Litigation Reform Impacts On Environmental Cases

Law360, New York (July 15, 2011) -- Texas recently enacted a litigation reform bill, House Bill 274, which has the stated purpose of curbing frivolous lawsuits. The bill contains a provision that shifts litigation costs, in certain circumstances, to parties bringing such lawsuits. It also contains measures to encourage settlement, liberalize the use of interlocutory appeals to resolve questions of controlling law early in the litigation, and limit the designation of responsible third parties late in the litigation process.

H.B. 274 applies to most types of civil litigation, however, the potential impacts on environmental claims may be more pronounced, because environmental claims are sometimes brought on tenuous legal grounds to delay or dissuade investment in industrial or infrastructure projects opposed by individuals or groups who find these projects undesirable due to perceived adverse impacts on their property or the environment.

Although applicable only in Texas, H.B. 274 may be the first of a new wave of nationwide legislative reform efforts.[1] Accordingly, the implementation of H.B. 274 by the Texas courts bears watching by environmental practitioners across the country.

H.B. 274: Texas' Litigation Reform Legislation

H.B. 274, a litigation reform bill intended to deter frivolous lawsuits, was passed by the Texas Legislature and signed by Governor Rick Perry on May 30, 2011. As introduced, H.B. 274 was to be the “loser pays” bill and would have allowed a party prevailing in state court to recover reasonable attorneys’ fees, regardless of whether the litigation had sufficient merit to survive summary judgment.

After substantial negotiations among stakeholders, including Texans for Lawsuit Reform and the Texas Trial Lawyers Association, the final version of H.B. 274 is more modest, but still contains several provisions with potentially important impacts on environmental litigation. Relevant provisions of H.B. 274 are summarized below.

(1) Directs the Texas Supreme Court to adopt rules providing for the dismissal of causes of action that have no basis in law or fact[2] and requires trial courts granting a dismissal under the new rules to award litigation costs and reasonable attorneys’ fees to the prevailing party.
(2) Adjusts the state’s existing “offer of settlement” provisions[3] by increasing the amount of post-settlement-offer litigation costs which may be recovered. The previous form of these provisions limited recovery such that a prevailing plaintiff’s award could not be reduced to less than 50 percent of the economic damages awarded. The new provisions allow recovery up to the total amount of the award.

(3) Amends the Texas Civil Practices and Remedies Code to give trial courts the authority to allow, without the agreement of all parties, an interlocutory and accelerated appeal from any order involving a controlling question of law as to which there is substantial grounds for differences of opinion.

(4) Prohibits defendants from designating a responsible third party after expiration of the statute of limitations for claims against the third party, provided the defendant has failed to comply with its obligations, if any, to timely disclose that the person may be designated as a responsible third party.

Impact on Environmental Claims

Depending on how the litigation reform provisions are applied by the courts, H.B. 274 will have potentially significant impacts on many forms of civil litigation in Texas, including state law-based environmental claims. Some of these impacts will be general in nature, no different from the impacts on litigation in other legal arenas. For example, the revised offer of settlement provisions may push more litigants to offer reasonable settlement terms and to accept offers, just as it would in non-environmental cases.

However, as with any area of the law, environmental litigation has its own nuances, meaning that H.B. 274’s impacts will likely result in a number of impacts particular to environmental law. First, the new provisions regarding attorneys’ fees for frivolous claims, i.e. those which have no basis in law or fact, may deter environmental groups from filing claims which cannot succeed on the merits, but are instead intended to delay industrial and infrastructure projects.

In the environmental arena, delaying a project can sometimes be as good as defeating one outright — with delay comes the possibility of expired permits and the possibility that more-stringent environmental requirements will become applicable. Further, the risk of delay can make financing industrial projects with outside investors more difficult.

Accordingly, some environmental challenges are filed based on thin legal grounds, with environmental groups knowing that they need not win a case to have a detrimental impact on the timing and financing of a project they oppose. For example, plaintiffs have been known to appeal state-issued environmental permits based on alleged impacts which are beyond the authority of the Texas Commission on Environmental Quality, such as increased vehicular traffic.

By imposing the risk of potentially significant monetary consequences for frivolous claims, H.B. 274 may help to dissuade these types of claims. However, this is unlikely to be a panacea for stopping frivolous claims, because showing a claim has no basis in law and fact based on the pleadings will be difficult.

Second, the new provision liberalizing the ability of parties to utilize interlocutory appeals may significantly speed up certain environmental cases. Many environmental cases are based on threshold legal issues, coupled with complicated or voluminous underlying facts which would be relevant only after settling the threshold legal issues.
For example, a remediation under the Texas version of CERCLA could include a threshold issue, such as whether an undisputed action by the defendant qualifies as arranging to dispose of a waste material, with fact issues regarding the amount of contamination attributable to the defendant becoming relevant only if the defendant is determined to be an arranger.

With the enactment of H.B. 274, when a controlling issue of law has been resolved by a trial court, but the resolution of factual issues will be a lengthy and resource-intensive process, it may be easier to appeal the issue of law without first undergoing the cost and expense associated with a full-blown discovery plan and a trial to settle contested fact issues. Of course, the appeals court decision may not bring finality to the case, but with legal issues decided at the circuit level, the issues in the case will be better defined and the parties may more easily reach an agreement on settlement terms.

Finally, the new provisions prohibiting the designation of responsible third parties could significantly impact trespass, nuisance and other traditional common-law causes of action, many of which are now authorized by legislative codes. These provisions modify a Texas litigation reform measure, passed in 2003, which allows defendants to designate responsible third parties with whom liability must be apportioned, even if these third parties are not joined to the case.

In cases involving the contamination of environmental media, such as groundwater, the alleged contamination could have involved the deposition of pollutants over a period of decades by successive property owners, any number of adjacent landowners, or both. These cases can take a long time to develop, with plaintiffs seeking to add defendants late in the litigation. However, with the changes to the responsible third parties law, a defendant who is not proactive in identifying and designating other responsible third parties at the outset of a case may find that their ability to shift their judgment costs to third parties has been foreclosed by time.

Concluding Comments

Only recently passed, H.B. 274 is far from being implemented. Before the full impacts of the bill are known, the Texas State Supreme Court must adopt new rules providing for the dismissal of causes of action that have no basis in law or fact and the state’s courts will need to apply the provisions of H.B. 274 in specific cases.

Nevertheless, these developments bear watching by environmental practitioners in Texas and other states given history shows state legislation that gains traction often is replicated in other statehouses across the nation.

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[1] For example, on July 7, 2011, the Lawsuit Abuse Reduction Act (H.R. 966), cleared the United States House Judiciary Committee. This legislation is aimed at reducing frivolous lawsuits by reinstating mandatory sanctions for violations of Federal Rule of Civil Procedure 11.

[2] Presumably, the new procedure will resemble motions for dismissal for failure to state a claim under Federal Rule 12(b)(6), to which there is not currently a Texas counterpart.

[3] Offer of settlement provisions are ones where a party may receive litigation and/or attorneys’ fees incurred after a formal offer of settlement has been offered and rejected and a judgment is less favorable to the rejecting party. In Texas, these provisions apply when: (1) a plaintiff rejects a formal offer and is awarded damages that are less than 80% of the offer; and (2) a defendant rejects a formal offer and the awarded damages are more than 120% of the offer. TEX. CIV. PRAC. & REM. CODE § 42.004(b).