

# TEXAS INSURANCE LAW NEWSBRIEF

FEBRUARY 25, 2013

## THE TEXAS SUPREME COURT APPROVES NEW PROCEDURES FOR DISMISSALS AND EXPEDITED TRIALS

On February 12, 2013, the Texas Supreme Court issued its Final Approval for Dismissal and Expedited Actions. The new rules are effective on March 1, 2013. A brief synopsis of these important changes in Texas litigation is below. A link to the Supreme Court's entire order may be found at <http://www.supreme.courts.state.tx.us/miscdocket/13/13902200.pdf>.

### Rule 91a – Motion to Dismiss

The Supreme Court adopted a procedure where a party may move to dismiss a cause of action on the grounds that a plaintiff's claims do not have a basis in law or fact. Similar to the already existing Federal 12(b)(6) Motion to Dismiss for Failure to State a Claim for which Relief can be Granted, a cause of action has no basis in law if the allegations, taken as true, do not entitle the claimant to the relief sought. The newly adopted Motion to Dismiss will be an important tool in future litigation; however, its procedures must be strictly followed.

- A Motion to Dismiss under Rule 91a must identify each cause of action the party seeks to dismiss and must specifically state the reasons the cause action has no basis in law or fact.
- Timing is essential. A Motion to Dismiss must be:
  - Filed within 60 days after the first pleading containing the challenged cause of action is *served* on the movant.
  - The Motion to Dismiss must be filed at least 21 days before the motion is heard. Further, each party is entitled to at least 14 days' notice of the hearing on the motion to dismiss. A response to the Motion to Dismiss must be filed no later than 7 days before the date of the hearing.
- A party filing a Motion to Dismiss pursuant Rule 91a does not waive its ability to challenge personal jurisdiction or venue by filing a motion to dismiss. By filing a Motion to Dismiss, a party submits to the court's jurisdiction only in proceedings regarding the Motion to Dismiss.
- The district court is not required to conduct an oral hearing on the Motion to Dismiss.
- The district court *must* grant or deny the motion to dismiss within 45 days after the motion is filed.

However, the court does may not rule on the Motion to Dismiss if, at least 3 days before the date of the hearing, the claimant nonsuits the challenged cause of action, or the Motion to Dismiss is withdrawn (i.e. the claimant amends the challenged cause of action).

- Upon a successful Motion to Dismiss, the court *must* award the prevailing party on the motion all cost and reasonable and necessary attorney fees incurred to the challenged cause of action in the trial court.

## **Rule 47 Claims for Relief**

The Supreme Court amended the pleading requirements under Rule 47 of the Texas Civil Rules of Procedure to require a more specific statement of the relief sought by a party. First, all original pleadings must state that the damages sought are within the jurisdictional limits of the court—previously, this requirement was limited only to claims for unliquidated damages.

Additionally, parties seeking relief must provide one of the following five statements regarding the amount and type of relief sought in its original pleadings:

- Only monetary relief of \$100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees (expedited actions);
- Monetary relief of \$100,000 or less and non-monetary relief;
- Monetary relief over \$100,000 or less but not more than \$200,000;
- Monetary relief over \$200,000 but not more than \$1,000,000; or
- Monetary relief over \$1,000,000.

Importantly, a party that fails to include one of the five statements for relief in its pleadings may not conduct discovery until their pleading is amended to comply with Rule 47.

The changes to Rule 47 now require parties to affirmatively plead into, or out of, an expedited action. More specifically, an expedited action is when a claimant pleads that they seek only monetary relief of \$100,000 or less, including damages of any kind, penalties, costs, expenses, pre-judgment interest, and attorney fees. It is important to note; however, that the expedited actions process is unavailable for counter-claimants.

## **Rule 169 - Expedited Actions**

A party that prosecutes an expedited action may not recover a judgment in excess of \$100,000, excluding post-judgment interest. The Expedited Action Rule is mandatory for any case that falls within the pleaded monetary relief requirement under Rule 47 (see above). The expedited action process is a truncated set of procedures designed to quickly dispose of cases in a prompt, efficient, and cost effective manner.

- The Supreme Court also amended Rule 190.2 (Discovery Control Plan Level 1) to apply to exclusively to Expedited Actions and Divorces involving \$50,000 or less. This means each party may take no more than a total of 6 hours of deposition testimony, and
  - each party may not serve more than 15 written interrogatories on any other party;
  - each party may not serve more than 15 request for production on any other party;
  - each party may not serve more than 15 request for admission on any other party; and
  - in addition to the content subject to a request for disclosure, a party may request all documents within a party's possession, custody, or control that it may use to support its claims or defenses.
- The discovery period for expedited actions begins when the lawsuit is filed and continues until 180 days after the date of the first request for discovery of any kind is served on a party. It is important to note that expedited actions are not subject to mandatory additional discovery. This means a court may deny additional discovery even if the discovery is related to new, amended, or supplemental pleadings. Also, the court may refuse to reopen discovery even if the matters have materially changed after the discovery cutoff.
- The court must set the case for trial within 90 days after the completion of the discovery period, and the court may only continue the case twice, not to exceed a total of 60 days.
- At trial, each side is limited to no more than 8 hours to complete jury selection, opening statements, evidence, examination and cross-examination of witnesses, and closing arguments. Upon motion; however, the court may extend the time limit to no more than 12 hours per side.

- A party may only challenge the admissibility of expert testimony as an objection to summary judgment evidence or during trial on the merits.

The court may remove a suit from the expedited action process on a motion showing good cause by any party; or if the claimant amends or supplements its pleading to seek relief other than monetary relief of \$100,000 or less.

- A claimant may not amend or supplement its pleading to remove a suit from the expedited process without the court's permission unless it is filed the earlier of 30 days after the discovery period is closed or 30 days before the date set for trial.
- If a suit is removed from the expedited action process the court must reopen the discovery period.

In expedited cases, the parties may opt out of alternative dispute resolution by agreement. Otherwise, the court may refer the case to a half day mediation with the following requirements:

- The mediation does not cost more than twice the amount of the filing fee, and
- The mediation is completed 60 days before the initial trial setting.

## FEDERAL JUDGE IN NORTH TEXAS DENIES REMAND MOTION & DETERMINES NO VALID CAUSE OF ACTION AGAINST ADJUSTER

Last Tuesday, a Federal District Court Judge in the Northern District of Texas denied a Plaintiffs' Motion to Remand in *Ronald DeCluette, et al v. State Farm Lloyds and Ruben Gallegos*, Civil Action No. 3:12-cv-4449-B, 2013 WL 607320. Plaintiffs Ronald and Annie DeCluette filed a claim with State Farm against their homeowner's policy for various residential property damage resulting from an April 3, 2012 storm. Plaintiffs also sued the insurance adjuster for his alleged failure to thoroughly investigate plaintiffs' claim. Plaintiffs' Original Petition alleged that the insurance adjuster's improper adjustment of the plaintiffs' claim resulted in State Farm's wrongful denial of a portion of their insurance claim.

State Farm removed the lawsuit to Federal Court on the basis of diversity jurisdiction. Specifically, State Farm alleged the insurance adjuster was improperly joined in an effort to defeat diversity jurisdiction. The plaintiffs sued the adjuster for alleged unfair and deceptive acts under 541.060 of the Texas Insurance Code. The Court determined the plaintiffs failed to plead any specific facts to support their allegations against the insurance adjuster. Further, the Court noted the plaintiffs did not attribute any facts to support their claim that they were specifically damaged by the insurance adjuster, nor had the plaintiffs attempted to serve the insurance adjuster with the lawsuit. Accordingly, the Court held the adjuster was improperly joined, and the plaintiffs' claim against the adjuster was not valid.

**Editor's Note:** MDJW attorneys Ryan Geddie and Chris Martin represent the carrier in referenced case.

## MDJW UNIVERSITY: "FIRST FRIDAY" FREE WEBINAR - "MAKING SENSE OF THE DUTY TO INVESTIGATE"

Our next "First Friday" seminar will be held this Friday, March 1<sup>st</sup>, at noon Central. Kaitlin Huber, senior counsel in the firm's Houston office, will present "Making Sense of the Duty to Investigate." Everyone knows an insurer owes a duty to investigate, but when the scope of every investigation is dependent on the facts of each individual claim, the meaning the "duty to investigate" can be perplexing. This free one hour course will examine the investigative parameters outlined by Texas courts with an emphasis on both best practices and ways to avoid subsequent criticism by plaintiff's counsel of one's investigative efforts. The course will also examine the consequences of claims investigations which are perceived to be deficient.

Ms. Huber is a member of the firm's Insurance Practice Group with an emphasis on the defense of coverage disputes and bad-faith allegations.

We have applied to the Texas Department of Insurance for one hour of Texas CE credit. Insurance professionals accredited by the Texas Department of Insurance should have their adjuster number available during the training in order to request credit for the course.

Register for this webinar at: <https://student.gototraining.com/r/3350364010980275712>

After registering you will receive a confirmation email containing information about joining the training. We have a limit of 200 participants for the webinar.

Note: If you have never participated in one of the MDJW webinars, or, if you have had trouble in the past connecting to a webinar, please use the following link to check your computer's connectivity: [http://support.citrixonline.com/en\\_US/gotomeeting/all\\_files/GTM140010](http://support.citrixonline.com/en_US/gotomeeting/all_files/GTM140010)

We hope you will join us this Friday at noon Central Time for our "First Friday" seminar.