

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1043 Mediation
SPONSOR(S): Metz
TIED BILLS: **IDEN./SIM. BILLS:** SB 1034

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|--|--------|-----------|--|
| 1) Civil Justice & Claims Subcommittee | | MacNamara | Bond |
| 2) Insurance & Banking Subcommittee | | | |
| 3) Judiciary Committee | | | |

SUMMARY ANALYSIS

Mediation is a process in which a neutral third person acts to facilitate the resolution of a lawsuit or other dispute between two or more parties. When a court refers an action to mediation, each party must attend the mediation conference and is subject to sanctions for failure to attend without good cause. A party is deemed to appear at a mediation conference if the following persons are physically present:

- The party or party representative having full authority to settle without further consultation;
- The party's counsel of record, if any; and
- A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle in an amount up to the amount of the plaintiff's last demand or policy limits, whichever is less.

HB 1043 requires an insurance carrier attending a circuit court mediation to have full authority to settle up to the insurance carrier's reserve on the claim and to have the ability to immediately consult during the mediation with a person having authority to approve a settlement above the insurance carrier's reserve. Additionally, the bill permits a court, upon motion of any party, to order a third party to attend and participate in a mediation conference if:

- The third party claims a lien or other asserted interest in the proceeds of any funds that a party may receive as a result of a mediated settlement agreement;
- The presence of the third party can be compelled by service of an order to appear for mediation served in the same manner as service of process under current law; and
- The presence of the third party will facilitate the mediation process

The bill further provides that a mediator's report to the court may only state that either a complete agreement was reached, a partial agreement was reached, or no agreement was reached. In the event the parties reach a partial agreement that eliminates claims or parties from the litigation, the bill allows the report to contain a list of those parties or claims.

The bill may have an indeterminate impact fiscal impact on state or local government.

The effective date for the bill is July 1, 2018.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Mediation is a process in which a neutral third person acts to facilitate the resolution of a lawsuit or other dispute between two or more parties. The statutes currently authorize courts to use mediation to aid in resolving cases, but the statutes also provide that many of the procedural aspects of mediation are to be governed by court rule.¹

Depending on the type of case, there are different circumstances under which a court would refer the matter to mediation. In a lawsuit for money damages, the court must refer the matter to mediation upon the request of a party if the party is willing and able to pay the costs of the mediation or the costs can be equitably divided between the parties.²

A court is not required to refer a case to mediation if it concerns medical malpractice or debt collection, is a landlord-tenant dispute not involving personal injury, is governed by the Small Claims Act, or involves one of the few other circumstances set forth in statute.³ However, a court may generally refer all or part of any civil action to mediation.

Rule 1.720, Florida Rules of Civil Procedure, governs the mediation process, including who exactly must attend the mediation conference and what settlement authority these persons must have. Each party must attend the mediation conference and is subject to sanctions for failure to attend without good cause.⁴ These sanctions include awarding of mediation fees and attorneys' fees and costs, against the party failing to appear. Moreover, each party must provide to the court and all parties a written notice, 10 days prior to the conference, which identifies who will attend the conference as a party representative or insurance carrier representative. This notice must also confirm that these persons have the required settlement authority.⁵

Unless permitted by court order or stipulated by the parties, a party is deemed to appear at a mediation conference if the following persons are physically present:

- The party or party representative having full authority to settle without further consultation;
- The party's counsel of record, if any; and
- A representative of the insurance carrier for any insured party who is not such carrier's outside counsel and who has full authority to settle in an amount up to the amount of the plaintiff's last demand or policy limits, whichever is less, without further consultation.⁶

A party representative having full authority to settle is defined in the rule as "the final decision maker with respect to all issues presented by the case who has the legal capacity to execute a binding settlement agreement on behalf of the party."⁷

At the conclusion of the mediation process, the mediator must report the result of the mediation to the court.⁸ If the parties do not reach an agreement, the mediator must report the lack of agreement to the

¹ S. 44.102(1), F.S.

² S. 44.102(2)(a), F.S.

³ Id.

⁴ Rule 1.720(f), Fla. R. Civ. P.

⁵ Rule 1.720(e), Fla. R. Civ. P.

⁶ Rule 1.720(b), Fla. R. Civ. P.

⁷ Rule 1.720(c), Fla. R. Civ. P.

⁸ However, if the agreement is not transcribed or signed, a stipulation of dismissal may be filed with the court instead of a report of the agreement. Rule 1.730(b), Fla. R. Civ. P.

court.⁹ If the parties consent, the mediator's report may also identify pending motions, outstanding legal issues, or other actions which, "if resolved or completed, would facilitate the possibility of a settlement."¹⁰ If the parties come to a partial or final agreement, a report of the agreement or a stipulation of dismissal must be filed with the court.¹¹

There is no requirement that the parties negotiate in "good faith."¹²

Effect of Proposed Changes

Insurance Carrier Representative's Required Settlement Authority

Under the Florida Rules of Civil Procedure, one of the persons that must be physically present at a mediation conference is an insurance representative for any insured party. The insurance representative must have full authority to settle, without consultation, in an amount up to the lesser of the policy limits or the plaintiff's last demand.

HB 1043 provides that an insurance carrier attending a circuit court mediation must have full authority to settle up to the amount of the insurance carrier's reserve on the claim subject to mediation. The reserve on a claim is not defined under current law. However, the term generally refers the amount of money set aside by an insurance carrier to pay a claim that has not yet been settled.¹³

The insurance carrier representative must also have the ability to immediately consult during the mediation by electronic or telephonic consultation with the person having authority to settle above the reserve, up to the lesser of the policy limit or the plaintiff's last demand. The person or persons consulted by the insurance carrier must be available to teleconference with the mediator at his or her request.

An insurance carrier who does not comply with the bill's requirements in good faith is subject to sanctions in the same manner as a party who fails to appear.

Compelling Interested Third Parties to Attend Mediation

Under the bill, the court may, upon motion of any party, order a third party to attend and participate in a mediation conference if:

- The third party claims a lien or other asserted interest in the proceeds of any funds that a party may receive as a result of a mediated settlement agreement;
- The presence of the third party can be compelled by service of an order to appear for mediation served in the same manner as service of process under current law; and
- The presence of the third party will facilitate the mediation process.

A third party cannot be required to pay any portion of the mediator's fees or costs when they are ordered to attend mediation as provided for in the bill and participate in good faith. Moreover, where a designated representative of a third party attends on the third parties behalf, the representative is required to have the ability to settle the entire claim of the third party or have the ability to immediately consult with a person who has this authority. The bill provides that the person consulted by the third-party representative must be available to teleconference with the mediator at the mediator's request.

⁹ Rule 1.730(a), Fla. R. Civ. P.

¹⁰ Id.

¹¹ Rule 1.730(b), Fla. R. Civ. P.

¹² See *Avril v. Civilmar*, 605 So.2d 988 (Fla. 4th DCA 1992).

¹³ See INTERNATIONAL RISK MANAGEMENT INSTITUTE, INC., *claims reserve*, *Glossary of Insurance & Risk management Terms*, <https://www.irmi.com/online/insurance-glossary/terms/c/claims-reserve.aspx> (last accessed on January 16, 2018).

A third party ordered to attend a mediation conference who fails to do so is subject to sanctions in the same manner as a party who fails to appear.

Mediator's Report

The bill further provides that a mediator's report to the court may only state one of the following:

- A complete agreement was reached,
- A partial agreement was reached, or
- No agreement was reached.

In the event the parties reach a partial agreement that eliminates claims or parties from the litigation, the bill allows the report to contain a list of those parties or claims. However, no other information may be disclosed.

B. SECTION DIRECTORY:

Section 1: Creates s. 44.407, F.S., relating to insurance carrier's settlement authority at circuit court mediation.

Section 2: Creates s. 44.408, F.S., relating to compelling interested third parties to attend circuit court mediation.

Section 3: Creates s. 44.409, F.S., relating to mediator's report.

Section 4: Provides an effective date of July 1, 2018.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

See Fiscal Comments, below.

2. Expenditures:

See Fiscal Comments, below.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

See Fiscal Comments, below.

2. Expenditures:

See Fiscal Comments, below.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have an indeterminate impact on the private sector. On one hand, where more parties are ordered to attend a mediation, it could delay scheduling and extend lawsuits. On the other hand, the bill could reduce the overall costs of fully resolving a case in the event the provisions of the bill result in more settlements occurring during mediation.

D. FISCAL COMMENTS:

The bill may reduce court expenditures in the event more lawsuits settle as a result of the provisions of the bill.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

Art. 5 s. 2(a) - The Supreme Court has exclusive rulemaking authority with respect to judicial practice and procedural matters. The Florida Supreme Court has stated that where it “has promulgated rules that relate to practice and procedure, and a statute provides a contrary practice or procedure, the statute is unconstitutional to the extent of the conflict.”¹⁴ However, the rules regulating mediation practice were enacted with statutory authority¹⁵ and the matters addressed by the bill may be considered substantive, not procedural.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

The bill makes reference to a “insurance carrier’s reserve on the claims” at line 26. While this term is common within the industry and thus arguably clear under the context of the bill, in order to avoid any potential confusion, a definition or reference to another source of law may act to eliminate any issues that may arise as a result of the term being used in the bill.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

¹⁴ *Massey v. David*, 979 So.2d 931, 937 (Fla. 1998).

¹⁵ S. 44.102(2), F.S.