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

LEGISLATIVE & CASE LAW UPDATE

April 12, 2013

FROM: Dan K. Worthington, TADC President

As we move into the last seven weeks of the legislative session, committee and floor action is becoming frenetic and fast-changing. The following is a current status of the bills TADC is actively engaged with or closely monitoring this session. Changes in status from the last report are highlighted in **bold** type. To view these bills, or any bill filed in the Texas Legislature, visit the Texas Legislature Online and enter the bill number:

Filing of Medical Bills/Paid or Incurred Related:

HB 1465 by Rep. Bryan Hughes (R-Mineola)--relieves obligation to file medical records with clerk until time of trial and requires objections to admissibility be made prior to trial or waived. **Set for hearing in House Judiciary & Civil Jurisprudence on April 15.**

HB 3457 by Rep. Craig Eiland (D-Galveston)--relieves obligation to file medical records with a court before trial commences so long as the business record affidavit is filed and the records and affidavit are provided to the other parties at least 30 days prior to the case being set for trial. Referred to House Judiciary & Civil Jurisprudence. TADC has suggested to Rep. Eiland a slight revision of the bill to refer to the "clerk of the court" to conform with the TRE. **Not yet set for hearing.**

SB 679 by Sen. Robert Duncan (R-Lubbock)--relieves obligation to file medical records with clerk until time of trial; amends §§18.001 and 18.002 to permit "paid" or "actually incurred" amounts to be added to affidavit. After several conversations with Sen. Duncan's office relating to SB 679, TADC has agreed with and support the bill so long as it did not make billing records which were inadmissible under *Haygood*, admissible.

The main points of this bill were to eliminate the need to file medical records before trial (the affidavit is still filed) and to add a way to get in the paid or incurred amounts. We were

concerned that as originally written, the rule could inadvertently repeal *Haygood.*

There is also a minor tweak to Section 18.002 and changing 18.001(d) to include "clerk of the court."

TADC's goal is to eliminate confusion (and appellate fights) over whether the affidavit purported to effectuate a change to existing law.

SB 679 has passed the Senate and has been referred to House Judiciary & Civil Jurisprudence.

Health Care Claims:

HB 2843 by Rep. Kenneth Sheets (R-Dallas)—requires a claimant to file the expert report on each defendant not later than 120 days of that defendant's answer (rather than the date of the original petition) and allows a defendant to object to the report not later than 21 days of the defendant's answer or of service of the report, whichever is later. **HB 2843 was reported from House Judiciary & Civil Jurisprudence on April 8 and awaits scheduling on the House calendar.**

Litigation Financing:

HB 1595 by Rep. Doug Miller (R-New Braunfels)--requires disclosure of agreements where a plaintiff has borrowed money using his or her lawsuit as the asset securing the loan, subjects litigation loans to the interest rate cap applicable to consumer loans generally, and subjects litigation lenders to regulation by the Finance Commission. HB 1595 was heard in House Judiciary & Civil Jurisprudence Committee on Monday, March 18. The committee heard testimony from the U.S. Chamber of Commerce (for the bill) and the litigation finance industry (against the bill). **HB 1595 remains pending in committee.**

HB 1855 by Rep. Doug Miller (R-New Braunfels)--requires disclosure of litigation financing agreements. Referred to House Judiciary & Civil Jurisprudence.

HB 1254 by Rep. Senfronia Thompson (D-Houston)/SB 1283 by Sen. Kevin Eltife (R-Tyler)--permits litigation financing, codifies industry best practices, and requires lenders to be registered with the Texas Department of Licensing and Regulation. HB 1254 was heard in House Judiciary & Civil Jurisprudence Committee on Monday, March 18. The committee heard testimony from the litigation finance industry (for the bill). **HB 1254 remains pending before the committee.**

Substituted Service/Social Media:

HB 1989 by Rep. Jeff Leach (R-Plano)--establishes a procedure to permit substitute service through service on social media. Referred to House Judiciary & Civil Jurisprudence.

Made Whole Doctrine:

HB 1869 by Rep. Four Price (R-Amarillo)/SB 1339 by Sen. Duncan--partial restoration of "made whole" doctrine as it relates to contractual liens in health insurance contracts through the establishment of a "quasi-proportionate" recovery scheme. **HB 1869 was voted favorably from House Judiciary & Civil Jurisprudence on April 8.** SB 1339 was referred to Senate State Affairs. TADC supports this bill in its current form.

Statute of Limitations--Insurance:

HB 1651 by Rep. John Smithee (R-Amarillo)/SB 851 by Sen. Larry Taylor (R-Friendswood)--allows an insurer in a homeowner or residential property insurance contract to limit the statute of limitations on first party claims to 2 years from the date of denial or 3 years from the date of loss. SB 851 has been heard in Senate Business & Commerce and is pending in committee. **HB 1651 was heard in House Insurance on April 9. Representatives of TTLA, Texas Watch, and the insurance industry testified against the bill. TADC opposes this bill. No one testified in support.**

HB 2086 by Rep. Ruth Jones McClendon (D-San Antonio)--establishes a 4-year statute of limitations for claims brought under Chapter 542 of the Texas Insurance Code. Referred to House Insurance.

HB 2956 by Rep. Smithee--prohibits insurers from using a form that requires pre-dispute arbitration arising from most insurance contracts (excludes TWIA). **HB 2956 was heard in House Insurance on April 9. The Texas insurance commissioner and Texas Watch testified in support of the bill. There was no opposition testimony. TADC supports this bill.**

Workers Compensation:

SB 1049 by Sen. Leticia Van de Putte (D-San Antonio)--reverses *Tex. Mut. Ins. Co. v. Ruttiger*, 381 S.W.3d 430 (Tex. 2012) by allowing a claim to be brought against a workers compensation carrier for unfair settlement practices under Chapter 541, Insurance Code. Referred to Senate State Affairs.

HB 1468 by Rep. Kenneth Sheets (R-Dallas)/SB 926 by Sen. Joan Huffman (R-Houston)--reverses *In re XL Specialty Ins. Co.*, 373 S.W.3d 46 (2012) by establishing that communications between an attorney representing a workers compensation carrier and the employer (insured) in the administrative proceedings are protected by the attorney-client privilege. **HB 1468 was heard in House Insurance on April 2. Representatives of the workers' compensation insurance industry testified in favor. Representatives of TTLA, the AFL-CIO and Texas Workers Advocates testified against the bill. TADC supports the concept of the legislation but has concerns with the draft as filed.** The Senate companion, SB 927 by Sen. Joan Huffman (R-Houston) has not been heard in Senate State Affairs.

Limits on Claims Against Insurers:

HB 1407 by Rep. Smithee--mandates automobile insurance policies permit an insured to invoke arbitration. Referred to House Insurance.

HB 1408 by Rep. Smithee--creates an administrative dispute resolution process for claims brought under a policy issued by the Fair Plan. Referred to House Insurance.

HB 2125 by Rep. Van Taylor (R-Plano)--for insurance policies governing property damage (excluding TWIA, Fair Plan, and Tex. Automobile Plan Association), requires an appraisal process (the cost of which is divided between the insurer and insured) as a condition to filing suit. Rereferred to House Insurance (originally referred to House Judiciary & Civil Jurisprudence).

Asbestos Inactive Docket:

HB 1325 by Rep. Miller--permits dismissal of cases pending in the MDL asbestos/silica dockets in which the claimant has not served a complying report unless good cause is demonstrated for retention; extends limitations for re-filing when report can be obtained and retroactive application of law in effect at the time the case was initially filed. Referred to House Judiciary & Civil Jurisprudence. **HB 1325 was voted favorably from House Judiciary & Civil Jurisprudence on April 8. The bill has been agreed to by the plaintiff's and defense asbestos bars.**

Uninsured/Underinsured Motorist Actions:

HB 1558 by Rep. Stephanie Klick (R-Fort Worth)--allows an insurer to recovery attorney's fees against an insurer if the insured prevails in a UM/UIM action. Referred to House Insurance.

HB 1774 by Rep. Ed Thompson (R-Pearland)--bars an uninsured claimant from recovering non-economic or punitive damages in an action arising from an automobile accident; does not apply if tortfeasor driver was intoxicated, flees the accident, or accident was willful or if the vehicle was being operated in furtherance of a felony. Referred to House Judiciary & Civil Jurisprudence.

Barratry:

HB 1711 by Rep. Allen Fletcher (R-Tomball)--permits recovery of statutory barratry damages even if the attorney voluntarily voids the contract and adds a recoverable $10,000 penalty. **Passed the House on April 11.**

Judicial Compensation:

HB 1710 by Rep. Richard Raymond (D-Laredo)--permits a county to give a state district judge a cost of living pay raise if there has been no pay increase during the preceding 3 years; decreases the time required for longevity pay from 16 years to 10 years. **Set for hearing in House Judiciary & Civil Jurisprudence on April 15**.

Judicial Selection:

SB 103 by Sen. Dan Patrick (R-Houston)--eliminates straight ticket voting in judicial races **Heard in Senate State Affairs on April 1 and left pending.**

SB 577 by Sen. Duncan--establishes a non-partisan elect-appoint-retain system for judicial selection. **Heard in Senate State Affairs on April 1 and left pending.**

Technology Funding:

SB 1147 by Sen. Royce West (D-Dallas)--establishes a statewide electronic filing system under rule adopted by the Texas Supreme Court; authorizes an additional filing fee. **Reported from Senate Jurisprudence on April 2. TADC supports this bill.**

SB 1146 by Sen. West/HB 2302 by Rep. Todd Hunter (R-Corpus Christi)--establishes a statewide electronic filing system fund financed by an increase in certain fees and court costs. **Reported favorably from Senate Jurisprudence on April 3. The House companion, HB 2302 by Rep. Todd Hunter (R-Corpus Christi) was voted favorably from House Judiciary & Civil Jurisprudence on April 8. TADC supports these bills.**

Exemplary Damages:

HB 3098 by Rep. Tryon Lewis (R-Odessa)—would prohibit both the discovery and admissibility of a party's net worth as a component of exemplary damages. Referred to House Judiciary & Civil Jurisprudence.

Appeals:

HB 3032 by Rep. Ana Hernandez Luna (D-Houston)—requires the SCOT to adopt rules mandating the final disposition of appeals not later than one year after perfection and expedited resolution of interlocutory appeals within three months. Referred to House Judiciary & Civil Jurisprudence.

Recusal:

HB 3380 by Rep. Todd Hunter (R-Corpus Christi)—repeals §74.053(c)-(f), which govern objections to the assignment of a trial judge, and provides that a trial judge may only be recused or disqualified if timely motion is made and granted under Rule 18(a) or 18(b), TRCP. **The bill was heard in House Judiciary & Civil Jurisprudence and left pending. TADC supports HB 3380.**

Attorney's Fees:

HB 3404 by Richard Raymond (D-Laredo)—limits actions by a claimant with a contingent fee or litigation expense agreement on claims arising out of settlement agreements to grounds of coercion, force, corruption, or forgery. Referred to House Judiciary & Civil Jurisprudence.

CASE LAW UPDATE

EMPLOYMENT LAW - WHISTLEBLOWER ACTIONS

Univ. of Texas Southwestern Med. Center at Dallas v. Gentilello, No. 10-0582 (Tex.February 22, 2013).

Dr. Larry Gentilello, a distinguished professor of surgery at UTSW, reported to his supervisor, Dr. Robert Rege, what he believed to be lax supervision of trauma residents in violation of proper Medicare and Medicaid requirements and procedures. After he was stripped of his faculty chair positions, he filed a whistleblower suit charging retaliation for that reporting.

The Texas Whistleblower Act bars retaliation against a public employee who reports his employer's or co-worker's "violation of law" to an "appropriate law enforcement authority"–defined as someone the employee "in good faith believes" can "regulate under or enforce" the law allegedly violated or "investigate or prosecute a violation of criminal law." In this case, the employee's report to a supervisor was considered as "purely internal" reporting without tie to the Act's undeniable focus on the law enforcement element of the Act.

Justice Willett wrote that a report to "law enforcement" would involve reporting to one who either makes the law or pursues those who break the law. Though internal reporting may be sufficient in other states, it is not sufficient in Texas. The Court determined that there was no jurisdictionally sufficient evidence of any objectively reasonable belief that the reported-to authority possessed what the statute requires: the power to (1) regulate under or enforce the laws purportedly violated, or (2) investigate or prosecute suspected criminal wrongdoing. The jurisdictional evidence must show more than a supervisor charged with internal compliance or anti-retaliation language in a policy manual urging employees to report violations internally. **READ THE OPINION IN FULL**

Texas A&M University-Kingsville v. Moreno, No. 11-0469 (Tex. February 22, 2013).

Moreno was an assistant vice president and comptroller at TAMUK who claimed that her supervisor fired her for reporting to the TAMUK president that the supervisor's daughter had received in-state tuition in violation of state law. TAMUK argued that Moreno's internal reporting fell short of the Act requirements: a good-faith report of a violation of law to an "appropriate law enforcement authority." The Court, with reference to the ***Gentilello*** opinion, noted that the Act's restrictive definition of "appropriate law enforcement authority" requires that the reported-to entity be charged with more than mere internal adherence to the law allegedly violated. The Legislature's language is 'tightly drawn,' and centers on law enforcement, not law compliance. **READ THE OPINION IN FULL**

MEDICAID LIEN - Federal vs. State statutory schemes

Wos v. E.M.A., No. 12-98 (U.S.Sup.Ct. March 20, 2013)

Federal law prohibits states from attaching a lien on the property of a Medicaid beneficiary to recover benefits paid by the State on the beneficiary's behalf. The anti-lien provision pre-empts a State's effort to take any portion of a Medicaid beneficiary's tort judgment or settlement *not designated as payments for medical care.*

When the infant E.M.A suffered multiple serious birth injuries, her parents filed a medical malpractice suit in North Carolina State Court against the delivering physician and the hospital. Though damages were estimated in excess of $42 million, the parties agreed to settlement at a much lower figure within the policy limits available. The parties informed the North Carolina Dep't. of Health and Human Services. Though HHS had a right under North Carolina law to intervene in the suit and participate in settlement negotiations to obtain reimbursement of medical expenses paid, or one-third of the total recovery, it did not do so. HHS did advise that it expected reimbursement. At the time of settlement, and without a full accounting of medical expenses, the State Court placed one-third of the settlement amount aside for reimbursement based on an irrebuttable statutory presumption that one-third of a Medicaid beneficiary's tort recovery was attributable to medical expenses.

The plaintiffs then filed this action in federal court seeking declaratory and injunctive relief, arguing that the State's reimbursement scheme that automatically allocated one-third of the recovery amount for reimbursement of medical expenses violated the Medicaid anti-lien provision. The Supreme Court discussed at length the interaction between provisions of the federal Medicaid anti-lien statute and state law requiring reimbursement using an arbitrary number. Citing *Ahlborn,* the Court noted that the Medicaid statute sets both a floor and a ceiling on a State's potential share of a beneficiary's tort recovery. At the same time, the Medicaid anti-lien provision prohibited a State from making a claim to any part of a Medicaid beneficiary's tort recovery not "designated as payments for medical care. Accordingly, the federal Medicaid anti-lien provisions pre-empted the State's statutory presumption that one-third of tort recovery was attributable to medical expense. **READ THE OPINION IN FULL**

HEALTH LAW

Estrada v. Mijares, No. 08-10-00290-CV (Tex.App.–El Paso February 20, 2013).

Plaintiff urged that the nurse practitioner's duty arises from the mere fact that she possesses a nursing license. The nurse practitioner maintained that she did not have a nurse-patient relationship with Plaintiff Estrada as she did not participate in care, nor was she asked to evaluate the patient by the physician. The Court discussed the existence and creation of the nurse-patient relationship and upheld summary judgment for the nurse practitioner. **READ THE OPINION IN FULL**

Creech v. Columbia Medical Center of Las Colinas Subsidiary, No. 05-10-01545-CV (Tex.App.–Dallas February 13, 2013).

In this medical malpractice case, the Plaintiff's appeal, arguing that the jury's verdict was against the great weight and preponderance of the evidence and that the expert testimony regarding causation offered by defendants was of no probative value. The record contained conflicting evidence on various theories of breach, and the testimony of various experts claiming that other experts were unqualified to render their opinions. "Like many medical-malpractice cases, this case was in many respects a battle of the experts." But it is the jury who decides which expert witnesses to credit. **READ THE OPINION IN FULL**

DISCOVERY–Production of e-data, computer and servers

In Re Pinnacle Engineering, Inc., No. 01-12-01105-CV (Tex.App.–Houston [1st Dist] March 12, 2013).

This case offers a helpful discussion of factors to consider in discovery fights relating to e-data. In this mandamus action, the real parties in interest were co-shareholders and employees of two privately-held corporations (PEI and PPSI). After termination of his employment, Houde sued the privately-held corporations under various theories, including breach of contract, breach of fiduciary duty, shareholder oppression, and civil conspiracy. PEI and PPSI counter-claimed for fraud and rescission. The parties served the same or similar requests for production on each other, seeking documents and communications relating to Houde's employment or ownership interest in PEI and PPSI, his educational background, and PEI and PPSI's investigation into Houde's educational background. Houde also requested the "network server(s) utilized for electronic data" from 2009 to 2011. Relators objected, Houde filed a motion to compel, relators amended to declare that they had produced responsive documents "after a diligent search," though they continued to object to production of their computers and network server hard drives. The trial court ordered production and relators filed their mandamus arguing abuse of discretion. (Relators assert that the trial court's order effectively gave Houde's expert, who was not identified in the order, and whose qualifications were challenged, "carte blanche to rummage through [relators'] storage devices" without imposing reasonable limits addressing privilege, privacy and confidentiality.

The appellate court determined that compelling production of computers and network server hard drives without requiring Houde to identify specific discovery requests did not comport with the requirements of rule 196.4. As a threshold matter, the requesting party must show that the responding party has somehow defaulted in its search for responsive data, that the response was inadequate, and that a search of the opponent's electronic storage device could recover deleted relevant materials. However, *only a qualified expert should be afforded access*, and only when there is some indication that retrieval of the data sought is feasible. The court may not give the expert carte blanche authorization to sort through the responding party's electronic storage devices, but

must impose reasonable limits on production. (The appeals court quoted extensively from *In re Weekley Homes, L.P.*, 295 S.W.3d 309 (Tex. 2009).) **READ THE OPINION IN FULL**

****

REMINDER - REGISTER NOW!
2013 TADC TRIAL ACADEMY

April 26-27, 2013 ~ Sheraton North by the Galleria

Dallas, Texas

If you have not yet registered for the TADC Trial Academy, do it today, space is limited – only a few spots remain!

The Trial Academy is an excellent opportunity for young lawyers to gain powerful skills in courtroom advocacy and an inexpensive alternative to many other programs.

The seminar is staffed by experienced trial attorneys who act as instructors in this intense two-day program. Instruction in Cross & Direct Examination of witnesses, Voir Dire, and Opening & Closing Statements, all in a courtroom setting. Respected members of the Judiciary will serve as judges for the event.

A young attorney is able to earn nearly 1 full year of CLE at a very reasonable registration fee and the program is outstanding. This year's problem is commercial in nature. REGISTER NOW as you will have to study course materials and the problem in advance of the Academy.

TADC CORE SPONSOR: S-E-A. Scientific Expert Analysis™