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Sunshine On My Shoulder: Reptile Smiting in the Sunshine State

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Reptile theory litigation tactics and commensurate nuclear verdicts have become a recurring problem for motor carriers, transportation brokers, and now, even shippers in high-stakes, catastrophic casualty litigation. There are many effective ways to counter Reptile theory tactics before litigation and in the heat of litigation itself. These have been touched on in my prior article. However, defense counsel can be aided in litigation by legislatively enacted state laws that codify more rationale decision-making processes for these cases. Such legislation can serve to curb the inflammatory and non-proximate causally related aspects of that type of litigation. That helps smite Reptile tactics—at least in part. Several states have already enacted legislative reforms that will assist transportation industry defendants in litigation to achieve results that are not tainted by prejudice. The most noteworthy of these is Texas, but efforts have also been made in states such as Missouri, Iowa, West Virginia, Louisiana, and Montana. Now, the Sunshine State has also weighed in.

The Florida state legislature recently enacted H.B. 837. (§768.0427 Fla. Stat: the "Act"). That Florida statute is chock-full of helpful codifications for motor carriers, brokers, and others in Reptile theory, high-value casualty litigation. First, the Act reduces the statute of limitations for general negligence cases (which would encompass all MVA casualty litigation) from four years to two years (this change applies to claims that have occurred after the effective date of the legislation, which is March 24, 2023). Clearly, this temporal ambit reduction compresses the time within which plaintiffs can file their lawsuits. It thus commensurately reduces the exposure period for motor carrier and broker defendants. This reduction also helps with exposure/risk minimization and analysis, and projections-and of course, reduces actual risk.

The Act next also changed Florida's comparative negligence system, from a *pure* comparative negligence system, to a *modified* comparative negligence system. By that comparative system, a plaintiff who is found to be more than 50% at fault, for his/her own harm, is barred from recovering any damages. Often in these cases, there is significant comparative fault attributable to the noncommercial driver plaintiff. The statute recognizes that that *quantum* of fault should be a factor. Because of the risk that a plaintiff's comparative fault may entirely bar the claim, plaintiffs' counsel thus have a stronger motivation to settle, and settle earlier, to recover at least some portion of damages. Obviously, this scenario leads to more leverage for defendants during settlement negotiations and would lower overall settlement amounts because of the increased litigation risk to plaintiffs. Jury research shows though, that in comparative negligence jurisdictions, jurors are sometimes less likely to take the extra step and find the plaintiff 51% liable if they know that the plaintiff would not recover at all. So, this is a bit of a wild card at trial. However, it still is nonetheless an *excellent* settlement tool.

The Act also modifies what evidence that is admissible at trial to prove medical treatment and expenses. The Act limits the amount of damages for past or future medical expenses to evidence of the amounts actually paid, regardless of the source of payment. Under the Act, if the claimant has healthcare coverage, he or she may offer evidence of the amount necessary to satisfy unpaid charges of the amount that such healthcare coverage is obligated to pay the healthcare provider, to satisfy the charges for the healthcare itself. If the claimant does not have healthcare coverage, evidence of the Medicare reimbursement rate effective at the time of trial for claimant's incurred medical treatment or services will be the evaluation tool. If there is no applicable Medicare rate for service, 140% of the applicable state Medicare rate will be applied. These measures, among others related to medical payments, should dramatically reduce actual and future medical expense recovery under the Act. Similar proof parameters apply to future medical treatment and services. Consequently, to evaluate the cost of past and future medical expenses in these cases, defendants will need to know and understand reimbursement rates and carefully assess the medical bills in each case for admissible dollar value versus face value. This undertaking may require retention of expert witnesses to determine the actual value of the medical bills. Importantly though, it is the plaintiff's burden to prove their medical damages.

The Act also makes a good attempt to curtail the cottage industry of plaintiff's counsel referring plaintiff/"patients" to particular doctors to create inflated injuries and commensurate medical expenses. The Act deems that referrals by plaintiff's counsel to treating physicians are no longer privileged and may be explored in depositions. Consequently, defense counsel is now permitted to inquire as to who recommended particular courses of treatment and why that treatment was recommended. Defense counsel will also be permitted to explore the doctor's relationship with plaintiff's counsel on a financial, professional, and personal level. These discovery topics, and their availability, should help decrease that particular cost-spiraling cottage industry. This provision of the Act further serves to level the playing field in Reptile theory litigation.

The plaintiff's bar in Florida recognized the dramatic impact the Act would have on plaintiff's recovery on claims in Florida. To that effect, the Floria state court system was deluged with eleventh-hour filings prior to the statute's effective date. To wit, there were 90,593 civil cases filed in the five days between March 17 and March 22, 2023. This statistic is obviously a very clear signal that plaintiffs' counsel realized the dramatic limitations on their recovery that are propagated by the Act. It also might mean slower docket times in Florida state courts for a while. Either way, the sun is shining a little brighter in the Sunshine State for motor carrier, broker, and shipper casualty defendants!

For more information on these topics, contact a member of the firm's Transportation & Logistics Practice Group.

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