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NEW TEXAS COVERAGE CASE ALERT – June 4, 2011

New Rules and Procedures for Texas Civil Suits Take Effect 9/1/11

In the Texas Legislative Session just concluded on May 31, 2011, the Texas House and Senate passed, and Governor Perry signed, HB 274. HB 274's provisions generally apply to suits filed after 9/1/11. Although the legislative process resulted in a significant scaling back of the bill, as compared to the more ambitious bill originally introduced and championed by the Governor, HB 274, as enacted, still contains several provisions that insurers handling suits in Texas filed after 9/1/11 need to be aware of.

New Motion To Dismiss Practice Rules to be Adopted. While the Federal Rules of Civil Procedure allow for federal court cases to be dismissed on motion under Rule 12b(6), Texas has never, until now, had a similar procedure. This has meant that courts typically allowed Plaintiffs to engage in some preliminary discovery and depositions before the courts would then entertain a motion for summary judgment, including "no evidence" motions. HB 274 now directs the Texas Supreme Court to adopt rules calling for early dismissal of cases that have "no basis in law or fact" on motion and without evidence within 45 days of the filing of the motion to dismiss. To discourage Defendants from filing motions to dismiss where the motion clearly is not appropriate, HB 274 calls for the Rules to be drafted to allow an award of attorney's fees to the party prevailing on the motion, including the Plaintiff if the motion is denied. **Possible effect:** Will depend on the wording of the Rules to be adopted by the Texas Supreme Court but some clearly meritless cases will likely be subject to quick dismissal early on and before significant defense costs have to expended as compared to the current summary judgment procedure.

New Rules to be Adopted for Quick and Efficient Resolution of Smaller Cases. HB 274 also directs the Texas Supreme Court to adopt new rules to promote the prompt, efficient and cost-effective resolution of civil actions where the amount in controversy, including attorney's fees, costs and interest, does not exceed $100,000. **Likely effect**: Quick trials and limited discovery and depositions in smaller cases; more such cases likely will get tried as it will now be more economically feasible to try them instead of just settling on "cost of defense" basis.

Plaintiffs Can No Longer Circumvent the Statute of Limitations Through the Use of the "Responsible Third Party" Designation Rules. Under current law, Section 33.004 TEX. CIV. PRACT. & REM. CODE provides that if the Defendant designates someone that the Plaintiff has not sued as having played a role in the accident/claim (*i.e.*, a "Responsible Third Party" or "RTP") so that the RTP's percentage of responsibility is submitted to the jury along with everyone else's (thereby potentially reducing the percentage of fault assigned by the jury to the Defendant) then the Plaintiff can amend to sue the RTP within 60 days even if the statute of limitations would otherwise have barred Plaintiff's claims against the RTP. The result of this situation under current law is that a Plaintiff could wait until after the statute of limitations had otherwise run on Plaintiff's claims, then sue some peripheral defendants who designate the RTP, then amend to sue the RTP, and then dismiss the originally sued parties. The potential for abuse was obvious and this has, in fact, occurred in several cases. HB 274 now closes this loophole by repealing the provision allowing Plaintiffs to sue the RTP after limitations has run but also now requiring that the Defendant identify the potential RTP in its Rule 192 Disclosures

before the statute of limitations on the Plaintiff's claims against them has run unless the Defendant did not know about their involvement earlier. **Likely effect**: Plaintiffs more likely to just sue everyone potentially involved initially rather than waiting to see if they should join someone later based on evidence developed and thereby run the risk of missing someone that they should have sued and limitations running; more parties sued initially that should not be sued; required earlier identification by Defendants of others potentially involved (*i.e.*, "finger pointing') in discovery, including others that the Defendant might have an ongoing business relationship with and thus would ordinarily not want to point the finger at unnecessarily.

Interlocutory (*i.e.*, Immediate) Appeal of Trial Court Rulings on Controlling Issues of Law Now Allowed. H.B. 274 provides that where the case outcome largely depends on a the court rules on a "controlling question of law as to which there is a substantial ground for difference of opinion," the trial court on its own, or a party on motion, may ask the Court of Appeals to immediately review the ruling in an interlocutory appeal on an expedited basis. While the current law allows interlocutory appeals in some limited circumstances on certain types of issues, HB 274 now greatly expands the types of rulings that will be immediately appealable. For example, under current law, denials of summary judgment motions are almost never appealable immediately, and thus correction of an incorrect ruling by the trial court usually must wait until the entire case is resolved and then appealed. Such denials will now be immediately appealable in some cases, and if the appellate court orders it or the parties agree to it, the case can be stayed pending the appeal so that costs that otherwise would be incurred in proceeding on are potentially avoided. **Possible effect**: Full employment for appellate lawyers; increased caseloads in Court of Appeals; resolution of cases where interim appeal involved will take longer, especially if case is stayed pending the appeal; denial of Defendant's MSJ will no longer necessarily result in greater pressure to settle the case if the ruling is subject to being quickly corrected on appeal.

"Offer of Settlement" Rules Revised. Although the original version of HB 274 that was introduced gave some real "teeth" to the "offer of settlement" procedure, the final enacted version of HB 274 ended up just making some "tweeks." As under current law, the offer of settlement procedure still can only be invoked by a Defendant and, once invoked, it still can be used by either side to create a risk of a shifting of fees and expenses of the litigation to the other side if a reasonable settlement offer is refused. As under current law, if a Plaintiff rejects a settlement offer that ends up being at least 80% of the amount ultimately recovered, then the Defendant can recover attorney's fees and certain litigation costs incurred after the rejected offer. Conversely, as under the current law, if the Plaintiff makes a settlement offer that is rejected by the Defendant and then recovers at least 120% of the rejected offer amount, the Plaintiff can recover fees and expenses incurred thereafter; and, as under the current law, the fee shifting against the Plaintiff is handled as a credit against the Plaintiff's recovery and never results in the Plaintiff or Plaintiff's counsel ever having to actually write a check to the Defendant. Thus, the amendments, as passed, left in place the irony of the current law that no fee shifting against the Plaintiff occurs if the suit is so baseless that the jury finds no liability or no damages. The main change made by the amendments is to no longer cap the amount of fees and expenses that can be shifted to the other side at 50% of the economic damages plus 100% of the noneconomic damages, but instead to now allow fee shifting of up to the amount of the entire recovery by the Plaintiff. **Likely effect**: Just as the current version of the rule is rarely used by either side, we do not expect the new version to be used very often either.

If you wish to discuss any insurance-related issues or needs, please feel free to contact Schubert & Evans, P.C. at 214.744.4400 or visit our website at www.schubertevans.com.