THE TEXAS LEGAL LIABILITY ADVISOR

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FUNDERBURK FUNDERBURK COURTOIS, LLP

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TEXAS SETS NEW RULES LIMITING TRIALS IN CIVIL CASES UP TO $100,000

INTRODUCTION

In 2011, the Texas legislature took another step in its ongoing effort to reform the way lawsuits are managed when it passed H.B. 274[1]. The legislation directed the Texas Supreme Court to adopt rules promoting the prompt, efficient, and cost-effective resolution of civil actions where the amount in controversy, inclusive of all claims for damages of any kind, does not exceed $100,000.[2] The law was aimed at reducing discovery costs and ensuring expedited prosecution of these suits in the civil justice system.[3] Because so many lawsuits fall into this category, the rules for expedited actions will significantly alter how many cases are developed through discovery and drastically limit the time permitted for the trial itself.

Earlier this year, the Texas Supreme Court adopted final rules for these expedited civil suits. The new rules apply to any case filed on or after March 1, 2013, and dramatically change how cases under $100,000 are handled. For example, under these new rules, without showing good cause to the trial court, total trial time for each side is limited to eight hours including picking a jury, statements, and presenting evidence. This means trial counsel are on the stop watch and must be efficient and succinct when presenting their case. The Court also established rules for a motion to dismiss based on the failure to state a claim, a new practice for Texas state courts.[4] The following article explores these new procedural rules in greater depth.

RULE 169 - EXPEDITED CASES

New Rule 169 of the Texas Rules of Civil Procedure governs expedited civil actions. The rule applies to any suit claiming only monetary relief aggregating $100,000 or less, inclusive of all damages, penalties, costs, pre-judgment interest and attorney's fees.[5] Medical malpractice claims and claims under the Family Code, Property Code, and Tax Code are excluded from Rule 169.[6] Importantly, a party is not permitted to recover any judgment in excess of $100,000 in any suit governed by Rule 169, post-judgment interest notwithstanding.[7]

However, there are exceptions which permit cases under the $100,000 threshold to avoid being subject to the restrictions of Rule 169. A court is permitted to remove a case from the expedited

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actions process on a motion by any party showing good cause or when a party pleads for any non-monetary relief.[8] But leave of court is required for any such pleadings filed thirty days after the discovery period is closed or thirty days before the date set for trial, whichever is earlier.[9] Leave to amend may be granted by the court only if good

cause for filing the amended pleading outweighs any prejudice to an opposing party.[10] When a case is removed from the Rule 169 process, the court must reopen discovery under Level 2 or 3 discovery rules,[11] any person who has been deposed may be redeposed, and the court should continue the trial date if necessary to permit completion of discovery.[12]

LIMITED DISCOVERY

There are very specific rules governing the discovery process in expedited civil actions. Discovery is governed by a level 1 discovery plan, which limits the amount of discovery that can be conducted. For example, all discovery must be conducted during the discovery period, which begins when the suit is filed and continues until 180 days after the date the first request for discovery of any kind is served on a party.[13] Each party has six hours in total to examine and cross-examine all witnesses in oral depositions; the parties can agree to extend it to ten hours but no more without court approval.[14] Parties are limited to sending no more than fifteen written interrogatories, excluding interrogatories asking a party only to identify or authenticate specific documents, fifteen requests for production, and fifteen requests for admissions.[15] In requests for disclosure parties may also request disclosure of all documents, electronic information, and tangible items that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses.[16] Additional discovery is subject to the discretion of the court when the interest of justice requires.[17] Unless requested by the party sponsoring the expert, a party may only challenge the admissibility of expert testimony as an objection when the expert testimony is offered, except that a party may file a motion to strike for late designation of the expert.[18]

QUICK TRIAL SETTING WITH LIMITED TRIAL TIME

On the request of any party, the court must set the case for a trial date that is within ninety days after the discovery period ends for the expedited action.[19] The court may continue the case twice, not to exceed a total of sixty days.[20] At trial, each side is allowed no more than **eight hours** to complete jury selection, opening statements, presentation of evidence, examination and cross-examination of witnesses, and closing arguments.[21] On motion and a showing of good cause by any party, the court may extend the time limit to no more than twelve hours per side.[22]

ALTERNATIVE DISPUTE RESOLUTION

Unless the parties have agreed not to engage in alternative dispute resolution, such as mediation, the court may refer the case to ADR once, provided it does not exceed a half-day in duration, does not exceed a total cost of twice the amount of applicable civil filing fees, and be completed no later than sixty

days before the initial trial setting.[23] The Court must consider any objections to ADR unless prohibited by statute.[24]

ANALYSIS

The new procedural rules for expedited matters will force attorneys to be efficient in their discovery, depositions, and trial, and puts a cap of the maximum amount of damages that can be awarded to a plaintiff. These rules should reduce the costs to prosecute and defend these types of actions. These rules are seemingly designed for the small auto case with two depositions and limited witnesses. Unfortunately, there are many cases where the amount in controversy is well under $100,000 but the case requires more time for discovery or more time to present at trial. Another problem is presented for plaintiff and their counsel when a jury in an expedited case somehow awards more damages than $100,000. Because a plaintiff cannot recover more than $100,000 no matter what the jury determines, plaintiff attorneys must use caution when pleading for damages less than $100,000. In the event a jury awards damages over $100,000 in an expedited case, the plaintiff client will certainly question why they cannot recover the full amount determined by the jury and will likely complain that the attorney did not properly handle the case. Prior to this legislation, it was uncommon for a plaintiff to plead and request a level 1 discovery plan in most personal injury cases. It simply did not make sense to limit discovery that may be necessary in a given matter. Now this is being forced on plaintiffs who happen to plead for monetary damages of $100,000 or less. Will these rules promote plaintiffs attorneys over pleading the value of their case to avoid these rules? It will be interesting to see whether plaintiff attorneys make a practice of simply over pleading the amount of damages being sought to avoid the damage cap and other limitations imposed by these rules, and whether judges will liberally allow cases to be removed from the expedited process.

The main benefit of Rule 169 will be realized by insurance carriers defending automobile and minor tort claims, where these new rules make it easier to control defense costs. Because attorney activity in these actions is specifically limited in terms of discovery and trial, the cost to defend these types of actions should be reduced. Additionally, carriers benefit because recoverable damages in expedited actions are capped, so a carrier can comfortably set reserves at $100,000 or less instead of an arbitrary amount such as what is being demanded by Plaintiff. But the tradeoff is that the limited discovery rules also serve to impede defense attorneys from discovering evidence that substantiates or refutes the Plaintiff's claims, evidence of fraudulent activity, or even evidence of prior medical conditions that may play a role in a plaintiff's personal injury case. Generally speaking, when we see a plaintiff wanting to limit discovery, we are usually suspicious of what the plaintiff is trying to hide. For some plaintiffs, limited discovery and a quick trial setting may be a very good thing for them, i.e., it reduces the likelihood that adverse evidence will be discovered and used against them.

But for most other litigants, these arbitrary discovery and trial limitations may pose more of a problem than a benefit. Contract and business cases can sometimes involve many documents, and witnesses and may not be appropriate for this type of expedited process. Only time will tell how these new rules play out in the courts. But what is apparent is that there should be many cases where these expedited rules will apply. There will likely be considerable cost savings for insurance carriers handling auto and minor personal injury claims. Carriers will need to have good trial counsel who are able to summarize and present witnesses and documentary evidence in an efficient succinct manner in the abbreviated trial time allotted, and yet forceful enough to educate the jury.

RULE 91A. DISMISSAL OF BASELESS CAUSES OF ACTION

Texas has a new procedural rule that permits a party to ask the court to dismiss a claim on the grounds that the claim has no basis in law or fact.[25] While this may sound like a great way for defense lawyers to keep plaintiffs' lawyers busy, the fee shifting provisions in the rule makes this rule something that will only be utilized by wealthy litigants or those who are certain on their legal or factual position on a particular claim. Rule 91a is applicable in all civil cases except family law cases and inmate litigation.[26] A cause of action has no basis in law if the allegations, taken as true, together with inferences reasonably drawn from them do not entitle the claimant to the relief sought.[27] A cause of action has no basis in fact if no reasonable person could believe the facts pled.[28]

RULE 91A - PROCEDURE

A Rule 91a motion to dismiss must state that it is made pursuant to the rule, must identify each cause of action to which it is addressed, and must state specifically the reasons the cause of action has no basis in law, no basis in fact, or both.[29] The motion must be: 1) filed within sixty days after the first pleading containing the challenged cause of action is served on the movant; 2) on file at least twenty one days before the motion is heard; and 3) granted or denied by the court within forty five days after the motion is filed.[30] Any response to the motion must be filed no later than seven days before the date of the hearing.[31] Any amended Rule 91a motion restarts the time deadlines of the rule.[32]

The court may not rule on a motion to dismiss if, at least three days before the date of the hearing, the respondent files a nonsuit of the challenged cause of action, or the movant files a withdrawal of the motion.[33] If the claimant amends the challenged cause of action at least three days before the date of the hearing, the movant may, before the date of the hearing, file a withdrawal of the motion or an amended motion directed to the amended cause of action.[34] Except by agreement of the parties, the court must rule on a Rule 91a motion unless it has been withdrawn or the cause of action has been nonsuited.[35]

No oral hearing is required to be conducted by the Court on a Rule 91a motion, but if such a hearing is conducted, each party is entitled to fourteen days' notice.[36] In ruling on the motion, the Court is not to consider any evidence, aside from the issue of attorney's fees and costs, and must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59.[37] Rule 59 of the Texas Rules of Civil Procedure allows for copies of notes, accounts, bonds, mortgages, records, and all other written instruments, making up any part of the claim or defense to be attached to or incorporated into the pleading.[38]

The Rule 91a motion does not waive any pending special appearance or motion to transfer venue, and by a filing a Rule 91a motion the party only submits to the Courts jurisdiction for the purposes of the Rule 91a motion and is bound only to the courts ruling on the motion including the award of costs and attorney's fees.[39]

COSTS AND ATTORNEY'S FEES

The Court is required to award all costs and reasonable and necessary attorneys fees to the prevailing party incurred with respect to the challenged cause of action, except in an action by or against a governmental entity or a public official acting in their official capacity or under color of law.[40] The court must consider evidence regarding costs and fees in determining the award.[41]

ANALYSIS

Rule 91a of the Texas Rules of Civil Procedure combines the framework of a Rule 12(b)(6) motion under the Federal Rules of Civil Procedure with a "loser pays" system. The fact that costs and attorney's fees can be awarded to the prevailing party means that defense attorneys will have to carefully analyze the chance of success before filing such a motion or risk having attorney's fees or costs awarded to the plaintiff.

RECOMMENDATIONS

The new rules of expedited civil actions impose damage caps, discovery limitations, and trial time limitations. These are things most plaintiff attorneys want to avoid. Plaintiff's attorneys will likely over plead the amount in controversy in any questionable cases so their case does not fall under the expedited rules mandate and damages cap. Cases that are pled under the new expedited civil actions seeking $100,000 or less in damages need to be evaluated early to determine if it is appropriate to either ask the court for more discovery and trial time, or removal from the Rule 169 procedures altogether. Cases that are appropriate for Rule 169 need to be worked up quickly and efficiently so that the case can be discovered appropriately and presented succinctly at trial. Carriers need to have counsel who are organized and able to present an effective defense in the allotted time.

Rule 91a motions to dismiss may prove useful in select cases with novel legal or factual issues. It is not for use with any common claims or occurrences. The fee and costs shifting provisions of the rule should be part of the analysis when deciding whether it is appropriate to file such a motion.

NOTES

[1.] Act of May 27, 2011, 82nd Leg., R.S., ch. 203, 2011 Tex. Gen. Laws 203 (H.B. 274).
[2.] Id. (codified as AMENDMENT OF TEX. GOV'T CODE ANN. §22.004(h)).
[3.] *Id.*
4. As required by the same legislation. TEX. GOV'T CODE ANN. §22.004(g).
[5.] TEX. R. CIV. P. 169(a)(1).
[6.] TEX. R. CIV. P. 169(a)(2).
[7.] TEX. R. CIV. P. 169(b).
[8.] TEX. R. CIV. P. 169(c)(1).
[9.] TEX. R. CIV. P. 169(c)(2).
[10.] *Id.*
[11.] TEX. R. CIV. P. 190.3 governs Level 2 cases and allows for 50 hours per side in oral deposition, 25 interrogatories and no limit on requests for production; TEX R. CIV. P 190.4 governs Level 3 cases and provides for the entry of a discovery control plan setting specific dates for the completion of discovery. The common practice in Harris County District Courts is the entry of a Docket Control Order by the Court setting a trial date and specific dates for discovery.
[12.] TEX. R. CIV. P. 169(C)(3), TEX. R. CIV. P. 190.2(C).
[13.] TEX. R. CIV. P. 190.2(B)(1).
[14.] TEX. R. CIV. P. 190.2(B)(2).
[15.] TEX. R. CIV. P. 190.2(B).
[16.] TEX. R. CIV. P. 190.2(B)(6).
[17.] TEX. R. CIV. P. 190.5.
[18.] TEX. R. CIV. P. 169(D)(5).
[19.] Tex. R. Civ. P. 169(d)(2).
[20.] TEX. R. CIV. P. 169(D)(2).
[21.] TEX. R. CIV. P. 169(D)(3).
[22.] TEX. R. CIV. P. 169(D)(3).
[23.] TEX. R. CIV. P. 169(D)(4).
[24.] *Id.*
[25.] TEX. R. CIV. P. 91A.
[26.] TEX. R. CIV. P. 91A.1.
[27.] *Id.*
[28.] *Id.*
[29.] TEX. R. CIV. P. 91A.2.
[30.] TEX. R. CIV. P. 91A.3.
[31.] TEX. R. CIV. P. 91A.4.
[32.] TEX. R. CIV. P. 91A.5(D).
[33.] TEX. R. CIV. P. 91A.5(A).
[34.] TEX. R. CIV. P. 91A.5(B).
[35.] TEX. R. CIV. P. 91A.5(C).
[36.] TEX. R. CIV. P. 91A.6.
[37.] *Id.*
[38.] TEX. R. CIV. P. 59.
[39.] TEX. R. CIV. P. 91A.8.
[40.] TEX. R. CIV. P. 91A.7.
[41.] *Id.*

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TEXAS LIMITS TRIALS IN CIVIL CASES UP TO $100,000