TADC e-Update
The Texas Association of Defense Counsel, Inc.

LEGISLATIVE / RULES UPDATE

February 7, 2012

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The end of the 82nd Legislative Session did not end the TADC's legislative efforts. As the TADC reported immediately following the close of the session, Gov. Perry signed into law HB 274, which among other things directed the Supreme Court to develop rules for a Motion to Dismiss practice (essentially a State version of FRCP 12(b)(6)) and an Expedited Jury Trial Process for claims with aggregate monetary claims of less than $100,000.

Without waiting for the Supreme Court to adopt a rule and respond after the fact, the TADC initiated a working group with TEX-ABOTA and the TTLA to determine if consensus rules could be developed consistent with the TADC mission of promoting a fair, accessible and efficient civil justice system. The TADC was represented on this working group by Keith O'Connell and Dan Worthington. The working group ultimately developed a proposed Motion to Dismiss rule and procedure, as well as a proposed rule to implement the legislative mandate for an expedited jury trial procedure.

Once developed, each of the two proposals took slightly different paths to the Supreme Court. The Motion to Dismiss proposal was sent by the Supreme Court directly to the Supreme Court Advisory Committee which approved it and sent it back to the Court. The Court then approved the

proposal and it is being scheduled for public comment. This proposed rule is available though the link indicated at the end of this Update.

The Expedited Jury Trial Procedure was (and remains) profoundly more problematic. In developing a proposal for the Expedited Jury Trial Procedure, Keith O'Connell surveyed those states which currently have a similar procedure and included a discussion of each working group's white paper. None of the States that currently have an expedited procedure mandate its use; the system has been universally implemented as voluntary. Our evaluation of the expedited jury trial procedure concluded that subjecting a Defendant to a mandated jury trial with sharply limited discovery and presentation of evidence solely because a Plaintiff had alleged damages under $100,000 was unfair to the Defendant and harmful to the civil justice system. By limiting the factor to be considered to money damages alone, the procedure failed to account for, among other things, circumstances where the monetary risk to the Defendant was greatly exceeded by other considerations such as: non-monetary relief (injunctions, declaratory judgments, etc.), allegations of professional negligence or a civil claim for alleged criminal conduct, and cases where the complexity of facts was not proportionate to the amount in controversy.

Consistent with this evaluation, Keith and Dan took the lead in drafting a voluntary rule which would allow a litigant's counsel to agree to the submission of a highly truncated procedure which limited discovery, the time within which to present evidence and the appeal in order to promote and provide the genuine expeditious handling of matters appropriate for the procedure. This rule was refined by the working group and provided to a Task Force appointed by the Supreme Court to develop a rule consistent with the Court's legislative mandate. David Chamberlain was appointed by the Court to sit on this Task Force. The Texans for Lawsuit Reform supported a mandatory expedited procedure and argued for such to the Task Force. The TLR relied on two grounds: (1) the legislative history supported a mandatory procedure; and (2) the amount of time a lawyer should devote to a case should be in proportion to the amount in controversy. The TADC responded to TLR's position immediately, by obtaining and studying the legislative history and debate from both legislative chambers and, in a letter to the Task Force signed by me, Keith O'Connell and Dan Worthington, advised the Task Force that: (1) TLR's representation that the legislative history supported a mandatory procedure was untrue; and (2) TLR's assumption that the amount in controversy will always be an accurate measure of what is at stake in the

litigation was fundamentally flawed. Copies of the transcripts of the legislative testimony and floor debates were attached to the letter, demonstrating that whether the procedure should be voluntary or mandatory was never discussed. Ultimately, the Task Force could not reach a consensus and submitted two versions of the procedure (one mandatory and one voluntary) to the Supreme Court Advisory Committee for its consideration. The voluntary version of the rule submitted to the Advisory Committee by the task Force was substantially similar to that provided to it by the working group and is the superior approach. After reviewing the work product supplied to it by the TADC as well as the competing proposals, the Advisory Committee voted to support our voluntary approach. This recommendation by the Advisory Committee as well as the Task Force report and the material generated by the TADC and the working group has been forwarded to the Court for its further action. We continue to work toward the enactment of a voluntary procedure and will advise.

The TADC will continue to oppose efforts by those who seek the abdication of a Defense counsel's judgment based solely on claims for efficiency, because it is detrimental to the civil justice system and the interests of our clients.

Copies of the working group material and the Task Force Report are available at the links indicated.

Working Group Material

TASK FORCE Report

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