

YOU MAY ALL GO TO HECK, I'M GOING TO (LITIGATE IN) TEXAS

By: Will Beasley

I've been sued! – should I remove to federal court? I want to sue! – should I file in Texas state court or federal court? These are questions that every litigant involved in a Texas lawsuit should ask. First and foremost, our recommendation is always to litigate in federal court. If federal court isn't an option, Texas has some unique devices that every litigant (or potential litigant) should know about—such as pre-suit depositions and offer of settlement.



Remove, remove, remove! If possible, it's always best to litigate in federal court. We have found that actions litigated in federal court generally reach a just conclusion more efficiently than actions in state court. Of course, part of the reason for this is that the federal judiciary is highly qualified and appointed to life terms. But federal courts also offer other benefits. First, the jurisprudence interpreting federal procedural rules is much more robust (with many more published district court opinions). Second, federal courts have local rules that often help the litigants through the process. This is not the case for some of Texas' smaller district courts. Accordingly, if possible, we recommend utilizing federal court jurisdiction.

Texas Pre-suit depositions. Texas procedure, like federal procedure, allows for pre-suit depositions to perpetuate testimony. Tex. R. Civ. P. 202; Fed R. Civ. P. 27. Texas procedure, unlike federal procedure, takes pre-suit depositions one-step further—and allows them to be used to *investigate a potential cause of action*. What this means is that if you believe you may have a fraud claim (which would require a heightened pleading standard to file suit), or a possible Texas trust fund claim, or any other potential claim—you may be able to depose the potential defendant (under Texas law) to investigate your claim. Not only could such a deposition help develop your claim, but it could also help lead to early resolution and settlement. This is something that every potential litigant in Texas should be aware of.

Texas offer of settlement. What if you have a plaintiff that refuses to budge from an unreasonable settlement amount? Invoke the Texas offer of settlement rule, and potentially flip your attorneys' fees and costs to the Plaintiff. Texas procedure, like federal procedure, allows for cost shifting after certain settlement offers are denied. Tex. R. Civ. P. 167; Fed. R. Civ. P. 68. Texas procedure, unlike federal procedure, is better for the defendant. Unlike its federal counterpart, the Texas rule does not require that the defendant offer that a *judgment* be entered against it. Rather, the Texas rule is an offer of *settlement*—meaning, there will not be a judgment entered against the defendant. More importantly, the Texas rule expressly requires attorneys' fees to be awarded to a successful party under the rule.

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We hope that these changes make big differences in the future.

Well done is better than well said.

- Benjamin Franklin



The federal counterpart may or may not allow attorneys' fees to be shifted in any given case—depending on what is included as "costs" in the cause of action. Based on our experience, it is very unlikely that attorneys' fees will be shifted under the federal rule. If invoking the Texas rule, there are other concerns that should be taken into consideration—such as that, once a defendant invokes the rule, the plaintiff can also use it *against* the defendant to make offers (not the case in federal court). Regardless of potential concerns, we have found the Texas rule to be an effective tool (especially in payment bond situations) to move towards an agreeable settlement figure.

Conclusion

If available, the choice between federal and Texas courts should not be taken lightly. All options, consequences, and procedures should be considered. And while it may often be preferable to litigate in a federal courtroom, there are times (such as an unreasonable payment bond claimant) when Texas courts may provide the better option.

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