TADC

THE TEXAS ASSOCIATION OF DEFENSE COUNSEL, INC

An Association of Personal Injury Defense, Civil Trial & Commercial Litigation Attorneys—Est. 1960

Office of the President
Mr. Dan K. Worthington
Atlas, Hall & Rodriguez, L.L.P.
P.O. Box 3725
McAllen, TX 78502
956/632-8293
956/686-6109 FAX
E-Mail: dkw@atlashall.com

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Ms. Marisa Secco
Rules Attorney, Texas Supreme Court
P.O. Box 12248
Austin, Texas 78711

RE: Proposed Adoption of Rules for Expedited Trials

Dear Ms. Secco:

The Texas Association of Defense Counsel ("TADC") opposes the proposed rules for expedited actions submitted for comment by the Supreme Court.

While our specific comments are set forth below, there are several fundamental issues which warrant mention at the outset. The scope of expedited actions, as provided in the Court's proposal, greatly exceed the limitation imposed by the legislative mandate and the compulsory nature of the proposal is not required by the mandate and does not further the goal of the promotion of justice in cases which fall within its scope.

As noted in its docket order on page 4, Texas Government Code §22.004(h) limits the scope of suits to which the expedited process is to apply to those in which "the amount in controversy, inclusive of all claims for damages of any kind, whether actual or exemplary, a penalty, attorney's fees, expenses, costs, interest or any other type of damage of any kind, does not exceed $100,000." However, despite this limitation, the Court's proposed Rule 169 specifically excludes counterclaims from the scope of its monetary limitation. For example, a party asserting a $1,000,000.00 compulsory counterclaim would nevertheless be compelled to prosecute the counterclaim in an expedited action if the plaintiff seeks monetary relief aggregating $100,000 or less. Removal of a suit from the expedited process is limited to a motion and showing of good cause by any party or the filing by the plaintiff of an amended or supplemental pleading seeking monetary relief exceeding $100,000. In our view, this proposed rule exceeds the legislative directive, would promote gamesmanship by pleading parties, would unfairly limit a counterclaimant to truncated discovery, and would leave an adversely affected party the sole remedy of a "good cause" motion with no explicit appellate remedy.

As the Court may be aware, several TADC members worked closely with the legislature in the development of the final version of HB 274,

which was enacted as Tex. Gov. Code §22.004(h), within which the legislative mandate for creation of rules implementing a procedure for expedited actions is found. Indeed, the TADC actively supported passage of HB 274. However, nothing within HB 274, Tex. Gov. Code §22.004(h), nor the legislative comments associated with its passage, contain a requirement that these expedited actions provide a plaintiff with the sole decision as to whether a matter should be submitted to a compulsory expedited trial process as opposed to a voluntary procedure by which both parties can exercise independent judgment in the submission of a case.

A review of the information considered by the Court, as described on page 5 of the docket order, weighs against a compulsory procedure. As noted by the Court, the TADC, the Texas Chapter of the American Board of Trial Advocates ("Tex-ABOTA"), the Texas Trial Lawyers Association ("TTLA") having reviewed the impact on litigants from a practice perspective concluded that a voluntary system would better benefit the civil justice system. After several discussions, the Court's Advisory Committee reached the same conclusion. While most of these practical issues are discussed in terms of the Court proposal's specific components, we have also included a list of real world examples which illustrate the "compulsory" procedure's shortcomings.

Furthermore, like the Court's task force, the TADC, Tex-ABOTA and TTLA working group studied the treatment of expedited actions in other jurisdictions. Our study of other jurisdictions, which was set out in a white paper on the issue, a copy of which is attached to these comments as attachment 1, revealed that most (if not all) other jurisdictions which have implemented an expedited actions system have made such system voluntary rather than compulsory. Having reviewed the impact on a litigant's right to a fair trial and a jury's right to be afforded the opportunity to render a fair verdict, we agree that a voluntary procedure is the superior alternative.

SUMMARY OF COMMENTS

- The Court's proposal exceeds the aggregate $100,000.00 limitation imposed by the legislature.
- Neither the legislative mandate contained within HB 274, the legislative history of HB 274, nor Tex. Gov. Code §22.004(h) requires the Court to promulgate a "compulsory" procedure for an expedited civil action process.
- A voluntary approach would allow an attractive option for parties to limit discovery, trial, as well as the appellate process in appropriate cases.
- The expedited process proposed by the Court is a "defendant-only Compulsory" procedure which assigns the unilateral power to a plaintiff to compel a defendant to abrogate the right to meaningful discovery without regard to the complexity of the issues or the non-monetary impact of an adverse judgment.
- The "good cause" removal component adds nothing to the rules. Aside from the lack of objective criteria upon which a "good cause" finding could be made, there is no provision to address the ability of a party to appeal or mandamus a trial court's granting or denial of a motion to remove a case from the expedited procedure. The lack of an interlocutory appeal of an order granting a motion to remove a case from the expedited procedure would deny the losing party the right to an appeal on the issue as it would have already been subjected to the full discovery this proposal seeks to avoid. Likewise, a party subjected to the process would have a difficult time

establishing harm as a result of the denial in that proving what full discovery would have revealed cannot be demonstrated since it was not permitted.

- After careful review, the TADC, Tex-ABOTA, the TTLA, and the Supreme Court Advisory Committee each concluded the voluntary approach was superior in advancing the goals of HB 274. Only the Task Force appointed by this Court failed to reach the same conclusion having failed to reach a consensus as to which approach was superior.

LEGISLATIVE MANDATE/LEGISLATIVE HISTORY

Tex. Gov. Code §22.004(h) requires that the Court adopt rules to promote the "prompt, efficient, and cost-effective resolution of civil actions." It required that these rules "shall address the need for lowering discovery costs in these actions and the procedure for ensuring that these actions will be expedited in the civil justice system." It is left to the Court to develop rules which best advance these two primary directives. We have included a transcription of the legislative debate as it related to the expedited jury trial process with these comments. The Court will find nothing within this transcription that reflects either a direct or implied mandate to the Court that its rules be either voluntary or compulsory.

- While the forced elimination of available discovery may indeed lower discovery costs, it has the collateral effect of eliminating a party's ability to fully and fairly develop a case and a jury's ability to have all of the evidence it needs to fully and fairly render a verdict.
- An expedited trial process may contemplate the speeding up of the process, but should not result in an abridgment of meaningful rights.
- A "compulsory" procedure can do nothing to expedite either the trial or the appeal, both of which are components of the "civil justice" system and arguably part of the legislative directive. Conversely, a voluntary procedure can address all of the "civil justice" components as required by Tex. Gov. Code § 22.004(h).

THE COURT'S PROPOSAL EXCEEDS THE STATUTORY LIMITATION

As noted by the Court, the legislature limited the scope of the expedited actions to those in which "the amount in controversy, inclusive of all claims for damages of any kind, whether actual or exemplary, a penalty, attorney's fees, expenses, costs, interest or any other type of damage of any kind, does not exceed $100,000." The Court's proposal exceeds this limitation.

- Rule 169(a) (1) limits the monetary limitation to "all claimants, other than counter-claimants..." The exclusion of "counter-claimants" from the monetary limitation expressly permits claims of an unlimited monetary sum to be compelled to be brought in an expedited action.
- Similarly, Rule 169(a) (1) permits a compulsory counterclaim for non-monetary relief to be compelled into an expedited action as well. That is a claim for non-monetary relief involving a value greatly in excess of $100,000.00 could likewise be compelled to be asserted in an expedited action.
- With regard to multiple claimants, the Court's rule does not limit "the amount in controversy, inclusive of all claims for damages of any kind..." to $100,000.00 within the expedited action, but rather permits each Plaintiff within an expedited action to assert claims up to $100,000.00.

Like the exclusion of counter-claims from the $100,000.00, this proposal exceeds the legislative mandate set out in the newly enacted Tex. Gov. Code §22.004(h).

- Beyond exceeding the scope of the legislative mandate, to require a Defendant/Counter-Plaintiff to defend a case exceeding $100,000.00 while being compelled to prosecute a compulsory counter-claim of unlimited monetary value within a 5 hour trial with extraordinarily limited discovery amounts to an unfair denial of a meaningful right to a jury trial.
- As discussed in detail below, the "good cause" pathway out of the expedited action process is an inadequate safeguard to fair access to a jury trial.

A VOLUNTARY APPROACH BETTER FULFILLS THE LEGISLATIVE MANDATE

A recurring criticism to the voluntary approach is the claim that the discovery limitations contained within Texas Rule of Civil Procedure 190.2 "Level 1" cases were made voluntary and consequently went unused. This criticism is misplaced:

- Our members' experience regarding cases in which the amount in controversy is under $50,000 is contrary to the assertion that "Level 1" discovery limitations are not routinely observed. Our experience reveals that while parties routinely seek a "Level 3" discovery control order in all cases, it is for the benefit of the parties in having Court-ordered deadlines and not the availability of discovery in excess of that set out in "Level 1."
- A voluntary approach would allow the parties to expedite all aspects of the civil justice system, from inception of the suit through the conclusion of the appeal. A version of this proposal was previously provided to the Court by the TADC/Tex-ABOTA/TTLA working group as well as the Supreme Court appointed Task Force. While there were technical objections to the Task Force version of the voluntary proposal, there was nothing which could not have been tweaked.
- Contrary to the voluntary approach, the Court's proposal can "expedite" the civil justice system only by allowing for the unilateral limitation of discovery and a gross limitation of the trial itself. However, a compulsory procedure cannot expedite the appellate process (the delays of which the Court is well-aware). The entirety of this process is expedited in the "voluntary approach."
- The proposed rules treat every case as if the **only** consideration forwhen a case should be submitted to an expedited jury trial is the stipulation of the amount in controversy. The rules do not take into consideration other factors like reputation or stigma and issues of claim preclusion.
- Tex. Gov. Code §22.004(h) does not mandate rules which expose an attorney, accountant or engineer sued for professional malpractice to severely limited discovery and an extraordinarily limited trial solely because the sum sought is less than $100,000. What is the value of the professional's reputation and why isn't it part of the consideration?
- Likewise, a party could find a judgment entered against it in the expedited system used as claim preclusion in other disputes.

COMPULSORY MEANS COMPULSORY ONLY AS TO DEFENDANT

The procedure proposed by the Court is a "Defendant Compulsory" procedure which assigns the unilateral power to the Plaintiff to compel a Defendant to abrogate the right to meaningful discovery without regard to the complexity of the issues or the non-monetary impact of an adverse judgment.

- Without regard to the genuine amount in controversy, a Plaintiff controls access to the Expedited Jury Trial Procedure through providing or refusing to provide the stipulation set out in the Court's proposal. Whether a case is appropriate for limited discovery will be left to the strategic decision of the Plaintiff and not to the appropriate or fair application to any particular case.

GOOD CAUSE IS UNDEFINED AND THERE IS NO ADEQUATE APPELLATE REMEDY

Arguably the proposed rules provide a single mechanism for removing the case from the proposed process upon a showing of good cause. However, the Court does not provide a definition of "good cause" from which a trial court can make a determination. Furthermore, the proposed rules do not provide for appellate review of the granting or denying of a motion to remove a case from the expedited process.

- Should a Court improvidently grant or deny a motion to remove a case from the expedited process, there is no adequate remedy on appeal. For those litigants forced from the expedited process in the absence of good cause, they will have been required to undergo discovery which should have otherwise not have been available. Similarly, those litigants improperly constrained from full discovery will be precluded from demonstrating legal harm from the lack of full discovery because without full discovery, it would not be possible to know what material evidence might have been discovered had discovery otherwise been permitted.
- Under the proposal, a Plaintiff is afforded the opportunity to avoid the "good cause" standard by merely asserting a claim for non-monetary relief.
- If "good cause" is going to be panacea for all of the shortcomings of this proposal, it must be defined and there must be an explicit appellate pathway for review.

FIVE HOUR LIMITATION

The Court's proposal adopts a five hour time limitation for each "side" which includes the entire trial process from jury selection through closing argument. However, the proposal does not specifically address several issues which can reasonably be anticipated to arise:

- Does the time limitation include the time required for a bill of exceptions?
- Does the time limitation include the "Daubert" hearings which are now required, except upon request of the offering party, to be conducted during trial?
- If the five hours is going to be exhausted, what must a party demonstrate to obtain additional time from the trial court and would "in trial" mandamus relief be available?

CLAIM PRECLUSION

Without regard to the concerns noted above pertaining to the Court' proposal's monetary limitation, there is the potential that unless the Expedited Action expressly excludes a finding made in a case submitted under the Expedited Action as a basis for res judicata or collateral estoppel, that a judgment in a case submitted as an Expedited Action could serve as a basis for liability or a defense to liability in a case brought outside the Expedited Action process.

- A finding of liability in a tort case submitted as an Expedited Action in which a Plaintiff sought $10,000.00 could potentially serve to preclude a Defendant from challenging liability in another suit brought by a derivative Plaintiff seeking $1,000,000.00.

REAL WORLD EXAMPLES

The procedure proposed by the Court presumes that the amount in controversy (at least for an individual plaintiff's claims) is the sole consideration for the submission of a case as an expedited action. However, a voluntary approach allows a litigant in consultation with his or her attorney to consider other facts when deciding whether or not to submit a case as an expedited action:

- A teacher being sued in a civil action for assaulting a student;
- An attorney, engineer, or other professional being sued for malpractice;
- A business being sued for fraud or dishonesty; or
- Any civil claim alleging criminal conduct.

There are other considerations such as complexity of the facts or numerosity of witnesses which might also lead a litigant to elect for a full trial rather than being compelled into a process where discovery is largely denied and the trial is so truncated that a jury cannot be given the relevant and otherwise admissible evidence necessary to return a correct verdict.

RULE 47

Tex. Gov. Code §22.004(h) did not call for the major revisions found in the newly proposed Texas Rule of Civil Procedure 47.

CONCLUSION

One of the clichés sought to be cured by an expedited system is the often repeated "justice delayed is justice denied." But even more certain is that, "justice denied is justice denied." To develop a procedure which permits one litigant to force another litigant into a trial process where there is very little discovery permitted and even less time to present relevant and admissible evidence to a jury based solely upon the amount in controversy is unfair and unjust.

It was because we share the Court's concern that the legislature's mandate be fully implemented that we supported HB 274 and worked to develop a rule which would establish an expedited action procedure which could return litigants to the Courthouse, when needed, in a manner which could expedite the process by reducing unnecessary costs and unneeded time delays with no loss of due process or fairness.

A voluntary system, such as that crafted by the Trial Bar (TADC, Tex-ABOTA and TTLA) allows litigants with disputes over liability or damages (in appropriate cases) a method to have a jury answer the charge and a judge to render judgment without the prospect of an appellate system which forces an inordinate amount of time and expense on the parties. The challenge is for us to provide our clients an attractive alternative to arbitration and settlements based on litigation costs as opposed to liability and damages.

Expeditiousness at the expense of a fair jury trial is too high a cost and this Court should not take this universally rejected and unsound route.

Very truly yours,

Dan K. Worthington,
President

Enclosure(s)