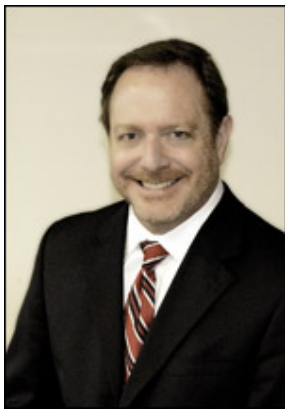


Insurance Coverage Case Law Update

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TEXAS SUPREME COURT UPDATE- DISMISSALS, EXPEDITED PROCEDURES, AND AFFIDAVITS

On November 13, 2012 Texas Supreme Court enacted its *Rules for Dismissals and Expedited Actions* which is one of the more significant rule changes in years. Absent objection and amendment, they will go into effect March 1, 2013.

1. DISMISSAL

The Texas Rules of Civil Procedure for the first time will provide a “dismissal” procedure. Previously, the only procedure for dismissal specifically contemplated by the rules was a Non-Suit or Motion for Summary Judgment. The new dismissal procedure provides that, except in certain family law cases, a motion to dismiss may be brought on the basis that the cause of action has “no basis in law or fact”. The motion must be brought within sixty (60) days of service of the defendant, provide for twenty-one (21) days notice of hearing, and the court must grant or deny the motion within forty-five (45) days after the motion is filed.

This type of dismissal is similar to a 12(b)(6) Motion to Dismiss for failure to State a Claim Upon Which Relief Can Be Granted found in the Federal Rules of Civil Procedure. The Motion to Dismiss does not involve evidence like a summary judgment. The court determines whether or not a cause of action has no basis in law or fact based on the pleadings. This procedure is different than Special Exception, which has been the only other ground for dismissing a cause of action under 91. Unlike a Special Exception, the rule does not allow for amendment of a petition to correct any errors. Most significant, under Rule 91(a)(7), an award of cost and attorney’s fees is required if dismissal is granted. The rule requires evidence of costs and attorney’s fees to be considered, indicating that the Judge does not have discretion in awarding fees upon proper proof. However, the rule indicates that if evidence is not submitted, attorney’s fees and costs may not be awarded by the Court.

For the first time, this significant change in the Rules of Civil Procedure allows dismissal of causes of action and award of costs and attorney’s fees without a finding of bad faith, and does not allow any repleading of causes of action. The question, of course, is whether Judges will actually grant these motions.

2. RULES FOR EXPEDITED ACTIONS

The Court also amended Texas Rule of Procedure 47 to allow for expedited procedures in the event of cases where the amount in controversy is less than \$100,000.

Rule 47 governs pleadings for Petitions, a Plaintiff is required to divide the Petition's claims for relief into one of the following five (5) categories:

- (1) only monetary relief of \$100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees; or
- (2) monetary relief of \$100,000 or less and non-monetary relief; or
- (3) monetary relief over \$100,000 but not more than \$500,000; or
- (4) monetary relief over \$500,000 but not more than \$1,000,000; or
- (5) monetary relief over \$1,000,000.

In the event these categories are not placed in the Petition, the Plaintiff will not be permitted to conduct discovery.

The expedited process applies in cases of \$100,000 or less, excluding certain Family Code, Property Code or medical malpractice actions. A case can be removed from the expedited action process on motion and showing of good cause, or if a claimant files an amended or supplemental pleading seeking relief other than monetary relief allowed by the rule.

In Rule 169, the new Rule for expedited actions, the following procedures apply:

- (1) Discovery is conducted under Rule 190.2 (Level 1 or 2);
- (2) On request, the court must set the case for trial within ninety (90) days after the end of discovery;
- (3) Each side is allowed five (5) hours to complete jury selection, opening statements, presentation of evidence, examination and cross-examination of witnesses and closing arguments. In other words, the entire trial must be finished within ten (10) hours, absent objections, bench conferences, challenges for cause to a juror and charge conferences.
- (4) The parties can only mediate by agreement. The Court cannot order mediation.
- (5) Expert challenge is not permitted except by virtue of summary judgment during a trial on the merits, outside of a strike for late designation.

3. MEDICAL EXPENSES AFFIDAVIT

Addition of Rule 902(c) simply provides by rule the affidavit for medical expenses which has previously been governed by Section 41.0105 of Texas Civil Practice & Remedies Code.