ADR in Expedited Trials in Texas: A Status Report

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H.B. 274 was introduced during the 82nd Texas Legislative Session in 2011 and quickly became known as the Loser Pay Bill. While the version of the bill that was finally passed and became Texas law on September 1, 2011 did not contain the controversial loser pay provision, it did mandate that the Supreme Court adopt a broad variety of rules respecting sweeping changes in Texas civil trial procedure.

Among other things, the bill amended Section 22.004 of the Government Code by adding a subsection (h) to reads as follows:

> (h) The supreme court shall adopt rules to promote the prompt, efficient, and cost effective resolution of civil actions. The rules shall apply to civil actions in district courts, county courts at law, and statutory probate courts 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 $100,000.00. The rules shall address the need for lowering discovery costs in these actions and the procedure for ensuring that these actions shall be expedited in the civil justice system. The supreme court may not adopt rules under this subsection that conflict with a provision of :
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> (1) Chapter 74, Civil Practice and Remedies Code [Medical Liability];
> (2) the Family Code;
> (3) the Property Code; or
> (4) the Tax Code

On August 25, 2011, 11 representatives of the Texas Trial Lawyers Association (TTLA), the Texas Association of Defense Council (TADC), and the Texas chapter of the American Board of Trial Lawyers (Tex-ABOTA) sent a letter to Justice Nathan Hecht proposing rules for expedited jury trials that, among other things, contained the following provision:

> The court *must not* order the parties to a civil action submitted to the Expedited Jury Trial Process to participate in alternative dispute resolution. (Emphasis added).

On September 22, 2011, a dozen current and former leaders of AA-M, the State Bar of Texas ADR Section, and the Supreme Court Advisory Committee on Court-Annexed Mediation responded with a letter to Justice Hecht urging that the foregoing language not be included in any rule adopted by the Court.

Pursuant to that legislative command, the Supreme Court of Texas appointed a Task Force For Rules In Expedited Actions.[1] The Task Force was charged with making

[1] Originally Misc. Docket No. 11-9193 dated September 26, 2011, and later amended by Misc. Docket No. 11-9201 dated October 5, 2011, to replace one member of the Task Force with another.

recommendations to the Court by February 1, 2012. Former Chief Justice Thomas R. Phillips, as Chair of the Task Force, issued its Final Report to the Supreme Court of Texas dated January 25, 2012. In pertinent part, the report stated:

> *Alternative dispute resolution*. The members of the Task Force unanimously adopted the recommendation of the ABOTA/TTLA/TADC suggested rule prohibiting judges from ordering those cases in the expedited process to mandatory ADR. The members carefully considered various communications from ADR practitioners extolling the efficiencies of ADR procedures and emphasizing the State's longstanding public policy in favor of ADR initiatives. In the end, however, the members concluded that the expedited action procedures would provide the same cost benefits associated with pre-trial ADR resolution, and that parties should not be forced to participate in and pay for ADR proceedings if they were already proceeding under the new rules.

Taken alone, that would not seem to bode well for a party who wants to take advantage of an expedited procedure, but still wants to try mediation. Nor does it take into account cases in which the parties have contractually agreed to an ADR procedure, but one of the parties has filed suit anyway.

And now, as Paul Harvey liked to say, for the rest of the story. The Task Force could not agree whether the expedited trial rules should be mandatory or voluntary. Six members voted to recommend a mandatory rule with an uncapped (i.e. not limited to $100,000 amount in controversy as defined in HB 274) voluntary alternative. Five members voted to recommend only a voluntary rule. The language regarding ADR is identical in the mandatory version, the uncapped voluntary alternative version, and the stand alone voluntary version.

Furthermore, the language actually recommended by the task force has some significant additions to the ABOTA/TTLA/TADC suggested rule. The recommended language is:

> Alternative Dispute Resolution. Unless the parties have agreed to engage in alternative dispute resolution or are required to do so by contract, the court must not- by order or local rule- require the parties to engage in alternative dispute resolution.

All of the foregoing was discussed by the Supreme Court Rules Advisory Committee (SCAC) at their meeting in Austin on January 27, 2012. Four representatives of the ADR provider community attended that meeting.[2] Much of the discussion at that meeting focused, as it had with the Task Force, on the issue of whether the rule should be mandatory or voluntary.

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[2] Suzanne Mann Duvall (AA-M President, past ADR Section Chair, Supreme Court Advisory Committee on Court-Annexed Mediation); Susan Schultz (ADR Section past Chair); Don Philbin (ADR Section Council member); and Mike Schless (past AA-M President, past ADR Section Chair, Supreme Court Advisory Committee on Court-Annexed Mediation)

A non-binding straw poll was taken, and by a margin of nearly two to one, the SCAC favored a voluntary rule.

Assuming no change in the Task Force recommended language regarding ADR, if the rule is voluntary (whether capped at $100,000 amount in controversy as defined in HB 274 or uncapped), there is not likely to be a very significant impact on ADR users in Texas. They will still have a choice. If they wish to use an ADR process, they can simply choose to opt out of the expedited trial procedure. Conversely, if they choose the expedited procedure, they could still avail themselves of a desired ADR procedure, *if* the other parties agree or if a contract so requires.

If the rule is mandatory, if both parties agree there can still be an ADR procedure. If one party desires an ADR procedure, even though the other party does not, the desirous party can avoid the application of the mandatory rule by pleading out of it. There are several ways to do that. First, the statute says the rule will apply to district courts, county courts at law, and statutory probate courts. It says nothing about justice and small claims courts.

Second, the statute applies only to cases 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 $100,000.00. With the addition of exemplary damages, penalties, interest, expenses, costs and attorney's fees, the actual damages would have to be fairly modest to come within the ambit of the rule. It would not take much of an effort to plead out of that range in good faith.

Third, even if a plaintiff pleads within the rule, a defendant wishing to avoid an expedited process would likely find a way to plead a counterclaim in good faith that pushes the controversy outside the $100,000 limit since the statute applies to all claims and attorney's fees.

Fourth, all three versions of the rule contain a provision that the "court must remove a suit from the expedited actions process….on motion and a showing of good cause by any party."

The biggest rub would be in the case that is plead, by all parties, within the rule and one party wants to use an ADR procedure but there is no agreement to do so or contract requiring it. In that case Texas would have the anomalous situation in which a statute[3] authorizes a judge to order an ADR procedure, but a Supreme Court rule prevents that judge from doing so.

For the DRCs and others who mediate cases within the ambit of HB 274 in district courts or county courts at law, a mandatory rule could significantly impact the availability of mediation services when fewer than all of the parties want both an expedited actions process and an ADR process.

The issue is now in the hands of the Supreme Court.

[3] §154.021 Civ. Prac. & Rem. Code