

August 25, 2011

VIA FACSIMILE & EMAIL

Justice Nathan L. Hecht
SUPREME COURT OF TEXAS
PO Box 12248
Austin, Texas 78711
nathan.hecht@courts.state.tx.us

RE: HB 274 Proposed Rule –Dismissal Of Causes Of Action That Have No Basis In Law Or In Fact

Dear Justice Hecht:

HB 274, by amendment to Section 22.004 of the Texas Government Code, directs the Supreme Court of Texas to adopt rules to provide for the dismissal of causes of action that have no basis in law or fact on motion and without consideration of evidence. The rules shall provide that the motion to dismiss shall be granted or denied within 45 days of the filing of the motion to dismiss. Further, HB 274 amends Chapter 30 of the Civil Practice and Remedies Code by adding Section 30.021, which awards costs and reasonable and necessary attorney's fees to the prevailing party on such a motion to dismiss.

As a result of this directive, representatives of TEX-ABOTA¹, the Texas Association of Defense Counsel (TADC)² and the Texas Trial Lawyers Association (TTLA)³ formed a voluntary working group to formulate proposed rules that promote both the letter and the spirit of the statutory mandate, from the perspective of trial practitioners on both sides of the Bar, in an

¹ TEX-ABOTA is the regional organization for the 14 ABOTA chapters in Texas. TEX-ABOTA, in association with the American Board of Trial Advocates (ABOTA) seeks to: (1) establish relations and cooperate with other legal organizations for the purposes of promoting the efficient administration of justice and constant improvement of the law; (2) elevate the standards of integrity, honor, and courtesy in the legal profession; (3) aid in further education and training of trial lawyers; (4) work for the preservation of our jury system; (5) serve as an informational center; (6) discuss and study matters of interest to attorneys; (7) provide a forum for the expression of interests common to trial lawyers; and (8) act as an agency through which trial lawyers in general, and Texas members of ABOTA in particular, have a voice with which to speak concerning matters of common and general interest.

² TADC is an association of approximately 2,000 members statewide, whose practices are primarily devoted to the defense of civil litigation including, but not limited to, intellectual property, labor and employment, commercial litigation, construction litigation, product liability and personal injury. TADC is not a trade organization. Their primary mission is: (1) the preservation of the Texas Civil Justice System; (2) preservation of the right to trial by jury as guaranteed by the Seventh Amendment of the U.S. Constitution and Article 1 Section 15 of the Texas Constitution; (3) ensuring a civil justice system that is balanced, accessible and effective; and (4) ensuring an independent judiciary that is adequately financed and staffed.

³ TTLA is a member organization comprised of plaintiff's attorneys throughout the State of Texas, united and committed to maintaining a civil justice system that protects all Texans and making Texas a safer and healthier place to live.

effort to assist the Supreme Court and Supreme Court Advisory Committee⁴. Additionally, at our request, the working group sessions were attended by Mr. Cory Pomeroy, General Counsel to Senator Robert Duncan, on Senator Duncan's behalf. Furthermore, the State Bar of Texas Section of Litigation graciously agreed to serve the working group's efforts as a resource.⁵

The working group convened on July 19, 2011 to reach a consensus on a rule governing motions to dismiss (as well as a rule for expedited jury trials). This was followed by a subsequent meeting on August 4, 2011. In addition to these meetings, there were numerous e-mail exchanges facilitating a collegial exchange of ideas. A significant number of hours have been devoted to this project. The enclosed proposed rule is the end result. This rule represents the unanimous consensus of each member of the working group. In addition to the proposed rule, we offer the following comments.

The intent of the legislature in creating this dismissal procedure was not to adopt a Texas version of the Federal Rule 12(b)(6) motion, which in many federal district courts are routinely converted to motions for summary judgment if evidence is submitted with the motion. The inclusion of the words "without evidence" in HB 274 makes it clear that the courts should only review the pleadings to determine whether the causes of action being pled have no basis in law or in fact. As such, the working group's proposed rule expressly states that the court cannot convert the motion to dismiss to a motion for summary judgment. However, the working group is aware that under current practice, affidavits or accounts attached to a pleading, such as a suit on a sworn account, can be considered "evidence." Accordingly, the working group agreed to make it clear that a court can receive evidence "attached to or incorporated by reference in the pleading" in ruling on a motion to dismiss.

A few other points are worth mentioning. Section (f) of the proposed rule incorporates the language of the new section 30.021 of the Civil Practice and Remedies Code regarding award of costs and attorney's fees, for ease of reference by practitioners. Also, the language of section (e) is identical to the "Rule of Construction" language included in H.R. 966, 112th Cong. (1st Sess. 2011).

We hope that the proposed rule of our working group is beneficial to the Supreme Court and the Supreme Court Advisory Committee. We are willing to help the Court and the Court's Advisory Committee in any capacity to effect rule(s) that satisfy the objectives of the statute and are fair.

⁴ Representatives of TEX-ABOTA include: Mr. David E. Chamberlain, Treasurer; Professor Gerald Powell, Abner V. McCall Professor of Evidence, Baylor Law School, Member; Mr. Dicky Grigg, Past President of TEX-ABOTA and Past President of the International Academy of Trial Lawyers, Member; Mr. David Cherry, Past President of TEX-ABOTA, Member; and Mr. Mike Wash, Member. Representatives of TADC include: Mr. Keith B. O'Connell, President; and Mr. Dan Worthington, Executive Vice President. Representatives of TTLA include: Mr. Mike Gallagher, Member; Mr. Craig Lewis, Past President of TEX-ABOTA and ABOTA, Member; Mr. Brad Parker, VP of Legislative Affairs; and Mr. Jay Harvey, Member and Past President.

⁵ Representatives of the State Bar of Texas Section of Litigation include former Justice Craig Enoch, Representative Tryon Lewis, (R-Odessa), and Ms. Pat Long Weaver, Treasurer.

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Rule __. Dismissal Of Causes Of Action That Have No Basis In Law Or In Fact

(a) A motion to dismiss one or more causes of action in a pleading, on the basis that the affirmative relief sought in the pleading has no basis in law or in fact, must be filed within 60 days of the date the moving party was first served with the pleading. The Court must set the motion to dismiss for oral hearing as promptly as practicable and must either grant or deny the motion within 45 days of the date the motion is filed.

(b) In ruling on the motion to dismiss, the Court:

(1) must accept as true all of the factual allegations in the pleading;

(2) must construe the pleading, and draw all reasonable inferences from the pleading, in the light most favorable to the party seeking affirmative relief;

(3) must not receive evidence from any party in connection with its ruling and must not consider any extraneous evidence not attached to or incorporated by reference in the pleading, whether referred to in the motion to dismiss or attached as an exhibit to the motion to dismiss; and

(4) must not, on its own initiative or on the motion of any party, change or convert the motion to dismiss under this rule to a motion for summary judgment.

(c) Nothing in this rule prohibits the party seeking affirmative relief from amending the pleading prior to the hearing on the motion to dismiss.

(d) The provisions of this rule shall not apply to, nor constitute a waiver of, a special appearance or motion to transfer venue.

(e) Nothing in this rule shall be construed to bar or impede the assertion or development of new claims, defenses, or remedies under federal, state, or local laws, including civil rights laws.

(f) The Court shall award costs and reasonable and necessary attorney's fees to the prevailing party.

(g) An official record must be kept of the oral hearing on the motion to dismiss.