

Senator Jeff Wentworth Introduced Two Bills in the 82nd Legislature Which Would Have Provided Windfalls to Plaintiff Lawyers and Delivered Blows to the Texas Civil Justice System and Economy

WENTWORTH'S JOB-KILLING, LAWYER-ENRICHING QUI TAM BILLS

In each of the past three legislative sessions, Senator Jeff Wentworth (R-San Antonio) has filed a bill in the Texas Legislature to create an exceptionally expansive, plaintiff lawyer friendly qui tam statute in Texas. (S.B. 1115 in 2011; S.B. 496 in 2009; and S.B. 1309 in 2007.) These bills vary somewhat from each other, but have the same intent and will be hereinafter referred to as "Wentworth's bill." Fortunately, Wentworth has not been able to get his bill passed.

The term "qui tam" is a short version of a Latin phrase describing a civil action brought by a private party *on the government's behalf and with the force and authority of the government*, through which the private party receives part of the government's recovery. Texas already has a powerful qui tam statute allowing private lawsuits arising from alleged fraud on the State in relation to its healthcare expenditures; the federal government mandates that the State have such a law. Wentworth's bill, however, vastly expands the opportunity for qui tam lawsuits in Texas beyond healthcare and allows qui tam suits related to *any expenditures made by or to the State*.

The bill would create enormous potential liability for all companies doing business with or paying royalties, fees, or taxes to the State of Texas. It would open new and expansive opportunities for mass tort lawyers to pursue job-killing litigation against Texas's employers, and represents an unnecessary and dangerous expansion of governmental power.

There is no need for Wentworth's bill.

Texas already authorizes qui tam lawsuits covering healthcare fraud. Statistics show that the great majority of recoveries by the federal government under its qui tam law (which is the kind of expansive and abusive law that Wentworth wants our State to duplicate) are related to healthcare fraud. In other words, Texas already has a qui tam law that covers the vast majority of instances of fraud on the government.

Additionally, Texas has another statute allowing a person to report to the State Comptroller information about a possible claim the State may be entitled to pursue to recover revenue or property. If the Comptroller believes the case has merit, the Comptroller must

refer the case to the Attorney General who may or may not pursue the case. If the Attorney General pursues the case and prevails, the person providing the information (the “whistleblower”) receives a percentage of the State’s recovery. The difference between the existing law and Wentworth’s bill, however, is that Wentworth’s bill allows an individual to pursue litigation in the State’s name, *even when the Comptroller and Attorney General decide the case is meritless and decline to pursue it.*

Wentworth’s bill creates new and substantial liability—even for innocent conduct!

Wentworth’s bill provides that a defendant would be liable for the State’s actual damages, plus two-times the State’s actual damages, plus a \$5,000–\$15,000 penalty per violation, plus interest, plus attorney fees—even if the defendant’s actions were inadvertent. Wentworth’s bill is not just about allowing citizens to help find fraud; *it is a bill to create substantial new or additional liability.*

Under Wentworth’s bill, if a defendant filed multiple documents with the government having the same error, or filed a single document repeating a single error, the defendant could be found to have committed multiple violations of the law, with each violation carrying a \$5,000–\$15,000 fine. The potential liability under Wentworth’s bill could have been so great that most defendants simply could not face the risk of litigation. Government always has enormous leverage when suing a private defendant who has to pay lawyers, but *Wentworth’s bill would give the government (and private bounty hunters acting on the government’s behalf) unprecedented leverage in litigation.*

With these kinds of damages, mass tort lawyers would be drawn to Wentworth’s bill like bears to honey.

Wentworth’s bill provides a disincentive to reporting fraud and creates endless liability.

To make matters worse, because qui tam plaintiffs are paid a percentage of the recovery, they have an economic incentive to delay reporting fraud in order to allow the claim to increase in value. State employees have an obligation to report fraud, but Wentworth’s bill would perversely allow State employees to conceal information so that damages could grow, and then file suit on the State’s behalf as a qui tam plaintiff.

Wentworth’s bill, in at least one of its manifestations, does not even contain a statute of limitations, thus creating *endless* liability. Under Wentworth’s bill, a qui tam plaintiff simply could let the damages accrue for an indefinite period of time before reporting fraud, just to maximize his own profit.

Qui tam litigation is expensive and often unsuccessful.

Most federal qui tam cases fail, and the same could be expected under Wentworth's bill. Historically, the U.S. Department of Justice has pursued only about 20% of the qui tam cases presented to it. Presumably, the Justice Department found most of the other 80% to be so meritless that it elected not to pursue them. *But, in many cases, the private lawyers for the plaintiffs pursue the lawsuits anyway because the federal law allows them to do, as would Wentworth's bill.*

Most of the cases the government has refused to join have failed ultimately—but only after costing defendants millions of dollars in attorneys' fees and countless hours of unproductive time. In fact, one study of qui tam cases found that the defendants' average expenditure for legal fees *in cases the government did not pursue* was \$1,431,660, while the average recovery was only \$97,223. These defendants paid almost 15 times more to their lawyers than they paid in settlement.

Every dollar a business uses to defend itself from a meritless lawsuit is a dollar it cannot spend to compete, expand, and create jobs.

Wentworth's qui tam bill is a very bad idea for Texas businesses, but would be a generous gift to Texas's trial lawyers. Further, Wentworth's bill shows his willingness to expand governmental power well beyond the scope of principled conservatism.

WENTWORTH'S PLAINTIFF LAWYER FRIENDLY COST-SHIFTING BILL

In 2003, the Texas Legislature passed an even-handed law allowing a party in litigation to recover some of its costs, including attorneys' fees, from its opponent if it made a settlement offer that the opponent rejected *and* that settlement offer turned out to be substantially better than the judgment the opponent ultimately obtained. In 2011, Jeff Wentworth decided it was time to try to turn this common-sense law into a bonanza for plaintiff trial lawyers.

In many lawsuits filed in Texas, the plaintiff is not entitled to recover attorneys' fees—which has been true since the Republic of Texas was founded in 1836. Sometimes defendants want to try to settle cases early by making what the defendants believe are reasonable settlement offers. Since 2003, Texas law has allowed these defendants to invoke a reciprocal procedure by which either the defendant or plaintiff can recover some of their attorneys' fees if the opposing party rejects a settlement offer that the opposing party really should have accepted—that is, a settlement offer that is a lot better for the party who rejected the offer than the judgment ultimately rendered.

Current law has a “defendant trigger”—it comes into play only if the defendant kicks-off the procedure allowed by the law. Once the procedure is initiated by the defendant, it becomes reciprocal, and any defendant who makes an offer under the law exposes himself to possibly paying the plaintiff’s attorneys’ fees (which the defendant normally would not have to pay). Consequently, the defendant is not likely to invoke the procedure and then make a “low-ball” offer to plaintiff, because to do so would be unlikely to resolve the case *and* would expose the defendant to paying the plaintiff’s attorneys’ fees. A defendant who invokes the statute is motivated to make an offer that will adequately compensate the plaintiff. A defendant who is not trying to incent the plaintiff to settle the case on reasonable terms simply would not invoke the statute, thus allowing the case to proceed as cases have proceeded since 1836, to no disadvantage to the plaintiff.

In 2011, Senator Wentworth introduced a bill (S.B. 1594) intended to make this common-sense statute a plaintiff-lawyer friendly statute in an attempt to tilt the playing field in favor of plaintiffs and their lawyers. Wentworth’s plaintiff-friendly bill would have removed the defendant trigger, thus effectively giving plaintiffs the right to recover attorneys’ fees in cases in which they have not been able to recover attorneys’ fees since Texas gained its independence.

But the bill went further than that. Wentworth’s bill sought to change the 2003 law’s formula for determining if fees were owed by the opposing party. Under Wentworth’s bill, the comparison no longer would be between the settlement offer and the plaintiff’s lawful recovery. Instead, it would be between the settlement offer and the amount awarded by the jury. In Texas—and in every other state in the Union—the amount a plaintiff actually recovers often is less than the amount the jury awards. This is so because juries are not required to know the law. Judges, on the other hand, are required to know the law and to apply it to the jury’s verdict, and applicable law often reduces the amount awarded by the jury.

This bill, had it passed, would have incentivized plaintiff lawyers to exaggerate damages and to encourage juries to assess enormous amounts that the plaintiff attorneys know could not survive scrutiny by the judge in the ultimate award. Such damages awarded in the *jury verdict*, under Wentworth’s formula, could force a defendant who rightfully rejected an unreasonable offer by a plaintiff, to pay the plaintiff’s costs and attorneys’ fees even if the ultimate *judgment* would not produce the cost-shifting. This was an exceedingly clever attempt by Wentworth and the trial lawyers to subvert the balance produced by the Texas tort reforms of the past twenty years by creating a new litigation environment, allowing plaintiff trial lawyers to gain new, unwarranted leverage in litigation.

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