independent initiative, so long as the order: (1) involves a controlling question of law, (2) as to which there is a substantial ground for difference of opinion, and (3) appeal of the order would materially advance the ultimate termination of the litigation. Mutual consent of the parties is no longer required. The order to be appealed should state that permission to appeal is granted, identify the controlling question of law and state the reason why appeal would advance the resolution of the case. New Rule 168 applies to prior trial court rulings so long as a party obtains an amended order complying with the procedure.

A trial court order will not guarantee review by the court of appeals. A party must first petition the court of appeals for permission to appeal within 15 days of the signing of the order in question. If the petition is granted, the permissive appeal is treated as an accelerated appeal.

### Import of Rule Change

Many litigants have been faced with unresolved, controlling legal questions as presented in motions for summary judgment, *Daubert* challenges, motions in limine and similar motions. These motions can impact the rights of the parties, the availability of particular relief, and the scope of trial.

The availability of an interlocutory appeal allows litigants to obtain answers regarding the law as applied to a particular case. The availability of an interlocutory appeal should encourage litigants to file dispositive motions earlier in a case, with an eye towards preparing an appropriate record for interlocutory appellate review. Litigants should also file motions regarding evidence admissibility, contract interpretation and other legal issues in order to streamline the litigation process.

## New Settlement Offer Provision

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### Gravamen of Rule Change

Former Texas Rule 167 of Civil Procedure set forth the procedure by which a defendant could make an offer of judgment. If a plaintiff refused the offer, and the final verdict was substantially less favorable than the refused offer, a portion of the plaintiff's recovery could be offset by the defendant's litigation costs. Former Rule 167 was relatively toothless — it could never create a right of recovery for a defendant and it could never offset completely a plaintiff's judgment. Indeed, in the event of a total defense victory, invocation of Rule 167 had no benefit whatsoever, as no judgment award existed to be offset.

Amended Texas Rule 167 of Civil Procedure, effective September 1, 2011, provides some teeth to the settlement offer procedure. Once a defendant files a notice invoking the settlement offer procedure, either the plaintiff or the defendant may make settlement offers. If the offer is refused by a plaintiff, the plaintiff is at risk of having its entire verdict offset, as opposed to only a portion of the verdict. The offset is mandatory whenever a settlement offer is more than 120 percent of the trial verdict. Conversely, if the defendant refuses a settlement offer, and the verdict is less than 80 percent of the settlement offer, the defendant will be forced to pay the plaintiff's litigation costs,

including attorney fees, up to the amount of the recovery. Thus, a defendant's refusal of a settlement offer could create a right for fee recovery where none otherwise existed. While settlement offers can be withdrawn or modified, once the procedure is invoked, the procedure cannot be halted.

### Import of Rule Change

Amended Texas Rule 167 of Civil Procedure should make parties cautious before sending offers of settlement and cautious before refusing any offer. Under prior Rule 167, a defendant could make any offer of settlement without any fear of negative repercussion — the risk was only to the plaintiff who refused the settlement offer. Even then, the risk was not too great, as the plaintiff's recovery would never be offset completely. Under the revised Rule 167, however, once a defendant invokes the procedure, the plaintiff can make offers of settlement, thereby creating a right of recovery for otherwise unrecoverable fees. By the same token, a plaintiff cannot refuse an offer of settlement with impunity, as the plaintiff's entire recovery could be placed at risk of offset. Defendants will have to weigh carefully their potential exposure before invoking the settlement offer procedure, and will then have to make realistic settlement offers. A defendant's failure to make a realistic settlement offer will allow a plaintiff to make a realistic settlement offer, thereby increasing the defendant's exposure with a fee recovery. Parties will have to carefully weigh the strengths and weaknesses of their case in order to make realistic settlement offers, as the failure to make or accept a reasonable settlement offer could have significant consequences.

## New Dismissal Rule

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### Gravamen of Rule Change

New Texas Rule 91a of Civil Procedure, titled *Dismissal of Baseless Causes of Action*, permits a party to move to dismiss a cause of action on the grounds that it has no basis in law or fact. A cause of action has no basis in law if the allegations, taken as true (together with the inferences reasonably drawn from them), do not entitle the claimant to the relief sought. A cause of action has no basis in fact "if no reasonable person could believe the facts pleaded."

Rule 91a sets forth the procedure for the dismissal motion. The body of the motion must: (1) refer to (invoke) Rule 91a, (2) identify the cause of action being targeted, and (3) state with specificity the reasons why the cause of action "has no basis in law, no basis in fact or both."

Further, the motion **must** be (1) filed within 60 days of the first pleading containing the cause of action challenged, (2) filed at least 21 days before any hearing thereon, and, importantly, (3) **granted or denied within 45 days** after the motion is filed. The court is **not** to consider evidence, effectively creating a “four corners” rule.

The cornerstone of the new rule is that the “loser pays.” That is, the prevailing party is awarded the costs and attorney’s fees incurred in challenging the cause of action.

### Import of Rule Change

In theory, this new rule ought to cause claimants to think twice before pleading every potential cause of action (almost by reflex). The new rule **should** encourage a careful pleader to “shoot with a rifle, and not a shotgun.” How this rule operates in actual practice, however, remains to be seen. Will this rule effectively toughen Texas’ notice pleading standards? If not, the rule may amount to little more than a Texas state court analog to federal procedural rule 12(b)(6) (dismissal for failure to state a cause of action). On the other hand, particularly in light of the political context in which the rule was granted, it may be that some courts will take a more aggressive approach when analyzing the sufficiency of a pleading. Of course, the approach taken will not be known unless and until motions under Rule 91a are first filed and decided. Potential movants, however, may be unwilling to act as the test case due to the “loser pays” provision.

## New Rules for Expedited Actions

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### Gravamen of Rule Changes

Amended Texas Rule 47 of Civil Procedure, titled *Claims for Relief*, will require plaintiffs to state in their petitions whether they seek: (1) monetary relief of \$100,000 or less (including damages of any kind, penalties, costs, expenses, pre-judgment interest and attorney fees), (2) monetary relief of \$100,000 or less and non-monetary relief, or (3) monetary relief over \$100,000 but not more than \$500,000, (4) monetary relief over \$500,000 but not more than \$1,000,000, or (5) monetary relief over \$1,000,000.

New Texas Rule 169 of Civil Procedure, titled *Expedited Actions*, applies to actions in which “all claimants” affirmatively plead that “they seek only monetary relief aggregating \$100,000 or

less” (including penalties, costs, expenses and attorney fees). A claimant who makes this affirmative allegation may not recover more than \$100,000. Cases **must** be removed from the expedited process for “good cause shown or if any claimant files a pleading, amended pleading or supplemental pleading seeking non-monetary relief.”

In cases where new Rule 169 applies, discovery will be governed by Amended Texas Rule 190.2 of Civil Procedure. The discovery period begins when suit is filed and continues until 180 days after the date the first **request** for discovery of any kind is filed. A party is limited to 15 each for requests for admissions, interrogatories and requests for production. Each party is limited to no more than 6 hours in total to examine **all** witnesses in oral depositions (or up to 10 hours by mutual consent). Importantly, a party may request disclosure of **all** documents, electronic information and tangible items that the disclosing party has in its possession, custody or control **and** may use to support its claims or defenses. Rule 902 of the Texas Rules of Evidence, titled *Self-Authentication*, was amended to include a “Medical expenses affidavit.” This affidavit will serve as prima facie proof both that expenses incurred for treatment were reasonable and necessary **and that the services provided were reasonable and necessary.**

Further, on either party’s request, the court **must** set a trial date within 90 days after the discovery period ends. Each side will be limited to **5 hours to try its case**. Absent consent or contractual requirement, the court **cannot** require alternative dispute resolution. A party may only challenge the admissibility of expert testimony as an objection to summary judgment evidence under Texas Rule 166a of Civil Procedure or during trial on the merits.

### Import of Rule Changes

If pursued aggressively, this suite of new rules and amendments could force cases to resolution far faster than is the current norm. If a discovery request is served with the petition, the discovery period ends 180 days later. If requested, the case must be set for trial 90 days after that. Consequently, the trial would occur approximately nine months after the suit was filed. Moreover, targeted discovery and depositions would be substantially curtailed. Absent a request for summary judgment, there would be no mechanism to challenge the admissibility of expert testimony prior to trial. Amended Rule 190.2 includes a device similar to the disclosure rule under federal rule 26 in

which a party would have 30 days from a request to produce “all documents, electronic information and tangible items that the disclosing party has in its possession, custody or control and may use to support its claims or defenses.” Neither side, absent a contractual provision, could force mediation.

Plaintiffs should be cautious since the trade-off for an expedited trial is a fixed damage ceiling. Commercial litigants with a small offset claim might be induced to file first, thereby forcing a larger counter claim into the expedited procedure. Parties may attempt to avoid the impact of this rule in several ways. First, the party might allege that the damages exceed \$100,000 including penalties (as might well be the case if a claim for punitive damages is made). Second, a party may add a claim for non-monetary relief (i.e., injunctive relief of some form). Third, a party may move to have this matter removed from the reach of Rule 169 for good cause shown.

## Conclusion

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The new Texas rules provide some important options for case handling and resolution. The new rules on expedited actions, summary dismissal and the revised rule regarding interlocutory appeals should make resolution of small cases and cases with controlling issues of law reach resolution faster. Similarly, the “loser pays” aspects of several rules should make parties more cautious about filing marginal or meritless claims or making meritless settlement offers or refusing settlement offers that have merit.

The new rules regarding interlocutory appeal and settlement offers are now in place. The rules regarding expedited claim handling and summary dismissal are set to become effective on March 1, 2013. The comment period for these two rules closed on February 1, 2013, with the proposed rule receiving criticism from various attorney groups due to its “mandatory” nature. There is some possibility the rules will be altered before becoming effective, with practitioners on both sides of the bar asking that the new rules be “permissive” in application rather than “mandatory.” The November 13, 2012 *per curiam* order (adopting Rule 91a and Rule 169), however, provides that “the Court has concluded that the objectives of HB 2743 cannot be achieved, or the benefits to the administration of justice realized, without rules that compel expedited procedures in smaller cases.” Whether the new rules succeed in “rejuvenating the courthouse,” as hoped by Justice Hecht, remains to be seen. However, the strategic options presented by these rules should be incorporated into any litigation strategy.

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*To discuss any questions you may have regarding the opinion discussed in this Alert, or how it may apply to your particular circumstances, please contact:*

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