"Loser Pays" Rules May Exclude Mediation in Some Small Cases But Overall Impact Muted

By: Mike Schless and Don Philbin***

The "Loser Pays" Legislation that passed the 82nd Legislature and became effective September 1, 2011 did not contain the highly controversial loser pay provision of earlier drafts, but did direct the Texas Supreme Court to adopt rule revisions, one of which could impact ADR practice in smaller cases.

Among other things, HB 274 required the Supreme Court to adopt rules to promote the "prompt, efficient, and cost-effective resolution of civil actions" in which the amount in controversy, inclusive of attorney's fees does not exceed $100,000. TEX. GOV'T CODE §22.004(h).

The Supreme Court appointed a Task Force for Rules in Expedited Actions. The central issue in Task Force deliberations became whether the Expedited Rules would be mandatory, voluntary, or a hybrid.

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) (an association of trial lawyers representing plaintiffs and defendants) aligned to recommend a purely voluntary rule. In doing so, they also recommended that the voluntary rule prohibit trial judges from ordering ADR procedures when the parties elect to proceed under the expedited process.

A dozen current and former leaders of Association of Attorney Mediators (AA-M), the State Bar of Texas ADR Section, and the Supreme Court Advisory Committee on Court-Annexed Mediation responded by urging that this language not be included in the rule.

The Task Force issued its Final Report on January 25, 2012. The report unanimously adopted the TTLA/TADC/TEX-ABOTA position with helpful changes after carefully considering various communications from ADR practitioners extolling the efficiencies of ADR procedures and emphasizing the State's longstanding public policy in favor of ADR initiatives and made helpful revisions as a result:

> 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.

The submissions and Task Force deliberations were heard by the Supreme Court Rules Advisory Committee (SCAC) on January 27, 2012 at their meeting in Austin. Four representatives of the ADR-provider community attended that meeting. Most of the discussion continued to turn on the issue of whether the rule should be mandatory or voluntary.

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

So, assuming no change in the Task Force recommended language regarding ADR, and further assuming that the rule remains voluntary, there should be minimal impact on ADR users in Texas.

Users will still have a choice. If they wish to use an ADR process, they can simply opt out of the expedited trial procedure. Conversely, if they choose the expedited procedure, they can still avail themselves

of an ADR procedure if the other parties agree or if a contract requires it.

Even if the rule is mandatory, and both parties agree, there can still be an ADR procedure. If one party desires an ADR procedure, even though the other party does not, a party could potentially avoid the application of the mandatory rule by pleading out of it. There are several ways to do that under the current proposal.

First, the statute applies 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. 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 may 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 impact will likely be in cases where all parties plead within the rule and one party wants to use an ADR procedure but there is no agreement to do so. In such cases, Texas might have the anomalous situation in which a statute authorizes a judge to order an ADR procedure, but a Supreme Court rule prevents the judge from doing so.

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

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

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