TORT REFORM ARRIVES IN FLORIDA

A Summary of How HB 837/SB 238 Will Impact Litigation in the Sunshine State

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On March 24, 2023, Florida Governor Ron DeSantis signed HB 837 / SB 238 into law, passing extensive tort reform measures pertaining to civil litigation in Florida. HB 837/ SB 238 became effective law on the date of signature, March 24, 2023, and will apply to any lawsuit filed thereafter. In March of 2023, Florida saw 280,122 new cases initiated in its E-Portal Filing System[1]. The significant increase in new cases filed in the first three weeks of March 2023 can likely be attributed to these changes. Below is a summary of what Florida lawyers can expect to see regarding the changes.

TWO-YEAR STATUTE OF LIMITATIONS FOR NEGLIGENCE ACTIONS

Prior to the enactment of HB 837 / SB 236, Florida's statute of limitations for general negligence was four (4) years. Newly reformed Florida Statute Section 95.11(4)(a) reduces the time limit to bring general negligence actions to two (2) years. However, protections are afforded for service members during times of active duty (which is defined by the Legislature) which materially affect their ability to appear under Section 95.11(12). What this means is that typically, a general negligence claimant will have two (2) years from the date of the incident to file suit. Otherwise, the action is subject to dismissal.

NEGLIGENT SECURITY PRESUMPTION AGAINST LIABILITY FOR THIRD-PARTY CRIMINAL ACTS

Florida Statute Section 768.0701 mandates juries to consider "all persons who contributed to the injury" in actions for damages against the owner, lessor, operator, or manager of commercial or real property brought by persons lawfully on the premises who were injured by the criminal act of the third-party. This will allow for the intentional tortfeasor to be added onto the verdict form.

Additionally, Section 768.0706 creates a presumption against liability for criminal acts of third parties who are not employees/agents in multifamily residential premises where certain minimum security standards are substantially implemented: 1) a security camera system at points of entry and exit which records and maintains video for at least thirty (30) days and video footage to assist in offender identification and apprehension; 2) a lighted parking lot illuminated with an average of 1.8 foot-candles at eighteen (18) inches above the surface from dusk until dawn or controlled by photocell; 3) lighting in walkways, laundry rooms, commons areas, and porches from dusk until dawn; 4) at least a 1-inch deadbolt in each dwelling unit door; 5) a locking device on each window, exterior sliding door, and any other door not used for community purposes; 6) locked gates with key or fob access along pool fence areas; and 7) a peephole or door viewer on each dwelling unit door that does not include a window or window next to the door.

Additionally, by January 1, 2025, multifamily properties must also implement a crime prevention policy through environmental design assessment no more than three (3) years old and provide proper crime deterrence and safety training to its employees in order to benefit from the presumption against liability. Assessment for compliance will be through either a law enforcement agency or a Florida Crime Prevention through Environmental Design Practitioner designated by the Florida Crime Prevention Training Institute of the Department of Legal Affairs. The Florida Crime Prevention Training Institute of the Department of Legal Affairs will develop a proposed curriculum or best practices to implement.

PROVING MEDICAL DAMAGES

Florida Statute 768.0427(2)(a) limits evidence of past medical treatment that has been satisfied at trial to evidence of the "amount actually paid, regardless of the source of payment."

Juries may consider what is "reasonable" for unsatisfied unpaid medical bills under 768.0427(2)(b)(1-5) including what the claimant's health insurer would have paid if

the claimant has health insurance, 120% of Medicare (or 170% of Medicaid if there's no Medicare rate) if the claimant does not have health insurance, or evidence of the amount a third party paid or agreed to pay in exchange for the right to receive payment under a letter of protection. Similar provisions apply to future treatment as well.

Section 768.0427(3) provides for required disclosures for any claimant using letters of protection including: a copy of the letter of protection, all itemized billing for the claimant's medical expenses, utilization of CPT codes, information regarding the selling of accounts receivable to a "factoring company" or third party, whether the claimant had health insurance coverage, and whether the claimant was referred for treatment under a letter of protection and if so who made the referral.

Importantly, there is a special carve-out for if the referral was made by the claimant's attorney. In that instance, even in the face of an attorney-client privilege objection, the financial relationship between a law firm and a medical provider, including the number of referrals, frequency, and financial benefit obtained, is relevant to the issues of bias of a testifying medical provider. This provision will allow for a wealth of discovery into the referral and financial relationships of large plaintiffs' law firms and commonly utilized treating physicians.

MODIFIED NEGLIGENCE STANDARD

Florida's newly reformed laws provide for a modified comparative negligence standard, as opposed to the pure comparative standard previously utilized. What this means is a claimant who is found to be more than fifty (50) percent at fault may not recover any damages. Previously, that same claimant would still recover damages reduced by the percentage of their fault.

CIVIL REMEDY & BAD FAITH CHANGES

Under the new Florida Statute 624.155(4)(b), an insurer is not liable for bad faith for a liability insurance claim brought under statutory or common law if the insurer tenders the lesser of the policy limits or the amount demanded by the claimant within ninety (90) days of receiving actual notice of a claim accompanied by sufficient evidence supporting the amount of the claim. Under 624.155(4)(c), failure of an insurer to tender within ninety (90) days is not bad faith and is not admissible in a bad faith action. If the insurer fails to tender within the ninety (90)-day period, any applicable statute of limitations is extended for an additional ninety (90) days.

Section 624.155(5)(a) states that mere negligence alone is insufficient to constitute bad faith. In fact, according to Section 624.155(5)(b), the claimant (the insured) has the duty to act in good faith in furnishing information about the claim, making demands to the insurer, setting deadlines, and attempting to settle the claim. However, this subsection does not create a separate cause of action. Of note, the jury may consider whether the insured or their representative acted in good faith and reasonably may reduce damages against the insurer accordingly under Section 624.155(5)(b)(2).

Section 624.155(6) states that if two or more third-party claimants have competing claims arising out of a single occurrence, which in total may exceed the insured's available policy limits, the insurer does not commit bad faith by failing to pay all or any portion of the available limits to one or more of the third-party claimants if, within ninety (90) days after receiving notice of the competing claims, the insurer either: (1) files an interpleader action under the Florida Rules of Civil Procedure. If the claims of the competing third-party claimants exceed the policy limits, the third-party claimants are entitled to a prorated share of the policy limits as determined by the trier of fact. This does not alter or limit the insurer's duty to defend the insured; or (2) pursuant to binding arbitration agreed to by the parties, makes the entire amount of the policy limits available for payment to the competing third-party claimants before a qualified arbitrator selected by the insurer and the third-party claimants at the insurer's expense. The third-party claimants are entitled to a prorated share of the policy limits as determined by the arbitrator, who must consider the comparative fault, if any, of each third-party claimant, and the total likely outcome at trial based upon the total of the economic and non-economic damages submitted to the arbitrator for consideration. A third-party claimant whose claim is resolved by the arbitrator must execute and deliver a general release to the insured party whose claim is resolved by the proceeding.

"ONE-WAY ATTORNEY FEE" ELIMINATED

"One-way attorneys' fees" corresponding with Florida Statutes Sections 626.9373 (suits against surplus lines insurers), 627.428 (suits against insurers to enforce an insurance policy), 631.70 (suits against life insurers of insurance policies or annuity contracts), and 631.926 (suits against the insurers of residential or commercial property) have been eliminated. These statutes are repealed. Further, this change will apply to auto-glass and personal injury protection (PIP) litigation, significantly limiting (if not completely eliminating) these types of lawsuits, as it will no longer be a fruitful business model for firms operating solely on these types of suits.

COMPUTATION OF ATTORNEYS' FEES

The newly amended Florida Statute Section 57.104 limits the awarding of attorneys' fees multipliers to "rare and unusual circumstances." There is a strong presumption that the lodestar fee is sufficient and reasonable. This change brings the Florida contingency fee multiplier statute in line with the federal standard.

DENIAL OF COVERAGE ATTORNEYS' FEES

Under the newly added Florida Statute Section 86.121, there is a limited ability to recover attorneys' fees from an insurance company after a total coverage denial. Such fees may be awarded in declaratory action to determine the validity of coverage.

ATTORNEYS' FEES FROM PROPOSALS FOR SETTLEMENT APPLY TO ANY CIVIL ACTIONS INVOLVING INSURANCE CONTRACTS

The provisions of Florida Statute Section 768.79 (offer of judgment or proposal for settlement section) now apply to any civil action involving an insurance contract.

BONDS FOR CONSTRUCTION CONTRACTS

Section 627.756 eliminates reference to 627.428, which previously governed the award of attorney's fees in certain construction disputes. Now, Section 627.756 independently provides for awards of attorney's fees against surety insurers in actions brought by owners, contractors, subcontractors, laborers, or materialmen.

CONCLUSION

The changes above will set the landscape for civil litigation in Florida for years to come. For a full version of all changes, please reference the Florida Senate's website, which includes the full text of Chapter 2023-15 at: http://laws.flrules.org/2023/15.

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[1] Fargason, Patrick. April 6, 2023. Comprehensive Tort Reform Spurs Record Filings. *Florida Bar News.* https://www.floridabar.org/the-florida-bar-news/comprehensive-tort-reform-spurs-record-filings/.