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

LEGISLATIVE & CASE LAW UPDATE

May 24, 2013

FROM: Dan K. Worthington, TADC President

As we approach the end of the session on Monday, we wanted to acknowledge Craig Eiland, a state representative from Galveston who announced his retirement earlier this week. Rep. Eiland has been a friend of civil justice and was always open to our perspective on legislative matters. His leadership will be missed.

So far, this session has not seen a substantial effort to limit/restrict access to the Courts. While we are hopeful this will continue to be the case, we will remain vigilant over the next few days.

The following is a current status of the bills TADC is actively engaged with or closely monitoring this session. You will notice that a number of bills from prior reports have been removed. These bills are now dead, though some ideas may be attached to other bills moving through the system. We will keep you apprised if that occurs. Changes in status are highlighted in **bold** type.

Filing of Medical Bills/Paid or Incurred Related:

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, the following language was inserted into the Senate committee substitute at the behest of TADC:

"If a medical bill or other itemized statement attached to an affidavit under Subsection (b-1) reflects a charge that is not recoverable, the reference to that charge is not admissible."

The objective of the bill is 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 We were concerned that as originally written, the rule might have inadvertently repealed *Escabedo*. This addition

clarifies that there is no repeal. 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 finally passed.**

Health Care Claims:

HB 2843 by Rep. Kenneth Sheets (R-Dallas)—requires a claimant to file the expert report on each defendant not later than120 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 service of the report, whichever is later. **HB 2843 was amended into HB 658 in the Senate.**

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 has finally passed and has been sent to the Governor**. TADC supports this bill in its current form.

Medicare Subrogation:

HB 658 by Rep. Kenneth Sheets (R-Dallas)—tolls postjudgment interest on an unpaid balance of an award of damages subject to a CMS lien, provided that the defendant pays in response to a demand letter before the 31st day after receipt of the demand. **HB 658 has passed the Senate as amended by adding HB 2843.** TADC supports this bill.

Worker's Compensation:

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 worker's 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, Texas Workers Advocates testified against the bill. TADC supports the concept of the legislation but has concerns with the draft as filed. **HB 1468 died in the Senate, but efforts to attach the bill to another vehicle are ongoing.**

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. The bill has been agreed to by the plaintiff's and defense asbestos bars. **HB 1325 has finally passed and has been sent to the Governor.**

Uninsured/Underinsured Motorist Actions:

HB 1773 by Rep. Ed Thompson (R-Pearland)—prohibits an insurer from delivering, issuing for delivery, or renewing a named driver policy. The bill allows an insurer to exclude individually named drivers, but not a class of drivers. **HB 1773 passed the House but died in the Senate.**

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. As amended in the Senate, the bill excludes an action to recover actual damages and a penalty for barratry from the expedited trial rule. **HB 1711 has finally passed and has been sent to the Governor.**

Technology Funding:

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. **HB 2302 has finally passed and has been sent to the Governor.** TADC supports this bill.

Judicial Selection:

HB 2772 by Rep. Justin Rodriguez (D-San Antonio) and Sen. Robert Duncan (R-Lubbock) calls for a joint Senate-House interim study of the judicial selection system in Texas. The study will cover the statutory, trial, and appellate courts. The interim study committee will report findings and recommendations to the 2015 Legislature. HB 2772 has been sent to the Governor.

Defamation Mitigation Act:

The House has concurred with Senate amendments to HB 1759 by Rep. Todd Hunter (R-Corpus Christi) and Sen. Rodney Ellis (D-Houston). The bill provides that a person alleging injury to reputation may only maintain an action against the publisher of the defamatory information if the person requests a retraction or correction, or if the publisher actually publishes a retraction or correction. A claimant must request the retraction or correction within the applicable limitations period, but if the request is not made within 90 days of receiving knowledge of the publication, the claimant cannot recover exemplary damages. A publisher has the right to request from the claimant further information relating to the alleged falsity of the information, and if the information is not provided, the claimant cannot recover exemplary damages unless the publication was made with actual malice. HB 1759 further defines the circumstances under which a published retraction or correction is timely and sufficient. Publication of a timely and sufficient retraction or correction immunizes the publisher from exemplary damages, unless the publication was made with actual malice. A request for retraction or correction is not admissible at trial, unless the publisher introduces the retraction or correction in mitigation of damages. Finally, HB 1759 requires a defamation action to be abated until a claimant files a sufficient request for retraction or correction. **HB 1759 passed and has been sent to the Governor.**

CASE LAW UPDATE

Summaries prepared by Rachel Carver & Jason Hungerford with Kemp Smith LLP, El Paso

TORTS

***Morris v. PLIVA, Inc.*, 2013 WL 1662929 (5th Cir. (La.) February 14, 2013).**

The 5th Circuit recently affirmed the Western District of Louisiana's dismissal of a complaint brought by several consumers of a generic drug against the manufacturer. One of the plaintiffs, after taking metoclopramide for more than two years, developed movement disorders. Taking the drug for more than twelve weeks has been contra-indicated on FDA labels since 2004. Plaintiffs sued for defective construction and composition, defective design, breach of express warranty, and inadequate warning. The recently-decided *PLIVA, Inc. v. Mensing*, 131 S.Ct. 2567 (2011) controlled in this case, which held that federal law requires generic drug labels to be identical as the corresponding brand-name labels. If a state law requires independent action by a generic manufacturer, it is preempted by the federal law.

Here, the Louisiana consumer law required manufacturers to take an affirmative step to warn consumers of changes in labeling. However, the federal law "duty of sameness" described above prohibited generic manufacturers from taking that type of action unilaterally, and could only do so if the brand-name manufacturer did so first. Since the brand-name drug manufacturer did not send a warning based on the 2004 change of labeling, in order to comply with federal law, the generic manufacturer could not do so either. Furthermore, the Court held that the manufacturer does not have a duty under state law to inform the FDA that a safer label might be proper. **READ THIS OPINION**

***Sherman v. Healthsouth Specialty Hospital*, 2013 WL 1339824 (Tex. App.—Dallas April 2, 2013).**

The Dallas Court of Appeals upheld a ruling made by the County Court at Law No. 3 in Dallas County that failing to secure a plaintiff in her wheelchair in the back of a transport van is a health care liability claim and subject to the expert report requirements of Chapter 74 of the Texas Civil Practices and Remedies Code. The defendant health care provider was transporting the plaintiff home, when a sudden stop caused plaintiff to be thrown from her wheelchair as a result of the provider's employee's failure to properly secure her wheelchair. Plaintiff sued under negligence theories, and the provider moved for dismissal for the plaintiff's failure to serve the requisite expert report within 120 days of commencing suit.

To be a "health care liability claim" under Chapter 74, the claim must meet all three requirements: (1) the defendant must be a physician or health care provider; (2) the suit must relate to the patient's treatment, lack of treatment, or other departure from accepted standards of medical care, health care, or safety, or professional or administrative services directly related to health care; and (3) the defendant's act or omission or other departure must proximately cause the claimant's injury. In this case, the court reasoned that plaintiff's claims related to departures from accepted standards of safety, in accordance with recent case law broadening the "safety" prong to include those safety claims that are not directly related to health care. Plaintiff claimed that the defendant was negligent in failing to properly care for her safety, despite the fact that plaintiff had no expectation of medical treatment from the provider, and that the alleged omission was not directly related to providing health care. Additionally, the court noted that it did not matter that the plaintiff's claims did not require testimony of an expert; "the expert report requirement of [Chapter 74] is a threshold requirement for the continuation of the lawsuit, not a requirement for recovery." The court, accordingly, upheld dismissal of the plaintiff's lawsuit. **READ THIS OPINION**

Willis, et al. v. Marshall, et al. (Tex.App. Dist.8 04/24/2013)

This is an appeal from the 431st District Court of Denton County, Texas, Cause No. 2008-30297-211. In this case the plaintiffs sued an accounting firm alleging several causes of action including fraud. The trial court granted summary judgment for the accounting firm relying on financial documents which all included a disclaimer letter demonstrating that the documents were directed to the attention of the then existing partners. The plaintiffs were doctors and various partnerships and trusts having various ownership interests in several health related entities. They sued the accountants who had performed accounting services for some of the health related entities. The accountants were sued under theories of negligence, negligent misrepresentation, fraudulent inducement, and conspiracy, for exemplary damages and violations of the Texas Securities Act and for statutory fraud under the Texas Business and Commerce Code. The accountants filed a hybrid motion seeking no evidence summary judgments and traditional summary judgments. The trial court found no evidence to support the claims of fraudulent inducement/statutory fraud and Texas Security Act claims granted the summary judgments.

The Court discusses at length the issue of "standing" and makes the distinction between individuals, partners and business entities. The Court concludes that the plaintiffs had no standing as limited partners to pursue relief against the defendants for breach of any legal right belonging to the limited partnership and as such, no subject matter jurisdiction existed to consider the plaintiffs' personal causes of action based upon their partnership interest for harms occurring to them or the limited partnership.

The Court outlines the standards for no evidence summary judgment motions and traditional summary judgment motions and also outlines the elements of each of the claims including negligent misrepresentation, fraud, negligence, fraudulent inducement, conspiracy, violations of the Texas Securities Act, and the claim for exemplary damages. The Court put a great deal of emphasis on the disclaimer letter that was used by the accountants in their statements and reports. As to each of the claims asserted the Court does an analysis and concludes that the summary judgment was proper in the trial court relying heavily upon the disclaimer letter to negate an essential element of each of the claims.

As to the exemplary damages claim, the Court merely concluded that the appellants did not properly brief the issue and the Court overruled the exemplary damages issue, claiming that they waived the issue by failing to analyze the rules or law and failing to attempt to apply them to the facts at issue. **READ THIS OPINION**

CIVIL PRACTICE

***Frontier Logistics, LP v. National Property Holdings, LP*, 2013 WL 168360 (Tex. App.—Houston [14th Dist.] April 18, 2013).**

The 14th District Court of Appeals reversed a ruling from the 269th District Court in Harris County, holding that an indemnity agreement between third-party plaintiffs and third-party defendants did not apply to the claims brought against the third-party plaintiffs according to the unambiguous language of the agreement. Third-party plaintiffs, including National Property Holdings, LP (collectively referred to as "National") entered into a settlement agreement with third-party defendants, including Frontier Logistics, LP (collectively referred to as "Frontier"). The settlement agreement included an indemnity provision wherein Frontier promised to indemnify, defend and hold harmless National and other entities from and against "any other claim asserted by [real estate developer Gordon] Westergren which is covered by the release granted by [Frontier] pursuant to [Section V of the Settlement Agreement]."

When Westergren sued National subsequent to the signing of the agreement, National sought indemnity from Frontier under the terms of the indemnity provision. Frontier moved for summary judgment, alleging that the Westergren lawsuit was not covered by the terms of the indemnity provision. The trial court disagreed, citing that most of the claims asserted in the lawsuit were covered by the indemnity provision, and subsequently awarded a money judgment in favor of the third-party plaintiffs.

In its opinion, the Court reasoned that the unambiguous language in Section V of the agreement obligated Frontier to release claims it had against National, but did not release claims that Westergren had against National. Westergren was not a signatory to the agreement. National concurred that the agreement contained no releases of Westergren's claims, but argued that the provision did include all claims by Westergren that "are of the same description as the claims by [Frontier] that were released in Section V" of the agreement. The Court stated that Frontier's interpretation of "covered by the release" actually means "would be covered by the release if Westergren were a releasing party." Such interpretation is not reasonable as it "adds words to the agreement and is contrary to the plain meaning of the language used." Accordingly, Frontier's claims for indemnity failed as a matter of law and the Court reversed the trial court's ruling, ordering Frontier take nothing on its indemnity claims. **READ THIS OPINION**

COMMERCIAL LITIGATION

***Aymett v. Citibank South Dakota*, N.A. 05-11-00451-CV (Tex. App.—Dallas, 2013).**

Citibank obtained summary judgment against Aymett in a suit to recover credit card debt under theories of breach of contract and suit on account. On appeal, Aymett claimed that Citibank could not prevail on its claim for suit on account because it failed to present a written contract between Citibank and Aymett. The Court of Appeals rejected Aymett's argument, holding that a suit on account can be based on an implied agreement to pay the amount owed. Evidence that Aymett made charges on the account; that Citibank sent account statements to Aymett reflecting charges, fees, and interest; and that Aymett did not dispute any of the charges on his statement was sufficient to establish an implied agreement for Aymett to pay back the amounts he charged. Aymett argued that there was no evidence that he actually received any statements from Citibank, but the Court found that Aymett's receipt of the statements was established by evidence that Citibank mailed the statements to Aymett's address each month, and that Aymett has responded to the statements by making regular monthly payments before defaulting.

The Court further rejected Aymett's contention that Citibank was not entitled to a judgment on an implied contract where it also alleged there was an express contract. Aymett specifically denied the existence of an express contact and in any event, the law does not prevent judgment under an implied contract where an express contract exists; it only prevents recovery under both an implied and an express contract. **READ THIS OPINION**

APPEALS

***Black v. Shor*, N.A. 13-11-00413-CV (Tex. App.—Corpus Christi, 2013).**

This multiple-party appeal concerns an arbitration award and judgment affirming the arbitration award under the Texas Arbitration Act. Appellant Black owned various oil and gas and commercial real estate companies, and Appellee Seashore was created for the purpose of investing in Black's companies. Seashore and its trustee raised claims against Appellants for breach of contract, breach of fiduciary, and fraud. Appellants filed counterclaims and all matters were submitted to an arbitration panel, resulting in an award for Appellees. Appellants challenged multiple aspects of the arbitration award and judgment. The Court of Appeals first rejected Appellee's argument that Appellants' claims were not preserved for appeal. Although Appellants only raised one ground for vacatur within the 90-day time frame to file a motion to vacate, Appellants eventually raised all of their vacatur arguments prior to the trial court's judgment, and Texas law does not prohibit consideration of issues raised following a timely motion to vacate but prior to judgment.

On the merits, Appellants challenged whether the award was granted to the correct party, and whether that party had previously transferred its interest in certain claims. The Court found that any issues related to the parties or claim ownership were properly decided by the arbitration panel: Appellants had stipulated that all of the parties were properly before the arbitration panel; the arbitration clause was broad enough to encompass

arbitration related to the ownership of any claims; and the issue of claim ownership was expressly submitted to the arbitrators. The Court also overruled Appellants' assertion that the trial court erred by failing to issue findings of fact and conclusions of law. The proceedings for the motion to confirm did not involve fact determinations made by the trial court and, thus, the trial court was not required to issue findings of fact and conclusions of law.

Nor did public policy require the award to be set aside. Appellants argued that the arbitrators failed to give legal effect to Appellants' attempt to terminate the partnership with Seashore, but Appellants did not provide any authority that the ability to freely terminate a partnership is a well-defined, fundamental public policy. The partnership-termination issue was presented to the arbitrators and at most, the arbitrators' failure to give effect to the termination was error, which does not necessarily constitute a violation of public policy. Appellants also asserted that the arbitrators awarded duplicative damages, but a mere mistake of law is not sufficient for vacatur, and nothing in the record suggested the panel made its decision in bad faith or failed to exercise honest judgment. Finally, the award of attorneys' fees to Seashore's trustee was not error because the award was authorized by Texas law and applicable arbitration rules. **READ THIS OPINION**

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