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Florida Has Enacted Tort Reform—What That Means and Does It Affect Other Jurisdictions

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Florida Pre-Tort Reform

For many years, Florida's national reputation for litigation has been very poor. Certain "pundits" have colloquially dubbed Florida as a "Judicial "Hellhole" (actually, a trademarked term), due to the excessive litigation, frivolous lawsuits and large jury awards.[i]

On January 8, 2019, Governor Ron DeSantis was sworn in as Florida's governor.

Florida Supreme Court Justices Pariente, Lewis and Quince each reached the mandatory retirement age (70 years old) during the second half of their then-current six-year terms, which concluded on January 7, 2019.[ii]

As a result, Governor DeSantis had an opportunity to re-shape the ideology of Florida's Supreme Court.

Notably, Justices Pariente, Lewis and Quince, along with the swing vote of Justice Labarga, were considered by Florida-Conservatives as an activist majority (of course, Florida-Liberals held the opposite viewpoint). Regardless, these outgoing-justices had adjudicated a number of decisions, which had resulted in increases to liability, stymied attempts at tort reform, etc.

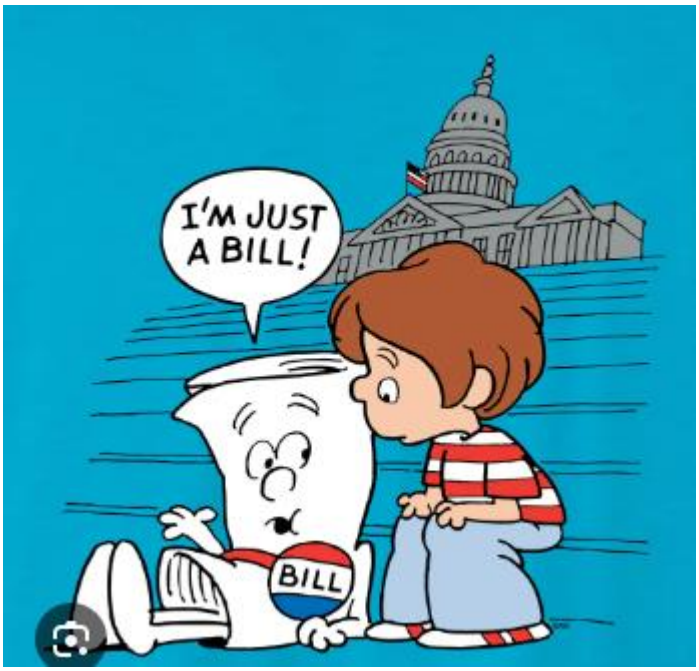
Once sworn in, Governor DeSantis quickly appointed three replacement justices: Justices Lagoa, Luck and Justice Muniz, all of whom were considered conservative/textualists (opposite of the outgoing-justices).

Since then, the composition of the Florida Supreme Court has changed due to elevations,[iii] *inter alia*, but, suffice it to say, the High Court continues to lean heavy-conservative, which differs from ideology make-up prior to Governor DeSantis' various appointments.[iv]

In light of the Florida Supreme Court's ideological shift, coupled with the Florida Executive and Legislative Branches being controlled by Florida-Conservatives, legislators saw renewed opportunities relative to enacting radical changes to the legal landscape, particularly tort reform.

Insert House Bill 837 / Senate Bill 236 ("Florida Tort Reform")

In February 2023, the Florida Tort Reform legislation was first-introduced, then was submitted to various Committee and Subcommittees and, thereafter, underwent several amendments.[v]



On March 17, 2023, the Florida House of Representatives passed HB 837 by a vote of 80 "Yeas" to 31 "Nays".[vi]

On March 23, 2024, the Florida Senate passed SB 236 by a vote of 23 "Yeas" to 15 "Nays".[vii]

Both the House[viii] and Senate[ix] votes were pursuant to party lines.[x]

On March 24, 2023, Governor DeSantis signed HB 837/SB 236 into law.

Following Governor DeSantis putting pen-to-paper Florida's Tort Reform legislation became *effective immediately*—well, sort of as explained further below.

Florida Tort Reform Statistics

In anticipation of Florida Tort Reform, plaintiff attorneys statewide filed a massive number of lawsuits, in order to be "grandfathered" into the then-existing laws.

In March 2023, the total number of documents filed in Florida's EFiling Portal reached the exorbitant number of 3.58 million documents (in 2.19 million submissions).[xi]

> The latter documents/submissions equated to 280,122 new lawsuits, which was 126.9% higher than the previously-held record from May 2021.[xii]
>
> Of the 280,122 lawsuits filed in March 2023, Miami-Dade County accounted for 71,000 new lawsuits (last year, during the same timeframe, there were 15,359 new lawsuits) and Hillsborough County had 53,000 new lawsuits.[xiii]

Obviously, the massive number of lawsuits increased case-loads for judges, but also and according to Patrick Manderfield, Deputy Communications Director of the Florida Court Clerks & Comptrollers, "[t]he record numbers of case strained [clerk] resources . . . impact[ed] normal operations (opening files, processing court records and reviewing/referring cases to appropriate courts and judges)."[xiv]

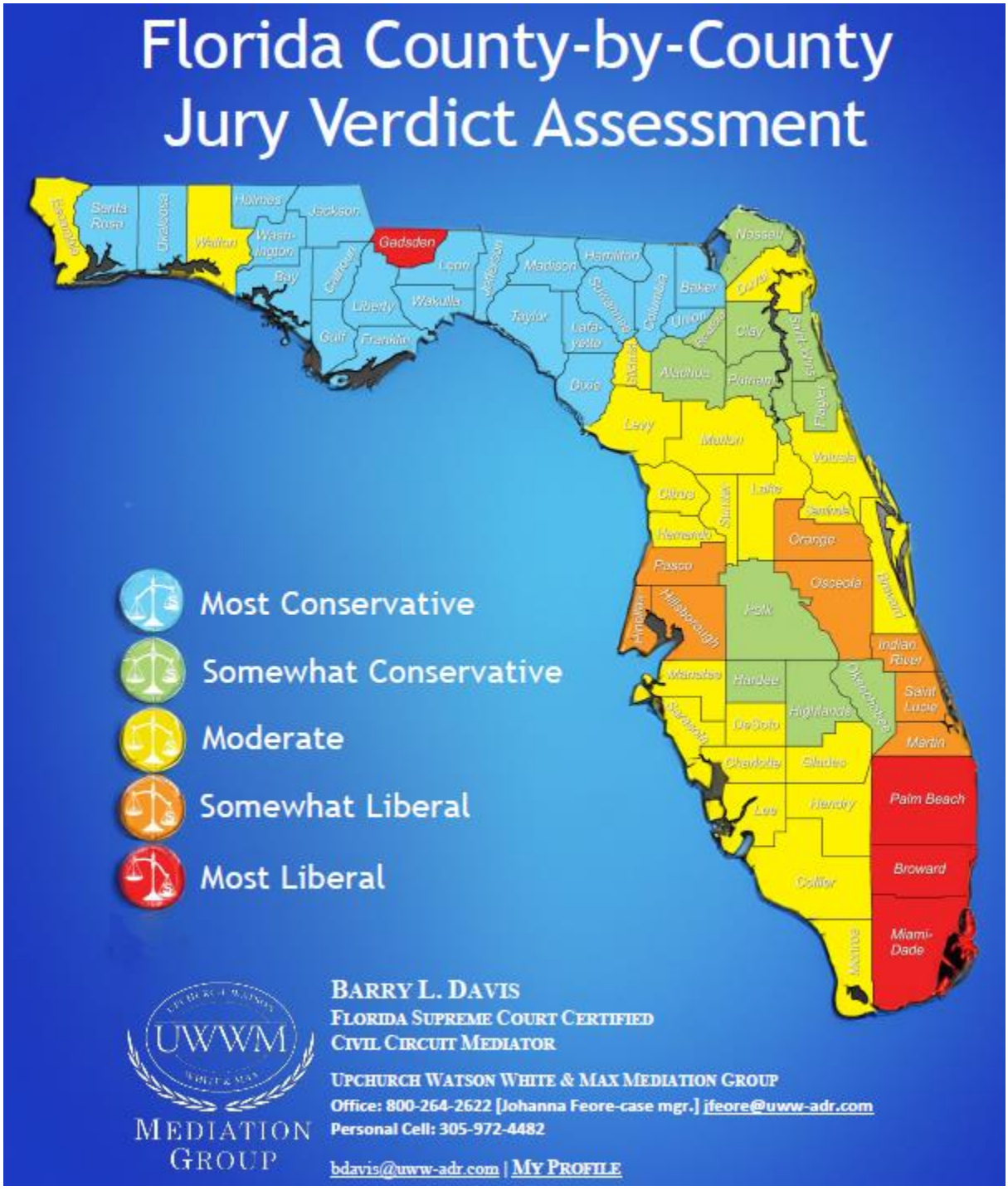
While Florida's metropolitan areas saw the largest number of filings on average, arguably, its rural jurisdictions were the most ill-equipped to handle the sheer increase in case volume due to lack of resources.

In addition to massive strains on the courts and clerks, litigators have been likewise impacted: (i) trial judges' hearing availability – particularly special set hearings – has virtually disappeared or is many months down the road; and, (ii) not only have expert witness rates increased, but so too have their availability (*e.g.*, inspections, compulsory medical examinations, etc.).

Compounding these difficulties, the Florida Supreme Court entered several administrative orders[xv] in response to COVID-19, which, in pertinent part, have required that all circuit civil cases (*i.e.* generally, a huge percentage of the tort reform cases) to be put on case management schedules/trial dockets. As a result, the tort reform lawsuits have the same/substantially-similar pre-trial deadlines/trial periods.

Florida attorneys are expected pandemonium during early-fall 2024.

Florida's Jurisdiction Breakdown



So What Is In Florida's Tort Reform Legislation?

Amendment To Florida's Statute Of Limitations ("SOL")

Historically: The SOL for negligence actions was four (4) years.

Post-Tort Reform: Fla. Stat. § 95.11 has been amended to reduce the statute of limitations for negligence actions from four (4) to two (2) years.

Further Considerations: Fla. Stat. § 95.11 at n. 2: "[t]he amendments to s. 95.11(3)(c) . . . made by this act [Florida Tort Reform] apply to any action commenced on or after the effective date of this act [Florida Tort Reform], regardless of when the cause of action accrued, except that any action that would not have been barred under s. 95.11(3)(c) . . . before the amendments made by this act must be commenced on or before July 1, 2024. If the action is not commenced by July 1, 2024, and is barred by the amendments to s. 95.11(3)(c) . . . made by this act, then the action is barred."

From Pure To Modified Comparative Fault

Historically: Florida was a pure comparative fault jurisdiction—*i.e.* a jury could find that plaintiff was 99% liable and defendant was 1% liable, which would result in the defendant having to pay-up (proposals for settlement could increase that 1%, if triggered).

Post-Tort Reform: Fla. Stat. § 768.81(6) provides that: "In a negligence action to which this section applies, any party found to be greater than 50 percent at fault for his or her own harm may not recover any damages. This subsection does not apply to an action for damages for personal injury or wrongful death arising out of medical negligence pursuant to chapter 766."

Further Considerations: Fla. Stat. § 768.81 at n. 2:

> "A. – [t]his act [Florida Tort Reform] shall not be construed to impair any right under an insurance contract in effect on or before [March 24, 2023]. [If it does affect,] this act applies to an insurance contract issued or renewed after [March 24, 2023]."
>
> "B. – "[e]xcept as otherwise expressly provided in this act, this act shall apply to causes of action filed after [March 24, 2023]."

So What Is In Florida's Tort Reform Legislation?

Creation of Fla. Stat. § 768.0427—Admissibility of Medicals Evidence

Past Medicals Evidence—Fla. Stat. § 768.04272(2)(a) and (b)

"(a) Evidence offered to prove the amount of damages for past medical treatment [ ] that have been satisfied is limited to evidence of the amount actually paid, regardless of the source of payment."

"(b) Evidence offered to prove the amount necessary to satisfy unpaid charges for incurred medical treatment [ ] shall include, but is not limited to, evidence as provided in this paragraph:

1. [ ] health care coverage other than Medicare or Medicaid, evidence of the amount which such health care coverage is obligated to pay the health care provider [("HCP")] to satisfy the charges for . . . incurred medical treatment [ ], plus the claimant's share of medical expenses under the insurance contract or regulation.

2. [ ] health care coverage but obtains treatment under a letter of protection [("LOP")] or otherwise does not submit charges for any [HCP's] medical treatment [ ] to health care coverage, evidence of the amount the claimant's health care coverage would pay the [HCP] to satisfy the past unpaid medical charges under the insurance contract or regulation, plus the claimant's share of medical expenses . . . had the claimant obtained medical services [ ] pursuant to the . . . coverage.

3. [ ] does not have health care coverage or has health care coverage through Medicare or Medicaid, evidence of 120 percent of the Medicare reimbursement rate in effect on the date of the claimant's incurred medical treatment or services, or, if there is no applicable Medicare rate for a service, 170 percent of the applicable state Medicaid rate.

4. [ ] obtains treatment [ ] under a [LOP] and the [HCP] [ ] transfers the right to receive payment under the [LOP] to a third party, evidence of the amount the third party paid or agreed to pay the [HCP] . . .

5. Any evidence of reasonable amounts billed to the claimant for medically necessary treatment or medically necessary services provided to the claimant."

So What Is In Florida's Tort Reform Legislation?

Creation of Fla. Stat. § 768.0427—Admissibility of Medicals Evidence

Future Medicals Evidence—Fla. Stat. § 768.04272(2)(c)

"(c) Evidence offered to prove the amount of damages for any future medical treatment or services the claimant will receive shall include, but is not limited to, evidence as provided in this paragraph:

1. If the claimant has health care coverage other than Medicare or Medicaid, or is eligible for any such health care coverage, evidence of the amount for which the future charges of health care providers could be satisfied if submitted to such health care coverage, plus the claimant's share of medical expenses under the insurance contract or regulation.

2. If the claimant 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 percent of the Medicare reimbursement rate in effect at the time of trial for the medical treatment or services the claimant will receive, or, if there is no applicable Medicare rate for a service, 170 percent of the applicable state Medicaid rate.

3. Any evidence of reasonable future amounts to be billed to the claimant for medically necessary treatment or medically necessary services."

So What Is In Florida's Tort Reform Legislation?

Creation of Fla. Stat. § 768.0427—Admissibility of Medicals Evidence

New Medicals Discovery/Evidence—Fla. Stat. § 768.04272(3)

"(3) In a personal injury or wrongful death action, as condition precedent to asserting any claim for medical expenses for treatment rendered under a [LOP], the claimant must disclose:

(a) A copy of the [LOP].

(b) All billings for the claimant's medical expenses, which must be itemized and, to the extent applicable, coded according to:

1. [Am. Med. Ass'n's] Current Procedural Terminology, or Healthcare Common Procedure Coding System . . .

(c) If the [HCP] sells the accounts receivable for the claimant's medical expenses to a factoring company or other third party:

1. [N]ame of factoring company or other third party . . .

2. The dollar amount for which the factoring company or third party purchased such accounts, including any discount provided below the invoice amount."

. . .

(e) Whether the claimant was referred for treatment under a [LOP] and, if so, the identity of the person who made the referral. If the referral is made by the claimant's attorney, disclosure of the referral is permitted, and evidence of such referral is admissible notwithstanding s. 90.502. Moreover, in such situation, 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."

So What Is In Florida's Tort Reform Legislation?

Creation of Fla. Stat. § 768.0427—Admissibility of Medicals Evidence

Further Caveats On Medicals Evidence—Fla. Stat. § 768.04272(4)

"(4) The damages that may be recovered by a claimant in a personal injury or wrongful death action for the reasonable and necessary cost or value of medical care rendered may not include any amount in excess of the evidence of medical treatment and services expenses admitted pursuant to subsection (2), and also may not exceed the sum of the following:

(a) Amounts actually paid by or on behalf of the claimant to a [HCP] who rendered medical treatment or services;

(b) Amounts necessary to satisfy charges for medical treatment or services that are due and owing but at the time of trial are not yet satisfied; and

(c) Amounts necessary to provide for any reasonable and necessary medical treatment or services the claimant will receive in the future."

So What Is In Florida's Tort Reform Legislation?

Is Fla. Stat. § 768.0427 Retroactive Or Not?

Fla. Stat. § 768.0427 at n. 1: "[B.] . . . [except as otherwise expressly provided in [Florida Tort Reform], this act shall apply to causes of action filed after [March 24, 2023]."

Subsequent Judicial Opinions:

Hillsborough County, FL (Tampa): *Sapp, et al. v. Brooks, et al.*, Case No. 17-CA-5664 (Fla. 13th Cir., May 19, 2023) (trial court held that Fla. Stat. § 768.0427 should be applied retroactively, because it was procedural and not substantive in nature); *Torres-Aponte v. Hudnall, et al*., Case No. 20-CA-7146 (Fla. 13th Cir., July 18, 2023) (same).

Broward County, FL (Ft. Lauderdale): *McIntosh v. North Broward Hospital District*, Case No. CACE-19-002027 (Fla. 17th Cir., June 9, 2023) (same).

Lee, Collier and Charlotte Counties, FL (Sarasota): *Montes, et al. v. Dollar Financial Group, et al.*, Case No. 19-CA-005556 (Fla. 20th Cir., July 12, 2023) (same); *Crumbly v. City of Fort Myers*, No. 21-CA-006295, 2023 WL 6519974, at *1 (Fla. 20th Cir. Ct. Aug. 3, 2023) (same).

Marion County, FL (Ocala): *Haines v. Vanmatre*, Case No. 2021-CA-0082 (Fla. 5th Cir., July 5, 2023) (same).

In support, these decisions have pointed to the House of Representatives Staff Final Bill Analysis.[xvi]

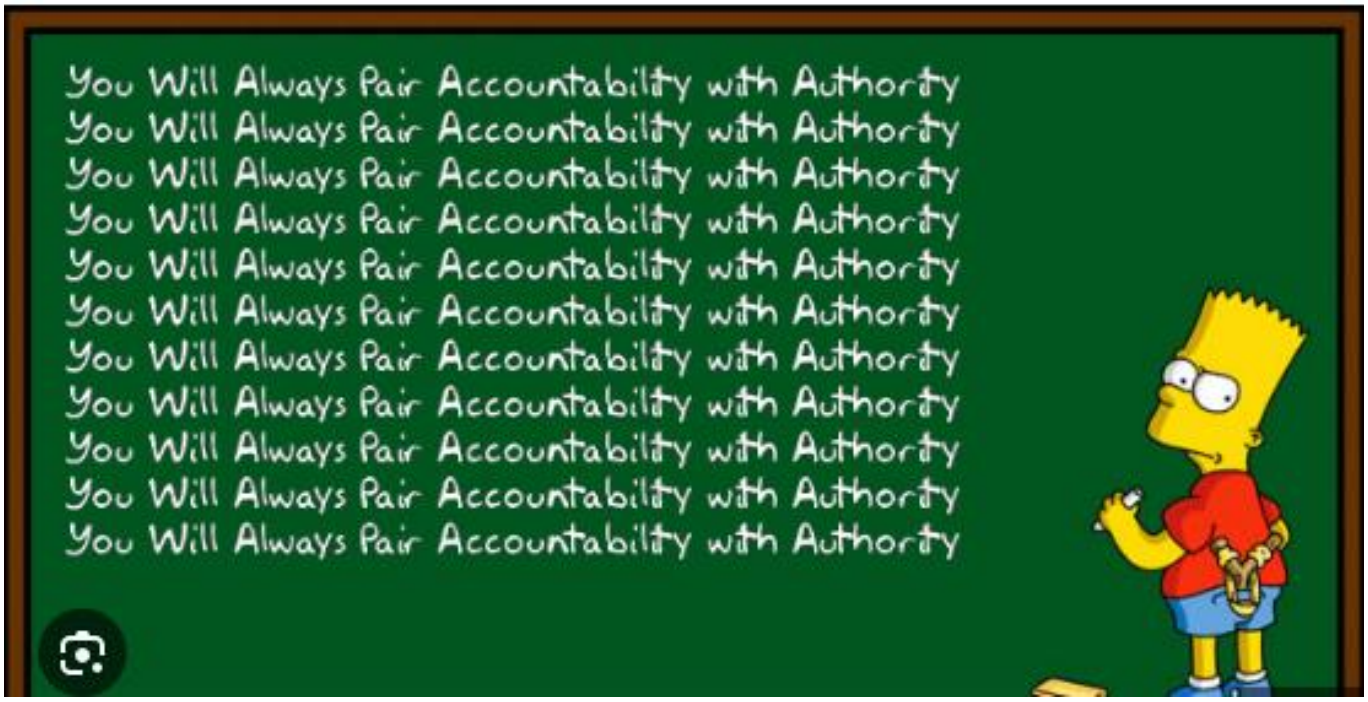
To date, no Florida appellate court has adjudicated the retroactivity question, so it continues to be decided on a case-by-case basis.

So What Is In Florida's Tort Reform Legislation?

New Statutes Create More Protection Against Negligence Security Claims

Historically: In negligent security cases, the third-party criminal assailants could not be put on the verdict form for purposes of apportionment of fault.

Post-Tort Reform: Fla. Stat. § 768.0701 was enacted, which required that in negligent security actions, the trier of fact must consider the fault of all persons who contributed to the injury (*i.e.* third-party criminal assailants).



Post-Tort Reform: Fla. Stat. § 768.0706 was enacted, which required that in negligent security actions that involved a multifamily residential property, where the property owner or operator has substantially implemented certain security measures further defined therein, there is a presumption against liability in connection with criminal acts that occur on the premises which are committed by third parties who are not employees or agents of the owner or operator of the property.

So What Is In Florida's Tort Reform Legislation?

Amendments to Florida's Bad Faith Statutes

Post-Tort Reform: Fla. Stat. § 624.155 was amended, which included the addition of subsection (4)(a): "an action for bad faith involving a liability insurance claim, including common law claims, shall not exist if the insurer tenders the lessor of the policy limits or the amount demanded by the claimant within 90-days of actual notice of the claim which is accompanied by sufficient evidence to support the amount of the claim."

Post-Tort Reform: Fla. Stat. § 624.155 was amended, which included the addition of subsection (5)(a), which, in pertinent part, provided that mere allegations of negligence by an insurer will no longer be sufficient to sustain a bad-faith action.

Post-Tort Reform: Fla. Stat. § 624.155 was amended, which included the addition of subsection (5)(b)1. and 2., which entail that for any action for bad faith against an insurer, not only does the insured, claimant and representative of the insured or claimant have a duty to act in good faith relative to furnishing information, making demands, setting deadlines and attempting to settle the claim, but the trier of fact may also consider the aforementioned actions/inactions in determining whether those persons did or did not act in good faith and, depending on the evaluation, the trier of fact may reasonably reduce the amount of damages awarded against the insurer.

Post-Tort Reform: Fla. Stat. § 624.155 was further amended, which included the addition of subsection (6): "If two or more third-party claimants have competing claims arising out of a single occurrence, which in total may exceed the available policy limits of one or more of the insured parties who may be liable to the third-party claimants, 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 files an (a) interpleader action or (b) pursues binding arbitration, and if the clams of the competing third-party claimants are found to be in excess of the policy limits, the third-party claimants are entitled to a prorated share of the policy limits as found by the trier of fact/arbitrator."

So What Is In Florida's Tort Reform Legislation?

Repeal And Elimination Of One-Way Attorney's Fees Provisions

Post-Tort Reform: Both Fla. Stat. §§ 627.428 and 626.9373 (generally, lawsuits based on insurance rates/contracts and insurers, respectively) have been repealed, which eliminated one-way attorney's fees provisions.

Lodestar Rules Amended

Post-Tort Reform: Fla. Stat. § 57.104(2) amended, such that in any action in which attorney's fees were determined or to be awarded by the court, there is now a strong presumption that a lodestar fee is sufficient and reasonable. The latter presumption may only be overcome in a rare and exceptional circumstance, where the evidence showed that competent counsel – in consideration of the suggested rates – could not have been otherwise retained.

New Statute Allows For Recoverability Of Attorney's Fees In Declaratory Relief Actions Against An Insurer

Post-Tort Reform: Fla. Stat. § 86.121 was created, such that subsection (1) provides that: "in an action brought for declaratory relief in state or federal court to determine insurance coverage after the insurer has made a total coverage denial of a claim: (a) either pay is entitled to the summary procedure provided in Fla. Stat. § 51.011 and (b) the court shall award reasonable attorney fees to the named insured, omnibus insured, or named beneficiary under a policy issued by the insurer upon rendition of a declaratory judgment in favor of any of the afore-mentioned."

Notably, the latter does not apply to any action arising under a residential or commercial property insurance policy.

Does Florida Tort Reform Affect My Jurisdiction?

1. As of January 2024, Justia reports that "[o]ver 30 states use some form of modified comparative negligence, while about a dozen states use pure comparative fault. Only a few states use contributory negligence."[xvii]

Modified Comparative Negligence:

50% bar (10): AR, CO, GA, ID, ME, MA, NE, ND, TN, UT.

51% bar (24*): CT, DE, FL, HI, IL, IN, IA, KS, MI* (51% bar for non-economic damages), MN, MT, NV, NH, NJ, OH, OK, OR, PA, SC, TX, VT, WV, WI, WY.

Pure Comparative Fault (12*): AK, AZ, CA, KY, LA, MI* (for economic damages), MS, MO, NM, NY, RH, WA.

Contributory Negligence (5*): AL, MD, NC, VI, Washington D.C.*

Other Model (1): SD ("slight negligence").

2. If my state has altered its statutes – by way of amendment, creation or repeal, could that affect my then-pending cases? It depends . . .

Florida Tort Reform, particularly relative to Fla. Stat. § 768.0427, provides a very informative snap-shot on these very dilemma and how to effectively argue that statutory changes should be determined retroactive, so that those changes apply to then-pending case. In short, at least in Florida, if the statutory change affected procedural rights, as opposed to substantive rights, then the statutory change can be applied retroactively. An analogous example where retroactivity was found occurred when Florida replaced the *Frye* standard with the *Daubert* standard (*i.e.* Fla. Stat. § 90.702). At bottom, because Florida courts found *Daubert* to affect procedural rights, it was applied to case that were then-pending when the change occurred.[xviii]

3. Monitoring the composition of your state's three branches of government, particularly the legislative and executive branches during election cycles, can provide a plethora of relevant information potentially affecting your practice. For example, while Florida tort reform was debated (pre-enactment), lawyers across the state – on both sides of the proverbial aisle – ready themselves accordingly.

Closing Remarks

These materials have been prepared by Andrew G. Tuttle, Esq., of the law firm Fowler White Burnett, P.A. The information herein is for educational and informational purposes only and does not nor shall it be construed to constitute legal advice or the consummation of an attorney-client relationship. Any errors, mistakes and/or omissions are the author's alone. Before following any of the educational or informational content herein, one should perform their own due diligence and/or consult an attorney.

Endnotes

[i] https://www.atra.org/2023/12/05/florida-no-longer-a-judicial-hellhole-named-point-of-light-in-annual-report/#:~:text=Various%20areas%20of%20the%20state,reshaping%20the%20state's%20legal%20climate.

[ii] https://www.flgov.com/wp-content/uploads/2018/09/Supreme-Court-JNC-FAQ.pdf

[iii] https://supremecourt.flcourts.gov/Justices

[iv] https://www.politico.com/news/2023/05/23/desantis-installs-another-conservative-on-florida-supreme-court-00098386

[v] https://www.flsenate.gov/Session/Bill/2023/837/?Tab=BillHistory

[vi] https://www.flsenate.gov/Session/Bill/2023/837/?Tab=VoteHistory

[vii] *See* xii., *supra*.

[viii] https://www.flsenate.gov/Session/Bill/2023/837/Vote/HouseVote_h00837e1036.PDF

[ix] https://www.flsenate.gov/Session/Bill/2023/837/Vote/SenateVote_h00837e1003.PDF

[x] https://natlawreview.com/article/florida-enacts-significant-tort-reform

[xi] https://www.floridabar.org/the-florida-bar-news/comprehensive-tort-reform-spurs-record-filings/

[xii] *See* v., *supra*.

[xiii] *See* v., *supra*.

[xiv] https://www.ttnews.com/articles/florida-tort-reform-law

[xv] https://supremecourt.flcourts.gov/content/download/731687/file/AOSC20-23-Amendment-12.pdf

[xvi] https://www.flsenate.gov/Session/Bill/2023/837/?Tab=Analyses

[xvii] https://www.justia.com/injury/negligence-theory/comparative-contributory-negligence-laws-50-state-survey/

[xviii] https://www.jdsupra.com/legalnews/daubert-applies-retroactively-explains-71872/