An Overview of the County Court Expedited Civil Actions Act

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I. Source & Purpose of the Act

The County Court Expedited Civil Actions Act ("Act") took effect on January 1, 2022. The Act is modeled on Rule 1.281 of the Iowa Rules of Civil Procedure. The stated purpose of the Act is to "increase access to Nebraska courts by establishing a streamlined process for handling civil actions in which the only relief sought is a limited money judgment. Such process would include limitations on discovery, the number of retained experts and the length of trial." Introducer's Statement of Purpose for LB 1027 (2019-20 Leg. Sess.). The Act was introduced by Sen. Steve Lathrop, the Chair of the Judiciary Committee.

The Act is primarily aimed at personal injury cases that do not involve large damage claims or serious injuries. It can be hard for potential plaintiffs to retain a lawyer to handle those kinds of cases if liability is in question because the cost and time involved in litigating the case are high in relation to the likelihood of success and the size of the potential recovery. Oftentimes, the largest cost is for an expert witness (normally, a doctor). Having a doctor testify is not only costly but also logistically difficult.

The Act is designed to cut costs and expedite the litigation by giving the plaintiff the option of using a report from his or her doctor. (Having a doctor testify, however, may be necessary as a practical matter if the case is tried to a jury and the defense has its own testifying expert.) The Act is also designed to streamline the litigation of the case by relaxing evidentiary requirements, imposing limits on discovery, setting deadlines, and limiting trial time.

II. Application & Recovery Limitation

The Act "applies to civil actions in county court in which the sole relief sought is a money judgment and in which the claim of each plaintiff is less than or equal to the county court jurisdictional amount . . . ." Neb. Rev. Stat. § 25-2742 (Cum. Supp. 2020). The jurisdictional amount is currently $57,000. Neb. Ct. R. § 6-1462(1). The following items are included for purposes of determining the amount of the claim: (1) the claim itself, (2) interest that accrued prior to the filing date, and (3) attorney's fees. The following items are not included: (1) prejudgment interest that accrued after the filing date, (2) post-judgment interest, and (3) costs. *See* Neb. Rev. Stat. § 25-2742(1) (Cum. Supp. 2020).

A plaintiff is not required to proceed under the Act. A plaintiff can litigate its case under either (1) the normal procedures for civil cases or (2) the procedures specified by the Act and its implementing rules. The plaintiff must make that choice before filing the action. If the plaintiff

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chooses to proceed under the Act, then the plaintiff must file a certification form with the complaint. Neb. Rev. Stat. § 25-2743(1) (Cum. Supp. 2020). The logical extension of requiring the certification to be filed with the complaint is that a plaintiff who files a complaint under the normal procedures cannot later invoke the Act by filing an amended complaint.

If a plaintiff chooses to litigate under the normal procedures for civil actions and proves damages in excess of $57,000, then the plaintiff will recover the full amount of the damages. The reason is that the jurisdictional amount is not a true jurisdictional limit. Section 24-517(5)(a) provides that an award "is not void or unenforceable because it is greater than such amount." Neb. Rev. Stat. § 24-517(5) (Cum. Supp. 2020). The parties have the option, however, of having the case certified to district court if the claims exceed the jurisdictional amount. *See* Neb. Rev. Stat. § 25-2706 (Cum. Supp. 2020).

By contrast, a plaintiff who chooses to litigate under the Act may not recover a judgment in excess of the jurisdictional amount. If a jury returns a verdict in excess of the amount, then the county court can only enter judgment for the jurisdictional amount. Neb. Rev. Stat. § 25-2743(3) (Cum. Supp. 2020). The election form includes a specific warning to plaintiffs about what will happen if the jury awards them more than the jurisdictional amount. *See* Rules for County Court Expedited Civil Actions, Appendix 1.

Litigation often involves multiple parties. Plaintiffs may be joined when they assert claims arising out of the same transaction and their claims raise a common question of law or fact. *See* Neb. Rev. Stat. § 25-311 (2016). Likewise, defendants may be joined when the claims asserted against them arise out the same transaction and raise a common question of law or fact. *See* Neb. Rev. Stat. § 25-320 (2016). The possibility of multiple plaintiffs raises the question of whether the $57,000 limit applies to the amount sought by each plaintiff or the total amount sought by all of the plaintiffs. The wording of the statute indicates that the limit applies to the amount sought by each plaintiff.

Section 25-2742 provides that the Act "applies to civil actions in which the claim of *each plaintiff* is less than or equal to the county court jurisdictional amount . . . ." Neb. Rev. Stat. § 25-2742(1) (Cum. Supp. 2020) (emphasis added). Furthermore, § 25-2743(3) provides that "*[a] party* proceeding under the act may not recover a judgment in excess of the county court jurisdictional amount set forth in subdivision (5) of section 24-517 . . . ." Neb. Rev. Stat. § 25-2743(3) (Cum. Supp. 2020) (emphasis added). Taken together, these sections indicate that the Act applies in cases in which the total amount of the claims asserted by all of the plaintiffs exceeds $57,000 – provided that the claims by each plaintiff do not exceed $57,000.

III. Physician's Report

As previously mentioned, the Act is designed to streamline the litigation of the cases for modest amounts of damages. A key component of the streamlined process is the procedure for submitting the testimony of a treating physician. Instead of having his or her treating physician testify by deposition or in person at trial, the plaintiff may have the treating physician complete

and submit a report. The report must be completed on a form adopted by the Supreme Court. Neb. Rev. Stat. § 25-2747(6)(a). The proposed form for the report is ECA Form 2. It is modeled on the form used in Iowa.

There is some uncertainty about how the information in the form should be presented to the jury. The language of the statute suggests that the form should be treated as an exhibit and offered into evidence:

> The report of any treating health care provider concerning the plaintiff may be used in lieu of deposition or in-court testimony of the health care provider, *so long as the report offered into evidence* is on a form adopted for such purpose by the Supreme Court and is signed by the health care provider making the report.

Neb. Rev. Stat. § 25-2747(6)(a) (Cum. Supp. 2020) (emphasis added).

IV. Evidentiary Objections

The Act provides that the Nebraska Rules of Evidence apply – but with a twist. The Act creates a procedure that eliminates the need to call a witness to provide the necessary foundation for documents when there is no real question about the document's authenticity or admissibility under the hearsay rule.

Section 25-2747 of the Act eliminates the need to call witnesses to lay the foundation for a document if four requirements are met:

> (a) The party offering the document gives notice to all other parties of the party's intention to offer the document into evidence at least ninety days in advance of trial and provides a copy of the document intended to be offered;
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> (b) The document on its face appears to be what the proponent claims it is;
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> (c) The document on its face appears not to be hearsay or appears to fall within a hearsay exception set forth in Nebraska law; and
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> (d) The objecting party has not raised a substantial question as to the authenticity or trustworthiness of the document.

Neb. Rev. Stat. § 25-2747(2)(a)-(d) (Cum. Supp. 2020).

There are two ways in which the objecting party may fail to raise a substantial question as to authenticity or trustworthiness. First, the party may fail to make a timely objection. Section 25-2747(5) provides that "[a]ny authenticity or hearsay objections to a document as to which notice has been provided under . . . this section must be made within thirty days after receipt of

the notice." *See* Neb. Rev. Stat. § 25-2747(5) (Cum. Supp. 2020). Second, the party may fail to provide a substantial reason for questioning the authenticity or trustworthiness of the document.

To illustrate how the statute is designed to work, assume that the plaintiff gives notice that she intends to offer what she claims are her hospital records. Also assume that the records contain the hospital's headers and logo as well as the names of the plaintiff and her treating physicians. In addition, the records state the types of treatments that the plaintiff received and when. They also contain the diagnosis of "hyperextension of the neck." Lastly, assume that the defendant objects on authenticity and hearsay grounds. How will the court most likely rule?

Authenticity. The document on its face seems to be what it purports to be: the plaintiff's hospital records. Unless the defendant can point to something that raises a real issue as to whether the documents are in fact the plaintiff's medical records, then the court should overrule the objection on authenticity grounds. As a result, the plaintiff will not need to incur the time and expense of subpoenaing the custodian of records or some other hospital employee to testify at trial about the authenticity of the document.

Hearsay. Hospital records normally contain entries made by persons with knowledge of the event at or around the time of the event and such entries are normally made in the regular course of the hospital's business. That means that the document on its face appears to fall within the business record exception to the hearsay rule – but only in part.

It is clear from the face of the document that the portion of the document that contains the diagnosis of hyperextension of the neck is hearsay and does not fall within the business record exception. Unlike the Federal Rules of Evidence, the Nebraska Rules exclude "opinions and diagnosis" from the business records exception to the hearsay rule. *See* Neb. Rev. Stat. § 27-803(6) (2016).

Because the portion of the document that contains the diagnosis fails to satisfy the requirements of § 25-2747(2)(c), that portion of the document is inadmissible. The court should either sustain the hearsay objection or overrule the objection in part and sustain it in part. *See Arens v. Nebco, Inc.*, 291 Neb. 834, 856, 870 N.W.2d 1, 18-19 (2015) (in holding that trial court did not abuse its discretion in excluding business records that contained both factual statements and diagnoses, the court noted when part of an exhibit is admissible and another part is not, the trial court has the discretion to reject the exhibit in its entirety or admit the admissible part).

V. Discovery

The Act imposes stringent limitations on discovery. Unless the parties agree or the court for good cause orders otherwise, each side gets ten interrogatories, ten requests for production, ten requests for admission, one deposition of a party, and two depositions of nonparties. Each side is also limited to one expert witness. Neb. Rev. Stat. § 25-2744(2) (Cum. Supp. 2020).

"For the purposes of the act, side means all litigants with generally common interests in the litigation." Neb. Rev. Stat. § 25-2742(3) (Cum. Supp. 2020); Neb. Ct. R. § 6-2201(c).

Like the Act overall, the discovery limitations are based on the Iowa Expedited Civil Action Rule (hereinafter "Iowa Rule"). *See* Iowa R. Civ. P. 1.281. The Iowa Rule was adopted in 2014 and applies in cases in which the amount in controversy does not exceed $75,000. Its adoption was not an isolated event. It was instead part of a broader civil justice reform effort that included making substantial changes to the Iowa Rules of Civil Procedure.

Perhaps the most significant change was to require the parties to a case to disclose basic information to each other without the need for formal requests. Disclosures have been part of the Federal Rules of Civil Procedure since 1993. Like the Federal Rules, the Iowa Rules have three types of disclosures: (1) initial disclosures, (2) expert disclosures, and (3) pretrial disclosures. *See* Fed. R. Civ. P. 26(a)(1)-(3); Iowa R. Civ. P. 1.500. The initial disclosures are required in cases covered by the Iowa Rule. Iowa R. Civ. P. 1.281(2)(b).

The disclosures provide much of the information that parties once obtained through interrogatories and document production requests. As a result, the parties do not need to use the formal methods of discovery to the same extent as they once did. That explains why the Iowa rules (like the federal rules) have a lower numerical limit on interrogatories than the Nebraska rules do. Absent a court order or agreement to the contrary, a party may serve 30 interrogatories in the Iowa courts and 25 interrogatories in the federal courts. Iowa R. Civ. P. 1.509(1)(e); Fed. R. Civ. P. 33(a)(1). By contrast, a party may serve 50 interrogatories in the Nebraska courts. Neb. Ct. R. Disc. § 6-633(a).

The limitations are even more stringent in cases governed by the Iowa Rule: ten interrogatories, ten requests for production, and ten requests for admission, plus limits on the number of depositions. These more stringent limitations are workable for two reasons: (1) the cases are smaller and less complex than civil actions not covered by the Iowa Rule and (2) the parties will obtain most of the information that they need to prepare their cases through the initial disclosures.

The major problem with imposing the same limitations in Nebraska is that the Nebraska Discovery Rules do not include any disclosure provisions. The Legislature was aware of the problem. The floor debates indicate that the Legislature passed the Act with the expectation that the rules would include initial disclosures. *See* Leg. Trans. 86-90 (July 20, 2020) (remarks of Sen. Lathrop and Speaker Hilgers).

The proposed rules include two sets of required disclosures:

- Initial Disclosures – information about the witnesses and copies of the documents that the party may use to support its claims or defenses, information about statements, information about damages and insurance policies, and a signed release for medical records in personal injury cases. *See* Neb. Ct. R. § 6-2203.

- Expert Disclosures – information about the expert a side may call at trial (identity, resume, and compensation) as well as a statement of the opinions the expert will express and the basis and reasons for them and any exhibits that will be used to summarize or support the expert's opinion. *See* Neb. Ct. R. § 6-2204. The information about the expert's opinions is very similar to the information currently discoverable through interrogatories under Discovery Rule § 6-326(b)(4).

The primary purpose of the initial disclosures is to provide the parties with the information they would normally obtain through their first set of discovery requests. The information they receive through the disclosures may help them draft more focused requests when they begin formal discovery. Therefore, the rule provides that absent a court order or stipulation to the contrary, no discovery requests may be served before the parties have made their initial disclosures. *See* Neb. Ct. R. § 6-2203(e).

The language of the rule indicates that all of the parties must serve initial disclosures regarding all of the claims before any of the parties may engage in formal discovery. While that may be a sensible approach in most cases, it may not be in others – for example, in cases involving counterclaims or cross-claims. Delaying discovery in those kinds of cases until all of the disclosures have been made could substantially delay the litigation. By making the prohibition on discovery subject to a stipulation or court order to the contrary, the rule gives the parties and courts the flexibility to allow discovery to begin sooner or in stages.

VI. Motions, Pleadings & Discovery Requests

Generally speaking, a party in an action brought under the Act may file the same kinds of motions that a party may file in an action governed by the normal rules of pleading and procedure. For example, a defendant may challenge the plaintiff's pleading by filing a Rule § 6-1112(b) motion to dismiss, a Rule § 6-1112(e) motion for a more definite statement, or a Rule § 6-1112(f) motion to strike. Section 25-2745(1) provides that a party "may file any motion permitted under rules adopted by the Supreme Court for pre-answer motions." Neb. Rev. Stat. § 25-2745(1) (Cum. Supp. 2020). Either party may file a motion for summary judgment. Neb. Rev. Stat. § 25-2745(2) (Cum. Supp. 2020).

The rules provide that the Nebraska Rules of Pleading and Discovery in Civil Actions apply to matters that are not specifically addressed by the Act or its rules. *See* Neb. Ct. R. § 6-2201(a). For example, a party may file a motion to amend a pleading pursuant to Pleading Rule § 6-1115(a) because neither the Act nor the Rules address amended pleadings.

Likewise, neither the Act nor the Rules address the contents of the complaint or of a deposition notice. The contents, however, are addressed by Pleading Rule § 6-1108(a) [contents of the complaint] and Discovery Rule § 6-330(b)(1)(A) [contents of deposition notice]. Those rules therefore apply.

There are a number of motions that are specific to actions brought under the Act – for example, a motion to modify the limitations that the Act imposes on discovery or a motion for additional trial time. But overall, motion practice under the Act is much the same as it is in other cases.

VII. Deadlines

A. Statutory Deadlines

The Act sets the following deadlines: (1) discovery must be completed within 60 days of trial, motions for summary judgment must be filed no later than 90 days before trial, and notices of an intent to offer a document must be given no later than 90 days before trial. *See* Neb. Rev. Stat. §§ 25-2744 (discovery), 25-2745 (summary judgment) & 25-2747 (notices of intent to offer) (Cum. Supp. 2020).

Courts normally do not set a trial date until late in the litigation. To make the statutory deadlines workable, Rule § 6-2209(b) requires the court to "enter an order setting the matter for trial, taking into consideration the Act, these Rules, and the Case Progression Standards for county court civil actions set forth in Neb. Ct. R. § 6-101." Neb. Ct. R. § 6-2209(b).

The deadlines in the Rules are based on the assumption that the case will be tried to a jury and ready for trial approximately six months after the answer is served. That is shorter than the Case Progression Standards, which provide that 90% of civil jury cases should be disposed of in one year. *See* Neb. Ct. R. § 6-101. It is longer, however, than the Case Progression Standards for civil nonjury cases. The Standards provide that 90% of civil nonjury cases should be disposed of in six months. As a result, the court may need to shorten the time period specified in the rules when it sets a nonjury case for trial.

Jury cases are sometimes set for trial during a specified period of time, which is often referred to as a "jury term." Instead of specifying a particular date for the trial, the court enter an order setting the matter for jury trial during a particular jury term and specify the first day of the jury term in its order.

B. Disclosure Deadlines

The federal rules and many state rules require the parties to hold a discovery conference and submit a discovery plan to the court. Fed. R. Civ. P. 26(f). Absent a court order or stipulation to the contrary, the parties must make their disclosures within 14 days after the conference. Fed. R. Civ. P. 26(a)(1)(C). While holding conferences and formulating plans may have advantages in terms of structing the litigation, they also have disadvantages in the form of additional time and cost. Therefore, the Rules do not require discovery conferences or plans.

Instead of tying the disclosure deadline to a discovery conference, Rule § 6-2203(c)(2) ties the deadline to the service of a responsive pleading. The rule is not a stand-alone provision but must instead be read in light of the Pleading Rules. Pleading Rule § 6-1108(a) discusses the contents of "[a] pleading which sets forth *a claim for relief*, whether an original claim, counterclaim, cross-claim, or third-party claim . . . ." Neb. Ct. R. Pldg. § 6-1108(a) (emphasis added). Pleading Rule § 6-1107(a) lists the six types of pleadings allowed: complaint, answer, reply to a counterclaim, answer to a cross-claim, third-party complaint, and a third-party answer. Neb. Ct. R. Pldg. R. § 6-1107(a). Counterclaims and cross-claims are asserted in the answer. *See* Neb. Ct. R. Pldg. § 6-1113(a).

The rule provides that a party asserting a claim must serve its initial disclosures regarding the claim within 14 days after service of the first responsive pleading to the claim. The word "first" was included to make it clear that when multiple defendants have appeared in the action, the 14-day period begins to run when any one of them serves a responsive pleading. *See* Rule § 6-2203(c)(2). Defendants who later appear in the action must be served with the disclosures 14 days after they serve their pleading. *See* Neb. Ct. R. § 6-2203(c)(2).

A defendant must serve its initial disclosures regarding a claim within 28 days after service of the responsive pleading to the claim. That will normally be 14 days after the plaintiff serves its initial disclosures (the plaintiff's disclosures are due 14 days after service of the responsive pleading).

In most cases, there will be one pleading that sets a claim for relief (the complaint) and one responsive pleading (the answer). But there may be rare cases with multiple defendants asserting counterclaims or cross-claims. To illustrate how the rule would work in such a case, assume that Defendant I served an answer to the plaintiff's complaint on Day 28 of the litigation and that Defendant I's answer contained a cross-claim against Defendant II. Defendant II served its answer to the plaintiff's complaint on Day 30 and served its answer to the cross-claim on Day 58 (30 days after service of Defendant I's answer to the complaint). When are the initial disclosures due?

- Plaintiff's disclosures regarding its claim are due on Day 42 (14 days after service of the first answer, which was served on Day 28).
- Defendant I's disclosures regarding the plaintiff's claim are due on Day 56 (28 days after service of its answer, which was served on Day 28).
- Defendant II's disclosures regarding the plaintiff's claim are due on Day 58 (28 days after service of its answer, which was served on Day 30).
- Defendant I's disclosures regarding its cross-claim are due on Day 70 (14 days after service of its cross-claim, which was served on Day 56).
- Defendant II's disclosures regarding the cross-claim against it are due on Day 86 (28 days after service of its answer to the cross-claim, which was served on Day 58).

The term "regarding a claim" is broad enough to cover all of the party's initial disclosure requirements (documents and witnesses used to support the party's claims or defenses, statements regarding the action or its subject matter, damages claimed, and insurance that may cover a possible judgment). The rule does not address how the filing of an amended pleading affects the disclosure deadlines. If the issue arises in a particular case, it can be addressed by a stipulation or court order.

Like the initial disclosures, the expert disclosures must be in writing and signed by the attorney or self-represented party. The rule provides that unless the court orders or the parties stipulate otherwise, the disclosures must be made within 90 days after service of the first responsive pleading. *See* Neb. Ct. R. § 6-2204(b). The first responsive pleading will normally be served within 30 days after the first defendant was served. *See* Neb. Ct. R. Pldg. § 6-1112(a)(1) (answer must be served within 30 days after service of the summons and complaint). Requiring the disclosures to be served 90 days later means that, as a general rule, the disclosures will be served approximately four months after the first defendant was served.

VIII. Time for Trial

The Act not only streamlines the process but also expedites it. The Act provides that an action brought under the Act should ordinarily be tried in two days and each side is allowed no more than six hours "to complete jury selection, opening statements, presentation of evidence, examination and cross-examination of witnesses, and closing arguments. Time spent on objections, bench conferences, and challenges for cause to a juror are not included in the time limit." Neb. Rev. Stat. § 25-2746 (Cum. Supp. 2020).