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## Who Wins with “Loser Pays” Legislation?



In May 2011, the Texas State Legislature passed “loser pays” legislation, which implements a number of tort reforms, including new rules allowing courts to dismiss meritless suits and awarding attorneys’ fees to the prevailing party who brings a successful motion to dismiss those meritless claims. The intention behind the recently passed “loser pays” legislation was to streamline the litigation process, lower costs, and allow parties to resolve disputes quicker, cheaper, and more fairly. Whether that will be the actual effect of House Bill 274 depends on who you speak with, however, and the real winner of loser pays legislation in Texas is yet to be understood.

Many view the new tort reforms, along with prior tort reform, as improving the legal climate and job creation in Texas. Some view the legislation as good news for small business, but bad news for Plaintiffs’ lawyers. Its proponents claim House Bill 274 will result in fewer frivolous lawsuits, lower litigation costs, and provide speedier justice for those that litigate meritorious claims. Its opponents claim, among other things, that the bill will give the upper hand in litigation to large corporations and will have the effect of preventing some individuals with legitimate claims from bringing their claims.

Under House Bill 274, the Texas Supreme Court has been assigned the task of making new rules that will allow Texas state courts to dismiss meritless lawsuits – before hearing evidence on the claims – and to award attorneys’ fees to prevailing parties after the court’s ruling on a motion to dismiss. Other provisions of House Bill 274 include: changes to the cap on attorney fees awards after a defendant triggers an offer of settlement that the plaintiff rejects; new rules to expedite suits seeking damages under \$100,000; and, expanding the types of trial court orders that are subject to appeals before a final judgment is entered.

Understanding how House Bill 274 works and its effect on the litigation process is important for both potential plaintiffs that are considering pursuing their claims, and the defense strategy employed by those defending claims brought by those plaintiffs. While the effectiveness of House Bill 274 and its new motion to dismiss practice remains to be seen, Friedman & Feiger is prepared to counsel its clients on the strengths of their claims and/or defenses and how to best prosecute or defend them.

House Bill 274 should not deter you from pursuing good claims and, likewise, it should not be an impediment to asserting valid defenses.

Sincerely,

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### INSIDE

In The Spotlight 2

Living Estate Planning Tools 2

A Focus Group Can Help Your Case 3

“Kids Just Wanna Have Fun” 4

Upcoming Events Calendar 4



## In The Spotlight: R. Brian Shields



### Duties, Rights and Remedies between Principals and Agents

Many business owners often ask themselves a very common question: as the owner of a company, what is my legal relationship with my employees and agents? While this area of the law has many nuances, some of the more important and fundamental elements are addressed herein.

Absent any agreement to the contrary, the principal of a company is obligated to (1) pay the agent; (2) reimburse the agent for reasonable expenses to do what the principal has ordered the agent to do; and, (3) indemnify the agent if he is held liable for something done within his duties without being negligent. For example, a construction worker negligently drops a hammer onto the head of a passerby, causing a serious injury to the passerby. The construction company would not have to reimburse the worker if the worker was sued because of the worker’s own negligence. In addition to the principal’s obligations above, the agent, in turn, owes duties to the principal. The first is a duty to act with normal care. If the agent



does not act with normal care, he will owe the principal damages. In the example above, if the passerby sued the company instead of the worker, and the company was found liable, the worker would have to indemnify the company because it was the worker’s negligence that caused the injury and not the company’s. In addition to a

duty of care, the agent also owes a duty of loyalty, meaning the agent cannot be involved in any self-dealing as well as the agent cannot usurp any business opportunities. Another example: Brad is hired as the CEO of a major movie theater. He is an agent of the company. Brad notices, while he is CEO, that the land neighboring the movie theater could be developed into housing. If Brad attempted to do this, he would be in violation of his duty of loyalty. Brad would first have to bring the opportunity to the movie theater and only if the movie theater passed on this business opportunity would Brad then be free to purchase the land and develop it into housing. Finally, the agent has a duty not to compete. Using the movie theater example, if Brad attempted to build a neighboring movie theater with the adjacent land, this would be in violation of his duty not to compete. However, an employee may, while still employed, prepare to enter into competition once his employment ends by setting up his own business, so long as he does not take away from his previous employer’s business by soliciting customers or key employees. If the agent of the principal breaches any of the above duties and profits from this disloyalty, the agent must give any profits he obtained directly to the principal.

As you can see, these are important concepts that affect every company on some level. It is crucial that you understand these relationships and operate your business accordingly.

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## Living Estate Planning Tools By Joy H. Phillips

Consider the following situations: 1. Your 18 year old is at college and in a car accident. He is rushed to the hospital and is unable to communicate or is unconscious. You call the hospital and ask for his present medical status. The hospital staff will not provide you with information regarding your child; or, you are at the hospital and the doctors decline to provide you with any information regarding your child’s injuries or condition. You ask the hospital to release your child to your care and you are refused. 2. Your 18 year old child signed a lease, but she is incapacitated and you are unable to negotiate with the landlord regarding the lease. 3. Your 18 year old child’s credit cards are stolen. You attempt to cancel the credit cards to prevent identity theft and the credit card companies will not speak with you.

Aren’t you the child’s parents? Don’t you have a right to make these important decisions for your own child? Legally, the answer is “No”. The legal age of an adult in Texas, is age 18. When your child reaches the legal age of adulthood, you no longer have legal control of your child’s matters. While you may consider the person a child, the “legal adult” has the ability to make his or her own decisions without being overridden by his or her parents. How could you have planned ahead? Estate planning is not just a tool for planning for death, but is a very important tool for lifetime planning in cases of incapacity or disability. Further, without the proper legal documentation or estate planning tools in place for the living, parents have no legal right to make decisions for their child who is, in the eyes of the law, a legal adult. Useful “living” estate planning tools include the Statutory Durable Power of Attorney, the Medical Power of Attorney, the General Power of Attorney, the Special Power of Attorney, HIPAA Authorization, and the Directive to Physicians otherwise known as the “Living Will.” Should you wish to discuss the living estate planning options for you and each of your children, please contact me at the firm.

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**Holding a Focus Group Before Trial Can Help You Win Your Case!**

**By James R. Krause**

It is beneficial for trial teams to be aware of juror biases and reactions when preparing for trial. Jury focus groups help identify key issues and themes and provide valuable insight into the arguments that will drive jurors' decisions. They identify these key issues and themes by analyzing juror feedback.

In most cases heading towards a jury trial, you may request that your lawyer hire a jury consultant to assist in picking the jury. You may also have the same jury consultant assist in preparing witnesses to testify at trial, and hire mock jurors to assist in focus groups or mock trials prior to trial. A mock trial is a more elaborate – and more expensive – process, which mimics an actual trial with opening statements, a condensed witness and evidence presentation, followed by closing arguments. A focus group is typically not more than a few hours long: there is usually an opening statement/summary of the case by the lawyers and a greatly condensed summary of the evidence. The costs of the focus group vary depending on the bells and whistles chosen, but the actual, incremental costs are only the costs of the mock jurors themselves since the work of the attorneys and the jury consultant would be incurred during trial preparation whether or not the focus group is held.

In both the focus group and the mock trial, a lawyer will be designated to act the role of your opposing counsel. My experience has been that the process is only valuable if this lawyer is given the time and knowledge to present an effective case for the opposition. This may mean that he/she must say some unflattering things about the client. Otherwise, the mock jurors determine who the home team is and the entire process is corrupted by juror bias for the group they know is paying them. This is the single greatest flaw in the process: if you don't invest the time into presenting an effective case for your opposition, you essentially get a pat on the back by the mock jurors and go into your trial learning nothing about their true biases.



Jurors base their decisions on a variety of factors. Preconceived notions, perceptions, attitudes, and experiences all play a role in a juror's decision throughout the course of a trial. Jury consultants facilitate valuable jury focus groups to help identify the processes by which jurors make decisions. During focus group discussions, jurors are continually observed for reactions to case themes and strategies on a moment-to-moment basis. Expert jury consultants monitor juror reactions with real-time jury analysis technology and provide a final focus group report, complete with data analysis, for review.

I find that getting a focus group on the calendar at least four weeks prior to trial is highly beneficial for a number of reasons:

1. It forces the lawyers to prepare a condensed version of the evidence and an opening statement many weeks before the real thing. The lawyers and the clients are all forced to face their own fears and the weaknesses of their case when there is still time to fix flaws in the case.
2. Based upon the juror feedback, some themes are eliminated and other themes become more important to the case presentation.
3. There is still time to conduct a follow up focus group with the retooled case.
4. The process educates the client, the lawyers and the juror consultant about the nuances, strengths and weaknesses of the case.
5. The jury consultant will gain valuable insight into the types of jurors that are optimal for the case.
6. By the time of the actual voir dire and opening statement at trial, all of the participants have vetted their ideas, have seen the impact of their ideas in the focus group, and should have a much more informed view of how the themes of their presentation will influence the jurors.

Sometimes clients and their lawyers become enamored with ideas and concepts that don't hold up in the real world: we call this "believing your own bull X#@%&." The focus group forces everyone to put ideas on paper early in the process and hear criticism of those ideas from folks outside the client group and trial team at a time when strategy changes can be made effectively. The process also allows the clients to see how their actions might be judged by a jury of their peers before much of the costs of the trial have been incurred; then, more informed decisions about settlement and the manner in which the case should be presented can be made.

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The F&F Foundation will present the "Kids Just Wanna Have Fun" charity event benefitting Children's Medical Center, Wednesday, December 7th at 7:00 p.m. at the Fairmont Hotel. This exciting evening will include dinner, games, a children's art auction and featured entertainer Grammy-Award winner Cyndi Lauper. Co-chairs for the evening are Janelle and Larry Friedman. Molly and Gregg Engles will be honored for their generosity and commitment to Children's Medical Center. Mistress of Ceremonies will be Fox 4's Clarice Tinsley.

Children's, a private, not-for-profit hospital, is one of the largest pediatric health care providers in the country. Serving children from birth to age 18, through nearly 570,000 patient visits every year, services range from simple eye exams to specialized treatment in areas such as heart disease, dermatology-oncology and cystic fibrosis.

Sponsorships range from \$5,000 to \$50,000 and tickets start at \$300. To purchase sponsorships or tickets, please call Janelle Friedman at 972-788-1400 or email her at [jfriedman@fflawoffice.com](mailto:jfriedman@fflawoffice.com)

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- A.J. Bart ~ Naomi J. Winick & JT Murphy ~ Simmie & Linda Cooper
- Mark Daniels, Eugene Knies of Four Wheels Auto Group

**Upcoming Events**

**Friedman & Feiger Calendar**

- October 6, 2011** Janelle Friedman hosts Essential Energy Business Networking Reception for Women Business Leaders, 6-8 p.m., The Joule Hotel Ballroom
- October 27, 2011** Janelle & Larry Friedman host a Kick-Off Announcement Reception for "Kids Just Wanna Have Fun" holiday benefit for Children's Medical Center
- November 3, 2011** Janelle Friedman hosts Essential Energy Business Networking Reception for Women Business Leaders, 6-8 p.m.
- November 16, 2011** Honorary Co-Chairs Janelle & Larry Friedman support the Paws Cause Pet Bowl Auction benefitting the SPCA of Texas
- November 17, 2011** Janelle Friedman joins Vicki Gunvalson of Bravo's Orange County Housewives and Susan Posnick for A Women That Soar success seminar at Saks Fifth Avenue, Noon—1:30 p.m.
- December 7, 2011** The F&F Foundation presents "Kids Just Wanna Have Fun", benefitting Children's Medical Center

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