COMMENTARY

Tort and Insurance Law Update and Binding Arbitration: What's New and What Do I Do?

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On March 24, the governor signed HB 837. This law changes many aspects of the civil litigation system as it relates to personal injury and insurance claims.

Here's What's New

Among other modifications, the new law shortens the statute of limitations from four years to two years in the majority of negligence cases. It also requires that a plaintiff prove that he or she was less than 50% at fault for the injuries sustained, mandates that the criminal be placed on the verdict form in a civil trial in which negligent security is alleged, and restructures the manner in which medical expenses are to be presented at trial. Interestingly, the law provides an insurance company with immunity from a bad faith action in a multiple claimant case under certain conditions.

The new Florida Statute s. 624.155(6) states: "an insurer is not liable beyond the available policy limits for failure to pay all or any portion of the available policy limits to one or more of the third-party claimants if, within 90 days after receiving notice of the competing claims in excess of the available policy limits, the insurer complies with either paragraph [the filing of an interpleader action with the court] or pursuant to binding arbitration that has been agreed to by the insurer and the third-party claimants, the insurer makes the entire amount of the policy limits available for payment to the competing third-party claimants before a qualified arbitrator agreed to by the insurer and such third-party claimants at the expense of the insurer." This will undoubtedly increase the number of binding arbitrations that trial lawyers will be required to participate in, so it is a good idea to become familiar with the process.

What Is Binding Arbitration?

Florida Statute s. 44.104 and Florida Rule of Civil Procedure 1.830 regulate the substantive and procedural rights for your client. You must read these very carefully. Note that the filing of an application for binding arbitration will toll the running of the applicable statute of limitations. Importantly, the Florida Evidence Code will apply in a binding arbitration

and the parties have a right to subpoena records and have witnesses sworn in at the hearing. The hearing may be transcribed and used in subsequent proceedings. If the parties have chosen an arbitration panel, all arbitrators may equally conduct the arbitration process, but a majority may determine any disputed question. Importantly, the final decision is to be made by majority vote, so unanimity is not required. The binding arbitration decision must be provided within 10 days after the hearing ends and thereafter any party can seek to enforce the decision by filing a petition for a final judgment.

Remember that "binding" means just that: The parties are bound by the decision as if it was a verdict. Unlike nonbinding arbitration, there is no option for filing a motion for trial de novo after a binding arbitration. A party can file an appeal of the decision to the circuit court within 30 days. This appeal is limited to "review of the record and not de novo."

The only issues that may be reviewed by the circuit court are as to the arbitrator's handling of the proceedings, any alleged partiality or misconduct by the arbitrator, and whether the decision reaches a result that violates the Constitution of the United States or the Constitution of the state of Florida. Suffice it to say, it is a very limited review.

Here's What You Do

Preparation is very important. Prepare as if it was a mini bench trial. This is not a time for the lawyers to "wing it." Make sure to work with your clients and witnesses so that they are comfortable with the exhibits that you are putting into evidence through them. Teach your arbitrator about the case early on by sending a clear and concise outline of your case with the materials a few weeks before the hearing. Note that Rule 11. 070 generally prohibits ex parte communication with an arbitrator so copy all parties on communications. Be aware that the arbitrator is likely to have read the materials before the hearing and to interject questions to the lawyers during the hearing.

In short, a binding arbitration is very serious business and essentially substitutes for your client's day in court. Make the best of the opportunity.

In other arbitration-related news, on Nov. 15, 2022, Chief Judge Jack Tuter of the 17th Judicial Circuit in and for Broward County, Florida issued Administrative Order 2022-49-CIV requiring mandatory nonbinding arbitration in every case involving water damage. Pursuant to this AO, if a case does not settle at mediation, it is mandatory for all parties in that case to participate in non-binding arbitration. The NBA hearing must be completed no later than 45 days before the Calendar Call for the trial.

For a detailed discussion of what nonbinding arbitration is and how to properly prepare your client's case for it, please read "My Civil Case Was Ordered to Nonbinding Arbitration: Now What? Tips from an Arbitrator," which I wrote for the Daily Business Review on March 4, 2022.

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