

**PLEASE SUPPORT HB 1153**  
**Concerning Attorney Fees When An Action is Dismissed Prior to Trial**  
**SPONSORS: Rep. Priola(R) & Sen. Tochtrop (D)**

**What does the bill do?**

As the law stands right now, any tort action filed as a result of death, injury to a person, or property destruction, requires a court to award a defendant attorney fees if the case is dismissed on a motion to dismiss under Rule 12 (b) of the Colorado rules of civil procedure. This bill extends the requirement to pay attorney fees to all civil actions. To clarify, this only requires the defendant to pay these fees if the case does not go to trial.

**Why is this necessary?**

The purpose of this bill is to reduce the amount of frivolous law suits that enter into the court. Such legislation will be beneficial in making the entire Colorado judicial system more efficient. Below are examples of how such tort reform will not only benefit not just the legal system, but the state of Colorado as a whole.

1. Small businesses are particularly vulnerable to frivolous tort lawsuits. The National Federation of Independent Business estimates that tort litigation costs small businesses over \$105 billion annually, \$35 billion of which comes out of their pockets, not insurance.<sup>1</sup> These types of reforms vastly improve the job climate for small business because there is less risk of such frivolous law suits.
2. Tort costs are especially prevalent in health care. Many doctors spend thousands of dollars each year, if not each month, on premiums for medical-malpractice insurance—not because American surgeons and dentists are especially disposed to malpractice, but because a lost lawsuit could be ruinous. This type of tort reform will help protect doctors from frivolous malpractice suits, and in turn, would lead to lower healthcare costs in the long term for Colorado.<sup>2</sup>
3. Empirically, it is shown that this type of tort reform incentivizes settlements outside of courts, which will free up individual court case loads.<sup>3</sup>

**Common Misconception: This Type of Tort Reform Originated in Texas**

Loser pays systems are not particularly unique among industrialized nations. If anything, the opposite is true. Germany, England, Canada, Australia, and most other European nations have such a system.<sup>4</sup> While the Texas legislation brought the issue to the forefront in the United States, it would be dishonest to say the reforms were completely original.

**Priola Amendment L001**

**What Does it Accomplish?** The Priola Amendment accomplishes two primary objectives

1. In the original bill, it would be mandatory for judges to award attorney fees to cases dismissed by a 12b ruling. The strike below gives the judge discretion as to who to award such fees too which will reduce costs associated with this bill.
2. It changes the bill so that this legislation will not apply to cases relating to the government, cases involving domestic relationships, and cases brought under the “Colorado Children’s Code” concerning juveniles

<sup>1</sup> DeMaura, Stephen. "Loser Pays,' Texas Small Business Wins | National Review Online." National Review, 31 May 2011. <<http://www.nationalreview.com/corner/268436/loser-pays-texas-small-business-wins-stephen-demaura>>.

<sup>2</sup> "Sorry, Losers." *The Economist*. 19 May 2011. <<http://www.economist.com/node/18712311>>.

<sup>3</sup> Gleason, Patrick, and Jason Russell. "RUSSELL & GLEASON: Perry's 'loser Pays' Is an Economic Winner." The Washington Times, 01 Sept. 2011. <<http://www.washingtontimes.com/news/2011/sep/1/perrys-loser-pays-is-an-economic-winner/>>.

<sup>4</sup> Gryphon, Marie. "Common-Sense Justice in Alaska." *National Review Online*. National Review, 28 Oct. 2008. <<http://www.nationalreview.com/articles/226102/common-sense-justice-alaska/marie-gryphon>>.

## States with a 'Loser Pays' System

- **Texas (HB 274)**
  - Passed by Texas Legislature and signed into law by Governor Perry in May 2011
  - Bill was designed to make litigation faster and less costly
  - Unlike the English Rule (the losing party pays the entirety of the other party's attorney fees), the reform in Texas applies only in certain situations. It does not apply to class-action suits, action by or against the government or cases in small claims courts.<sup>5</sup>
- **Alaska**
  - Alaska has always had some form of loser pays legislation, dating back to its time as a territory. However, it only pays a portion of the attorney fees.<sup>6</sup>
    - Alaska Rule of Civil Procedure 82
- **New York**
  - Has a loser-pays system when suing for unfair and deceptive business practice. It also has an offer-settlement system if the final outcome is worse than a settlement offer.<sup>7</sup>
- **California**
  - Has a loser-pays system when suing for unfair and deceptive business practice. It also has an offer-settlement system if the final outcome is worse than a settlement offer.<sup>8</sup>
- **Illinois**
  - Has a loser-pays system when suing for unfair and deceptive business practice.<sup>9</sup>
- **Florida**
  - Has an offer-settlement system if the final outcome is worse than a settlement offer.<sup>10</sup>
- **Oregon and Oklahoma**
  - Have enacted statutes that apply loser-pays principles to many areas of litigation. In Oklahoma a defendant can choose an "offer-of judgment" provision. Oregon has converted a lot of one-way loser-pays statutes into two-way loser-pays statutes.<sup>11</sup>

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<sup>5</sup> Bill Text at <http://www.capitol.state.tx.us/tlodocs/82R/billtext/pdf/HB00274F.pdf>

<sup>6</sup> Rennie, Douglas. "RULE 82 & TORT REFORM: AN EMPIRICAL STUDY OF THE IMPACT OF ALASKA'S ENGLISH RULE ON FEDERAL CIVIL CASE FILINGS." *Alaska Law Review* 29.1 <<http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1172&context=alr>>.

<sup>7</sup> LaMance, Kevin. "Loser-Pays System States." *Legal Match*, 14 Jan. 2014. <<http://www.legalmatch.com/law-library/article/loser-pays-system-states.html>>.

<sup>8</sup> *Ibid.*

<sup>9</sup> *Ibid.*

<sup>10</sup> *Ibid.*

<sup>11</sup> *Ibid.*

## House sends 'loser pays' bill to Senate

May 9, 2011

The Texas House on Monday approved a watered-down version of "loser pays" legislation that seeks to add financial penalties for filing frivolous lawsuits.

The bill, approved largely on a party-line vote, could impose a hefty penalty on lawsuit winners, leading to a tongue-in-cheek Democratic amendment to rename it the Loser Pays and Sometimes the Winners Pay Act.

And, thanks to a floor amendment whose passing surprised many, the bill heads to the Senate with a bonus for homeowners who successfully contest property tax appraisals: their court costs and attorney fees would be paid by the losing appraisal district.

Gov. Rick Perry praised the bill, saying it moves Texas "one step closer to implementing a loser pays system that will help expedite legitimate legal claims and crack down on junk lawsuits."

Perry declared the bill a legislative emergency last week after Democrats temporarily derailed it on a parliamentary technicality known as a point of order.

As originally introduced, the bill would have created a true loser pays system — lawsuit losers would have to pay the other side's court costs and lawyer fees.

But House Bill 274 was changed in committee to assess legal fees against somebody who files a lawsuit that is tossed out under a so-called motion to dismiss for failing to state a valid legal claim.

Texas is among eight states that do not allow motions to dismiss before evidence is presented in civil court, and the bill would direct the Texas Supreme Court to adopt rules creating that option.

Monday's House debate was largely devoid of the partisan hostilities that boiled over Saturday when the Republican majority invoked a rarely used rule to pass the loser pays bill on second reading without allowing debate or amendments. Their unusual move was provoked by stalling tactics that the Democratic minority used to derail a number of Republicans' priority bills.

Democrats focused their objections on changes that could force some lawsuit winners to pay their opponent's legal costs under the "offer of settlement" rule, which was adopted to encourage pretrial settlements as part of the 2003 tort reform legislation, aimed at limiting the number of civil lawsuits and the size of many damage awards.

The penalty would apply when plaintiffs, or those who file suit, reject a settlement offer and go to trial. If the judge or jury were to award less than 80 percent of the defendant's settlement offer, the plaintiff would have to pay legal fees accrued by the defense from the time the offer was rejected.

Under current law, the legal fees are capped at no more than 50 percent of economic damages and 100 percent of all other damage awards.

The loser pays bill would strip out the cap. Rep. Craig Eiland, D-Galveston, said that unfairly turns winners into losers who could end up being required to pay more than they won in court.

"This is not about frivolous lawsuits; this is about valid, justifiable lawsuits," Eiland said. "The jury could find that I was correct in filing that lawsuit, that I was wronged but I would still end up having to pay their attorney fees."

Bill supporters say a similar provision protects plaintiffs who make a counteroffer that is rejected. Defendants would have to pay a plaintiff's legal fees if the court award were 120 percent of the counteroffer.

"This evens the playing field," said Rep. Brandon Creighton, R-Conroe, the bill's author.

Because no amendments were allowed during Saturday's second reading of the bill, Monday's hearing was the first chance to propose changes from the floor. But House rules require two-thirds approval for amendments to bills on third and final reading, creating a high hurdle that Rep. Roland Gutierrez, D-San Antonio, met with his "taxpayer relief amendment."

Gutierrez proposed allowing homeowners to collect legal fees when they successfully contest their home values. If the appraisal district wins, however, the agency is entitled to nothing because "they have their own attorneys."

Rep. Phil King, R-Weatherford, opposed the amendment, saying that while he was sympathetic to its goals, the change would impose a large, unexpected financial burden on taxing districts that would ultimately be paid by taxpayers.

"Our taxes have gone way too high," Gutierrez responded. "This is a vote to give them the relief they need and send the tax appraiser where he needs to go."

The amendment passed 100-45.

Source: Austin American Statesman<sup>12</sup>

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<sup>12</sup> Lindell, Chuck. "House Sends 'loser Pays' Bill to Senate." Austin American Statesman, 9 May 2011. <<http://www.statesman.com/news/news/state-regional-govt-politics/house-sends-loser-pays-bill-to-senate/nRZtG/>>.

## **'Loser Pays,' Texas Small Business Wins**

May 31, 2011

Gov. Rick Perry and the Texas state legislature want the rest of the country to hear this message loud and clear: The Lone Star State is open for business.

In a unanimous vote last week, the Texas senate adopted 'loser pays' tort-reform legislation, which says that a plaintiff must pay the winning party's legal fees if their complaint is judged to be groundless. On Wednesday, the Texas house concurred. Governor Perry, who had championed the legislation from its inception, signed it Monday night.

The *Wall Street Journal* editorialized, "This Texas upgrade will build on reforms in 2003 and 2005 that have vastly improved the legal climate in what has not coincidentally become the country's best state for job creation. Texas rewrote everything from class-action certification to product liability" — and I would add the state's medical-malpractice reforms to that list.

No wonder the nation's CEOs list Texas as the best state for business.

The success of 'loser pays' is destined to be viewed as a key victory for the Republican legislature over a group that once enjoyed almost limitless influence in the state: the Texas Trial Lawyers Association, which lobbied aggressively against the law. Prior to the reforms instituted in 2003 and 2005, Texas was an ambulance chaser's paradise. Nowadays, even the \$13 million the trial lawyers spent to defeat Perry and other pro-tort-reform Republicans in the 2010 election had little impact. In a stunning rebuke, Lt. Gov. David Dewhurst stared down the trial lawyer lobby and shepherded the measure through to a 31-0 vote in the Senate.

Perry is blazing an important trail for other governors such as South Carolina's Nikki Haley, Pennsylvania's Tom Corbett, Florida's Rick Scott, Oklahoma's Mary Fallin, and Alabama's Robert Bentley, all of who ran and won while proposing similar legal-reform ideas.

Why are these types of reforms so important?

The cost of tort litigation is strangling the U.S. and small businesses in particular. According to Marie Gryphon of the Manhattan Institute, the cost of tort litigation topped \$247 billion in 2006. The National Federation of Independent Business estimates that tort litigation costs small businesses over \$105 billion annually, \$35 billion of which comes out of their pockets, not insurance.

'Loser pays' reform will result in fewer frivolous lawsuits, lower litigation costs, and more expedient justice for legitimate claims. Just as important, the passage of loser pays is yet another example of how Texas has taken the national lead in job creation and the fostering of a strong business climate. Immediately following Perry's earlier reforms, the number of physicians applying to practice rose by 60 percent, filling a increasing need across the state, according to the *Journal*. Likewise, by tossing off the threatening shroud of frivolous lawsuits, Texas is removing yet another barrier to small business expansion and job growth.

In a country groping in the darkness for ways to create more good-paying jobs, the nation's governors should look to the aggressive reform agenda in Texas to light their path.

Source: National Review<sup>13</sup>

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<sup>13</sup> DeMaura, Stephen. "Loser Pays, Texas Small Business Wins | National Review Online." National Review, 31 May 2011. <<http://www.nationalreview.com/corner/268436/loser-pays-texas-small-business-wins-stephen-demaurea>>.

## **RUSSELL & GLEASON: Perry's 'loser pays' is an economic winner**

September 1, 2011

There isn't much policywise coming out of Europe these days that one would expect a conservative like Texas Gov. Rick Perry to emulate because the Continent typically is the domain of the left. However, Mr. Perry recently imported a reform from across the pond that is sure to make the Lone Star State, already the economic envy of the nation, even more of a job-creating juggernaut.

Under the current American legal system, each side in litigation typically retains financial responsibility for its own legal fees absent a prearranged agreement stating otherwise. Yet under the English rule, adopted by virtually every other legal system in the West, the responsibility for attorneys' fees can be summed up in two words: Loser pays. When two sides enter into litigation, the losing side must pay the winning side any damages awarded, as well as compensation for legal fees incurred by the victor.

Mr. Perry made passage of a modified version of the English loser-pays rule a top priority during this year's biennial session of the Texas Legislature. After emphasizing the need for such tort reform during his State of the State address in February, Mr. Perry made loser pays the law of the land in Texas by signing H.B. 274 in May.

As Mr. Perry remarked in his signing statement, loser pays "provides defendants and judges with a variety of tools that will cut down on frivolous and costly claims in Texas."

The appeal of loser pays is that it mitigates unjustified lawsuits against individuals and businesses. Empirically, it has been shown that the loser-pays system incentivizes two conflicting parties to settle outside of court, meaning savings on attorneys' fees for both sides as well as reduced costs for taxpayers caused by a less congested court system for the state and plaintiffs who have warranted cases.

According to Ryan Brannan, policy analyst for the Texas Public Policy Foundation, loser pays makes the legal system more objective and legitimate. "The procedural protections ... go a long way toward ensuring that our judicial system dispenses justice according to the merits of the case rather than the size of the wallet," Mr. Brannan said.

Unlike the English-style loser-pays rule, the Texas version applies in certain situations and does not apply to class-action suits, an action by or against the government or anything in small claims court.

While more constrained than English-style loser pays, the Texas version allows an impartial judge to determine when a lawsuit has, according to the language of the law, "no basis in law or fact on motion and without evidence," giving the judge the authority to declare an early dismissal when appropriate.

This is not the first time Mr. Perry has tackled necessary pro-growth tort reform. The implementation of loser pays in Texas comes on the heels of Mr. Perry's landmark 2003 medical liability reforms, which established a burden of proof for punitive damages similar to criminal law by requiring a unanimous jury verdict and capped noneconomic damages at \$750,000. A 2008 report by the Perryman Group found those reforms to be directly responsible for an immediate first-year influx of almost 2,000 new physicians into Texas as well as a 70 percent drop in lawsuits against hospitals. The Texas Public Policy Foundation estimates that the state has netted more than 25,000 doctors since. Following the 2003 reforms, Texas doctors saw medical liability insurance rates decline by an average of more than 21 percent, with some seeing nearly a 50 percent rate cut. Those savings enabled hospitals to expand charity care by 24

percent. Three years after these lawsuit reforms, Texas became the first state ever to be removed from the American Medical Association's list of states experiencing a liability crisis.

Loser pays, which took effect on Thursday, is expected to have a positive impact on the already booming Texas economy once it takes effect. Jeff Moseley, president and chief executive officer of the Greater Houston Partnership, states that "loser pays legislation protects businesses and helps us grow jobs and paychecks."

After Texas was rated as the top state in which to do business for the past seven years by CEO Magazine, it was hard for some to imagine how to make Texas an even more attractive place for employers to create jobs. Yet, with the passage of loser pays, Mr. Perry has found a way to do just that. There is a strong case to be made that Perry-style reforms could help revive the sluggish national economy.

**Source: The Washington Times<sup>14</sup>**

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<sup>14</sup> Gleason, Patrick, and Jason Russell. "RUSSELL & GLEASON: Perry's 'loser Pays' Is an Economic Winner." The Washington Times, 01 Sept. 2011. <<http://www.washingtontimes.com/news/2011/sep/1/perrys-loser-pays-is-an-economic-winner/>>.



## Sorry, losers

May 19, 2011

SOME bills are much more contentious than suspenseful. Take Texas's new "loser pays" measure. The bill, an extension of the state's much-vaunted 2003 tort reforms, would make some people who lose a lawsuit responsible for the legal fees of their opponents. Even some winners would be on the hook, if the jury award is much less than they had previously been offered in a settlement. Rick Perry, the governor, has designated the reform an emergency matter, and on May 9th it easily passed the state's House of Representatives, thanks to the huge Republican majority there. It is now with the state Senate, which also has a Republican majority. They will fiddle with the language. But Mr Perry should be getting his pen ready.

Texas's "loser pays" provision is the latest in a series of such reforms. Tort reform has long been totemic to the political right, which argues that the current system allows trial lawyers to seek extortionate settlements for alleged damages. That creates extra costs for business, encourages litigiousness and warps sectors of the economy. According to some assessments, the costs of the tort system are equivalent to almost 2% of GDP each year.

Tort costs are especially heavy in health care. Many doctors spend thousands of dollars each year, if not each month, on premiums for medical-malpractice insurance—not because American surgeons and dentists are especially disposed to malpractice, but because a lost lawsuit could be ruinous. Tort reform has been back in the spotlight as concerns about government spending and health-care costs have spurred new looks at cost-saving, confidence-boosting measures. In January, as protesters were preparing to bundle into the Wisconsin state capitol to support unions, Governor Scott Walker signed a package that caps punitive damages for personal injuries, among other provisions. Last week the Tennessee General Assembly passed a similar bill capping non-economic damages.

There is also action at the national level. Congress is considering a bill that would cap awards and lawyers' fees and put a three-year statute of limitations on medical-malpractice claims. According to a report from the Congressional Budget Office, the measure would reduce the federal government's health spending by \$34 billion between 2011 and 2021. The projected savings would mostly come from lower premiums, along with a slight decline in "defensive medicine"—doctors ordering unnecessary tests and procedures to cover themselves against possible lawsuits.

Critics say that medical care will deteriorate if damages are capped. There is no evidence of this. Texas's rate of workplace injuries, for example, is lower than the national average. Tort reform can also help states attract or retain businesses and workers, particularly in the health sector.

But even if tort reform could save the country several billion dollars a year, that is still just a sliver of overall health spending. It may be that tort reform is most valuable as a signalling device. It shows that a state cares about business. That would go some way to explaining why tort reform is such a priority for crusading fiscal conservatives. Frivolous lawsuits are, along with criminal aliens and fraudulent voters, a bit of a bogeyman. They do exist, but are hardly as ubiquitous as the thundering rhetoric would suggest.

**Source: The Economist**<sup>15</sup>

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<sup>15</sup> "Sorry, Losers." *The Economist*. 19 May 2011. <<http://www.economist.com/node/18712311>>.

## Common-Sense Justice in Alaska

October 28, 2008

In the two months since vice-presidential hopeful Sarah Palin first appeared on the national scene, journalists and voters alike have become curious about Alaska. Palin family activities like moose hunting and competitive snowmachine racing hint at a culture of rugged individualism that big-city dwellers may find quaint. But Alaska's state motto — "Alaska to the Future" — reflects a polity that revels in its own vision of progress. Alaska's unique system of civil justice, for instance, demonstrates that the Last Frontier's common-sense traditions sometimes yield better policies than can be found elsewhere in the United States.

Alone among the states, Alaska embraces a traditional "loser pays" rule for legal fees in most civil lawsuits. If you prevail in a lawsuit in Alaska, you're entitled to recover your reasonable attorney's fees from your defeated adversary. The rule discourages weak lawsuits and better compensates plaintiffs with strong claims. It makes intuitive sense to Americans who strongly value personal responsibility. After all, why should one citizen have the power to impose a huge financial burden on another despite being in the wrong? Legal accusation should be a serious matter, and loser pays punishes frivolous tort prospecting.

In fact, loser pays seems so intuitively fair that many Americans are surprised to discover that the rest of the nation follows a very different rule. The so-called "American rule" — that each side in a dispute must pay its own lawyers, regardless of the outcome — prevails everywhere else in the country, with unfortunate results for justice. As John Stossel observes: "When you win, you lose under our system. I win, I defeat your claim. But it has cost me tens, hundreds of thousands, sometimes millions of dollars. I have a victory that has brought me to the poorhouse."

It's deeply ironic that most of America has adopted a rule so inimical to individual responsibility. Every welfare state in Europe holds its litigants responsible for the costs they impose on their fellow citizens, as does Canada, Australia, and the vast majority of other countries in the world. In this respect, at least, these nations better exemplify our cherished frontier values than we do. Alaska alone has enshrined individual responsibility in its litigation system.

Alaska's unique rule is a product of its history. When the United States purchased Alaska from Russia in 1867, the icy wilderness had so few inhabitants that the U.S. neglected to establish immediately any civil law there at all. Congress instituted a civil legal system for Alaska in 1884 through an Act that borrowed from Oregon's civil code and applied it to the new territory virtually wholesale. At that time, an Oregon statute allowed the prevailing party in a civil suit to recover attorney's fees from the loser. While Oregon unwisely dumped its loser-pays rule eventually, Alaska embraced loser pays and stuck with it.

Loser pays has helped Alaska resist the excesses of personal-injury litigation that have clogged so many American courts. Tort lawsuits comprise only 5 percent of Alaska's litigation docket, while they make up nearly 10 percent in the rest of the U.S. By contrast, Alaskan domestic disputes and probate matters, to which loser pays does not apply, form a relatively larger part of the state's cases. The Alaska Judicial Council conducted a review of Alaska's loser-pays rule in 1989 and found that, while the law could not deter filings by irrational plaintiffs, it did reduce the number of low-merit lawsuits in Alaskan courts. The Council also found that a majority of Alaskan attorneys liked the system and believed that it functioned well.

Of course, the rule is not perfect. For one thing, it provides only partial reimbursement. Prevailing plaintiffs receive roughly two-thirds of their actual legal expenses and prevailing defendants recover only 20 to 30

percent of their bills — too little to serve fully the interests of either justice or judicial efficiency. Alaska also has not explicitly legalized litigation insurance, which permits plaintiffs with modest means but strong legal cases to protect themselves against the possibility of a fee award. Such insurance is common in England and in other loser-pays countries, and it plays an important role in preserving access to justice in a loser-pays system.

Still, Alaska's rule puts the state head-and-shoulders above the "lower 48." Perhaps U.S. state lawmakers whose attention has been captured by Governor Palin's sudden celebrity will embrace an Alaskan export other than fossil fuels or King crab: loser-pays principles could help to make court systems faster and cheaper — and outcomes more just — from coast to coast.

**Source: National Review<sup>16</sup>**

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<sup>16</sup> Gryphon, Marie. "Common-Sense Justice in Alaska." *National Review Online*. National Review, 28 Oct. 2008. <<http://www.nationalreview.com/articles/226102/common-sense-justice-alaska/marie-gryphon>>.