SUBJECT: Assessing attorney's fees, costs and damages for frivolous civil lawsuits

COMMITTEE: State Affairs — favorable, without amendment

VOTE: 14 ayes — Seidlits, S. Turner, Alvarado, Black, Bosse, Carter, Craddick, Danburg, Hilbert, Hochberg, B. Hunter, D. Jones, Ramsay, Wolens

0 nays

1 absent — McCall

SENATE VOTE: On final passage, February 1 — 30-0

WITNESSES: (*On SB 31 and/or its House companion, HB 1015 by Seidlits*)

For — Bill Whitehurst, Texas Trial Lawyers Association; Richard W. Weekley, Texans for Lawsuit Reform

Against — None

On — Joseph V. Crawford, Texas Association of Defense Council

BACKGROUND: Sanctions for the filing of frivolous lawsuits are governed by Rule 13 of the Texas Rules of Civil Procedure and Chapter 9 of the Civil Practices and Remedies Code.

Rule 13 governs the signing of court documents such as pleadings and motions. Rule 13 allows a court to impose sanctions (including charging expenses, court costs and attorney's fees, striking a pleading or motion, contempt of court, or even dismissing the case or rendering a judgment) against the person signing the documents, or a party represented by the signer, if the court finds the documents groundless. Rule 13 does not allow the imposition of attorney's fees for defending a frivolous suit. The rule defines groundlessness to mean that there was no basis in law or in fact for the allegation and that the allegation was not warranted by a good faith extension of current law. Interpretation for the scope of Rule 13 is generally left to the discretion of the trial judge.

Chapter 9 of the Civil Practices and Remedies Code clearly states that it is not meant to alter in any way the provisions of the Rules of Civil Procedure, and establishes a test similar to Rule 13 for determining a violation. Groundlessness is not defined, but some examples given in sec. 9.011 include actions brought in bad faith, for the purpose of harassment or for an improper purpose such as to cause unnecessary delay or needlessly increase the cost of litigation. Sanctions allowed under sec. 9.012 are similar to those in the Rule 13. However, the section allows any party whom the court finds made a groundless pleading 90 days to correct the pleading or withdraw it. No such grace period is allowed under Rule 13. If the pleading is modified or withdrawn within the 90-day grace period, no costs may be imposed against the offending party. As a practical matter, Rule 13 is used by courts when assessing sanctions against a litigant.

DIGEST:

SB 31 would allow awards of attorney fees, costs and additional damages for inconvenience, harassment and out-of-pocket expenses incurred in defending a frivolous lawsuit or action. The bill would apply to all civil actions, but a larger assessment could be made under other law.

SB 31 would not be limited to pleadings, motions or other court papers, as is the current law, but would apply to any action or part of an action and could apply to a plaintiff or a defendant. A court could impose sanctions upon finding an action or any part of an action was frivolous, groundless in law or fact, vexatious, for delay or harassment or unnecessarily expands the action because of improper conduct, including abuse of discovery procedures. A party could make a motion for sanctions at any time while proceedings are pending before the trial court.

Code of Criminal Procedure sec. 10.004 would give an expanded list of what a court could consider in determining whether an action was not brought in good faith.

SB 31 would allow for the same hearing and notice requirements as under both of current rules, but would provide that a court must state in writing its reasons for assessing any sanctions.

A court would be allowed to impose a sanction directly against a party, include a sanction in the judgment or allocate a sanction among more than one party.

The bill would allow for an exception for those parties appearing without an attorney unless the party is an attorney.

The parties to a case would be allowed to file a binding stipulation agreeing to not assess any sanctions or to assess sanctions in a different manner than SB 31 provides.

SB 31 would provide for mandatory appellate review of assessments if an appeal was sought.

The bill would apply to any action commenced on or after the bill's effective date, September 1, 1995.

SUPPORTERS SAY:

SB 31 would establish a more workable mechanism for imposing court-ordered sanctions to deter frivolous or harassing lawsuits that take up court time and harm those against whom the suits are filed. One of the most often-cited reasons why Rule 13 does not curb the filing of frivolous lawsuits is that judges are reluctant to impose anything other than reprimands or monetary sanctions on litigants for sanctionable actions rather than risk impairing a litigant's due process rights. However, reprimands are rarely a strong enough deterrent, and monetary sanctions do not cover attorney's fees, which are usually the most expensive cost of defending a frivolous suit. SB 31 would solve this problem by allowing a court to impose sanctions for attorney's fees, but would not allow a court to impose any sanction other than a monetary one.

Another improvement that SB 31 would make over Rule 13 is that it would allow a court to base its sanction on something other than the signing of a pleading or other paper. In many instances a court is limited by this requirement in Rule 13 because it cannot sanction frivolous conduct unless there is a frivolous motion or pleading presented. To deter frivolous lawsuits a court needs to be able to punish actions as well as filed papers.

The notice and hearing requirements of SB 31 are virtually identical to those in current law. These provisions help to ensure that a party is not blind-sided by a motion and hearing for sanctions, and that the party has an opportunity to respond the charges against the party, and perhaps even correct the problem.

Courts have been criticized in the past when awarding sanctions for not clearly setting out the reasons for such awards. In some instances, there is a general frivolousness or lack of proper respect for the proceedings on the part of one litigant. A court could not assess sanctions under SB 31 without stating the reasons in writing, defining the exact conduct that it determined was frivolous. Another protection for innocent litigants would be the mandatory appeal process available at the request of the sanctioned party.

OPPONENTS SAY:

SB 31 proposes the wrong approach to curbing frivolous lawsuits in Texas courts. The bill could produce more litigation than it would stop.

The primary problem with SB 31 is that it proposes entirely new law and is not based on any other frivolous lawsuit enactment in any court system. Because it is so new, every part of this legislation would have to be tested in court, causing a backlog of appellate cases. The proper approach to take would be enact a bill similar or identical to a current law or rule that has proved successful. An example of such a rule is Rule 11 of the Federal Rules of Civil Procedure. Almost every issue regarding Rule 11 has already been litigated and resolved. Rule 11 allows a court to award attorney's fees.

Even if a more familiar approach is taken to sanction frivolous lawsuits, at the very least it would be necessary to remove the mandatory appellate review process from SB 31. Requiring a court to hear every appeal made would lengthen the time it takes to assess sanctions and greatly increase costs, in a measure meant to cut litigation costs.

NOTES:

HB 1565 by T. Hunter, reported favorably by the House Civil Practices Committee, is based on Rule 11 of the federal Rules of Civil Procedure governing sanctions for frivolous suits.

HB 1565 would declare that the signing of a pleading or motion would be a certificate that, to the signer's best knowledge:

• the pleading is not being presented for an improper purpose, including harassment, delay, or to increase the cost of litigation;

• each claim, defense or other contention is warranted by current law or a non-frivolous argument for the extension of current law;

• each allegation is likely to have evidentiary support; and

• each denial is warranted on the evidence or based on a lack of information.

HB 1565 would allow any party, or the court on its own initiative, to move for sanctions. If a party prevailed on such a motion, the court could award reasonable attorney's fees incurred in presenting or responding to the motion. Any party against whom such a motion was raised would have a reasonable opportunity to respond to such allegations.

If a court determined that a violation had occurred, it could impose sanctions upon the signer and/or a person represented by the signer. The sanctions imposed had to be limited to sanctions sufficient to deter repetition or the normal sanction for such actions including:

• a direct order by the court;

• a fine; or

• an order to pay the expenses incurred by the other party including reasonable attorney's fees.

Under HB 1565, a court could not award a monetary sanction for violating the requirement that each claim must be based on current law or a reasonable extension of current law. A court could also not award monetary sanction on its own initiative unless it did so before a voluntary dismissal or settlement of the claim.

HB 1565 would require a court imposing a sanction to describe the violation and basis for the sanction in a order.

HB 1565 would state that the Supreme Court could not override its provisions by rule, and it would apply to all suits commenced after September 1, 1995.