Florida Tort Reform Legislation - 2023

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Implemented by passage of House Bill (HB) 837

Effective Date(s)

This law states that it applies to causes of action filed with the court after

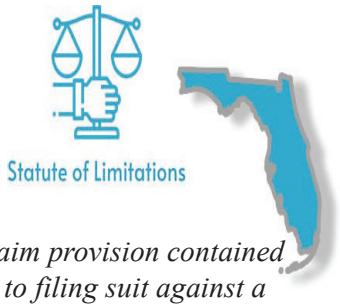
March 24, 2023

- There is disagreement amongst trial courts as to whether certain provisions of the Act will be given retroactive effect.
- The shortening of the statute of limitations for negligence causes of action from 4 to 2 years applies to causes of action accruing after March 24, 2023.
- Changes in the law regarding insurance contracts apply to those issued or renewed after March 24, 2023.

Implemented by passage of House Bill (HB) 837

Statute of Limitations

The statute of limitations for negligence claims is reduced from four (4) years to two (2) years.



How does this affect the three (3) year notice of claim provision contained in Section 768.28(6) F.S., which is a prerequisite to filing suit against a governmental entity?

Depends upon when the cause of action accrued. If cause of action accrued prior to 3/24/23, the 4-year SL is still in effect, so no reason Plaintiff cannot fully comply with pre-suit notice requirements.

Implemented by passage of House Bill (HB) 837

Statute of Limitations (cont.)

- For these claims, if Plaintiff filed suit prematurely (in order to meet the 3/24/23 deadline) consider moving to dismiss Complaint for failure to comply with Section 768.28(6) F.S.
- If case dismissed and has to be refiled, it will be subject to the new law changes.

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Statute of Limitations (cont.)

For causes of action accruing after 3/24/23, essentially renders the pre-suit notice requirement moot, in those cases where Plaintiff fails to provide said notice prior to filing suit.

- May want to consider filing motion to stay the case until Plaintiff complies with Section 768.28(6) F.S.
- May want to raise failure to provide notice as an affirmative defense and wait to see whether Plaintiff remedies the deficiency-if not move for summary judgment due to lack of notice.

The discrepancy between the 2 year SL and 3 year notice of claim period is unlikely to be addressed by Legislature in the near future.

Implemented by passage of House Bill (HB) 837

Medical Bills

The law limits the introduction of evidence for medical damages at trial.

Intended to address the abuses which were occurring with respect to:

1) Letters of Protection (LOP)

2) Conscious decision by Plaintiff's lawyers to not utilize client's available private health insurance coverage and/or Medicare/Medicaid coverage, in order to inflate "boardable" medical expenses at trial.

Implemented by passage of House Bill (HB) 837

Past Medical Care

The law limits evidence of past *paid* medical bills to the amount actually paid for the services regardless of the source of the payment.

- If a health insurer paid for a medical bill, the amount the insurer paid is admissible at trial. Plaintiff cannot introduce into evidence the amount the provider billed.
- Abolishes the previous post-verdict judicial setoff procedure.

Implemented by passage of House Bill (HB) 837

Past Medical Care (cont.)

As to *unpaid* medical bills:

- If a plaintiff has health care coverage, the amount which the health insurer must pay under an insurance contract or regulation (plus the plaintiff's contribution, such as a co-pay or deductible) is admissible at trial.
- If a plaintiff has health care coverage but chooses to fund medical care through a letter of protection, only evidence of the amount his healthcare insurer would have paid if he had submitted his bills to the insurer (plus the plaintiff's contribution) is admissible.

Implemented by passage of House Bill (HB) 837

Past Medical Care (cont.)

As to *unpaid* medical bills:

- If a plaintiff does not have health care coverage, then evidence of 120% of the Medicare reimbursement rate being in effect on the date of the claimant's incurred medical services may be introduced at trial. If there is no applicable Medicare rate for a service, 170 percent of the applicable state Medicaid rate is admissible.

- If a plaintiff receives medical services pursuant to a letter of protection, and the medical bill is assigned to a third-party factoring company, only evidence of the amount the third party agreed to pay the provider for the right to receive payment is admissible at trial.

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Future Medical Care

The law limits evidence as to future medical care:

- If a plaintiff has health care coverage or is eligible for health care coverage, only evidence of the amount for which future charges could be satisfied if submitted to such health care coverage (plus the plaintiff's portion such as co-pays and deductibles) is admissible.

- If a plaintiff does not have health care coverage or has health care coverage through Medicare or Medicaid, or is eligible for such health care coverage, evidence of 120% of the Medicare reimbursement rate in effect at the time of trial for the medical treatment or services the claimant will receive is admissible.

If there is no applicable Medicare rate for a service, 170% of the applicable state Medicaid rate, is admissible.

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Health Contracts/Medical Expenses

Discovery of health contracts. Contracts between providers, insurers, and HMOs are neither subject to discovery nor admissible.

Damages for medical expenses. The law prohibits recovery for amounts above the amounts paid for medical services, and it also prohibits an award for damages from exceeding the amount:

1) Actually paid by or on behalf of the claimant to his provider
2) Necessary to satisfy charges for unpaid medical services at the time of trial.
3) Required to provide for any reasonable and necessary future medical treatment.

Implemented by passage of House Bill (HB) 837

Expected Effect of Changes to the Admissibility of Medical Expenses

- Defense experts who opine on the appropriateness of the amount of medical bills will hopefully no longer be necessary.
- Plaintiff-oriented doctors, especially surgeons, will (hopefully!) rethink their medical treatment and billing approach.
- Reduced value of future life care plans.
- Lower past and future medical expenses presented to the jury should reduce non-economic damage awards and potential for a so-called “nuclear” verdict.
- Increased ability to reasonably settle claims at mediation.

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HB 837 Potential Loophole?

- The final allowable evidence under HB 837 is "Any evidence of reasonable amounts billed to the claimant for medically necessary treatment or medically necessary services provided to the claimant."
- Defendants must be cautious as there is a potential a Plaintiff friendly doctor may claim their bills are reasonable and medically necessary due to the Plaintiff's limited availability of medical professionals willing to treat accident patients. Thus, those doctors are higher paid given they do not accept insurance proceeds and recovery is not guaranteed.
- Therefore, a proactive defense that actively pursues what is reasonable and customary in the entire industry is likely the best course of action until this provision is thoroughly tested in the appellate courts.

Implemented by passage of House Bill (HB) 837

Letters of Protection

If a Plaintiff receives medical services subject to a letter of protection, the Plaintiff must disclose the following:

- ✓ A copy of the letter of protection.
- ✓ All billing for Plaintiff's medical expenses, which must be itemized and coded (in effect on the date the services were rendered).
- ✓ Whether the provider sold the accounts receivable to a third party, the name of the party, and the dollar amount paid by the third party.

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Letters of Protection (cont.)

- ✓ Whether the plaintiff had health insurance at the time of treatment and the identity of the health care coverage provider.
- ✓ Whether the claimant was referred for treatment under a letter of protection, and, if so, the identity of the person who made the referral.

Implemented by passage of House Bill (HB) 837

Modification to the Attorney-Client Privilege

No attorney-client privilege in communications related to an attorney's referral of a client to a health care provider for treatment.

- This overturns the Florida Supreme Court's decision in *Worley v. Central Florida YMCA*, which found that the defense could not seek discovery information about the relationship between Plaintiff's attorneys and medical providers to whom they referred clients, finding that those communications were protected by the attorney-client privilege.

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Modification to the Attorney-Client Privilege (cont.)

Under the new law, 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 issue of the bias of a testifying medical provider.

- Prior to this law change, plaintiff's counsel could address the alleged bias of the defense medical expert, but defense counsel was restricted in telling the jury about the financial relationship between plaintiff's counsel and plaintiff's treaters.

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Comparative Negligence

The law changes Florida's comparative negligence system from a pure comparative negligence system to a modified system (except for medical negligence cases).

This aligns Florida with a majority of the other states who have already adopted a "modified" comparative negligence standard.

Previously, a plaintiff was entitled to recover a percentage of damages proportionate to the degree of fault of the defendant, regardless of his/her degree of fault.

Under new law, if a Plaintiff is found to be more than 50% at fault for causing his/her injuries, then they recover nothing from the Defendant.

Implemented by passage of House Bill (HB) 837

Negligence Security

In a negligent security action against the owner or operator of real property by a person lawfully on the property who was harmed by the criminal act of a third party, the trier of fact is now required to consider the fault of all persons who contributed to the injury or death, including the criminal actor.

- Criminal perpetrator (known or unknown) can now be listed on verdict form and jury can assign a percentage of fault to that individual, for which property owner will not be financially responsible.

- Moreover, the owner or operator of the property cannot be held negligent for damages to a third party attempting to commit, or engaged in committing, any criminal act on the property.

Implemented by passage of House Bill (HB) 837

Negligent Security-Owner or Operator of a Multifamily Residential Property

The law provides a presumption against negligent security liability for the owner or operator of a "multifamily residential property" which demonstrates compliance with specified security measures.

Requirements for Presumption Against Negligence

The law provides three requirements that a property owner must show they followed before the incident giving rise to the negligence claim.

1) A list of physical property safety measures to be taken on the property;

2) A crime prevention analysis; and

3) Crime prevention training for all employees.

Implemented by passage of House Bill (HB) 837

Physical Property Safety Measures

The first requirement includes the implementation of the following safety measures:

- A security camera system at points of entry and exit which records and maintains footage for at least 30 days.
- A lighted parking lot that provides light from dusk until dawn.
- Lighting in the hallways, laundry rooms, common areas, and porches from dusk until dawn.
- A deadbolt measuring at least one inch in each dwelling unit door.

Implemented by passage of House Bill (HB) 837

Physical Property Safety Measures (cont.)

- A locking device on each window and each exterior sliding door, and another on other doors not used for community purposes.
- Locked gates with key or fob access along pool fence areas.
- A peephole or door viewer on each dwelling unit door that does not include a window or that does not have a window next to the door.

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Crime Prevention

Crime Prevention Analysis. By January 1, 2025, the property owner must complete a "crime prevention environmental design" that is no more than three years old for the property. The assessment must be performed by a law enforcement agency or a Florida Prevention Through Environmental Design Practitioner (FCP). The property owner must remain in substantial compliance with this assessment.

Crime Prevention Training. By January 1, 2025, the property owner must provide proper crime deterrence and safety training to its current employees. This training is to familiarize employees with security principles, devices, measures, and standards outlined in the checklist of physical measures listed in requirement one.

Implemented by passage of House Bill (HB) 837

Crime Prevention (cont.)

Proposed Curriculum. The Florida Crime Prevention Training Institute of the Department of Legal Affairs shall develop best practices for owners and operators to implement such training.

Trespassers. Trespassers do not have a claim for negligent security.

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Bad Faith

New Duty of Insureds and Impact on Damages

Now, in every bad faith action in Florida, the insured, claimant, and/or their representative have a duty to act in good faith in providing information, making demands, setting deadlines, and attempting to settle the claim.

The trier of fact may consider whether the insured, claimant and/or their representative acted in good faith and may reasonably reduce the damages awarded. Mere negligence remains insufficient to bring a claim for bad faith against an insurer.

Implemented by passage of House Bill (HB) 837

Bad Faith (cont.)

Changes to 90-day Period, Admissibility, and Statute of Limitations

No bad faith action can lie if an insurer tenders the lesser of the policy limits or the amount demanded by the plaintiff within 90 days after receiving actual notice of the claim and sufficient evidence supporting the claim.

It is not bad faith if the insurer does not tender, and the existence of the 90 days is inadmissible in any action seeking bad faith.

Should the insurer not tender, the statute of limitations is extended for an additional 90 days.

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Bad Faith (cont.)

When Insurer Is Not Liable For Failure To Pay Policy Limits For Multiple Claims Exceeding Limits

If multiple claims arising out of a single occurrence exceed the policy limits, the insurer is not liable beyond the policy limits for failure to pay any or all of the policy limits within 90 days if:

- The insurer files an interpleader to determine rights of claims, and if found in excess of policy limits, claimants are entitled to a prorated share; or
- The insurer makes full policy limits available at binding arbitration, in which claimants are entitled to a pro rata share of policy limits as determined by the arbitrator, who must also consider comparative fault and the likely outcome of trial. If a claim is resolved by the arbitrator, a general release must be executed by the claimant to the insured party whose claim is resolved.

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Contingency Fee Multiplier

Previously, Florida case law allowed for courts to consider and award contingency fee multipliers to attorneys' fees, based on various factors.

The new law creates a "strong presumption" that the lodestar fee (number of hours expended multiplied by a reasonable hourly fee) is sufficient and reasonable in a case in which attorney fees are determined by or awarded by the court.

A claimant may overcome this presumption only in rare and exceptional circumstances and only if they can demonstrate that they could not have otherwise reasonably retained competent counsel.

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One-Way Attorneys' Fees

Previously, "one-way attorneys' fees" applied in situations in which an insured prevailed in an action against an insurer.

Under new law, one-way attorneys' fees in insurance cases now only apply to declaratory judgment actions for the determination of insurance coverage against an insurer after a denial of coverage of a claim, which does not include a defense under a reservation of rights.

Implemented by passage of House Bill (HB) 837

One-Way Attorneys' Fees (cont.)

If a declaratory judgment is granted in favor of the insured against the insurer, the court shall award reasonable attorneys' fees, which are limited to those incurred in the action.

Goal is to reduce meritless insurance claims - Plaintiffs may be subject to liability for insurer's attorneys' fees and are less likely to file questionable claims.

QUESTIONS?

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