The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL:	SB 1034
INTRODUCER:	Senator Steube
SUBJECT:	Mediation
DATE:	January 9, 2017
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Stallard	Cibula	JU	**Pre-meeting**
2.			BI	

I. Summary:

SB 1034 reduces the settlement authority that an insurance carrier representative must have at a mediation conference and authorizes a circuit court to compel the attendance of interested nonparties at a mediation conference. Additionally, the bill restricts what a mediator may disclose in its report to the court if the parties reach no agreement, but the bill expands what may be in the report if the parties reach a partial agreement.

The current Florida Statutes authorize courts to order parties to mediation conducted according to the Florida Rules of Civil Procedure. The rules currently address the attendance and settlement authority of parties and their representatives, but not the attendance of interested nonparties, such as lienholders.

Under the rules, an insurance carrier representative attending mediation must have authority to settle up to the lesser of the policy limit or the plaintiff's last demand. Under the bill, however, the insurance carrier representative attending mediation must have authority to settle only up to the insurer's reserve on the claim, which would be less than the policy limits and may be less than the plaintiff's last demand. Nonetheless, the attending representative must have immediate access to a person who has authority to settle up to the lesser of the policy limits or the plaintiff's last demand.

The bill also authorizes a circuit court, upon a party's motion, to compel lienholders or other interested nonparties to attend a mediation conference.

Finally, the bill sets forth what may be in a mediator's report to a court regarding the result of a mediation process. If no agreement is reached in mediation, the report may say only that no agreement was reached. This is more restrictive than the current rule, which permits additional information to be included if the parties consent. In the case of a partial or complete agreement, the current rules require the mediator to report the existence of the agreement, "without comment," to the court. Regarding a complete agreement, the bill is consistent with current rule,

stating that the mediator's report may state only that a complete agreement was reached. Regarding a partial agreement, the bill permits the report to state only that such an agreement was reached, unless any claims or parties were eliminated from the litigation by virtue of the partial agreement. And if a claim or party was eliminated by virtue of a partial agreement, the report may list these claims or parties.

II. Present Situation:

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.[1] 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 the Florida Rules of Civil Procedure.[2] 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.[3] However, a court need not refer such a case to mediation if it is one of 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.[4]

Beyond these cases that a court *must* refer to mediation, the court *may*, in general, refer all or part of any other filed civil action to mediation.[5]

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.[6]

Each party must attend the mediation conference and is subject to sanctions for failure to attend without good cause.[7] And Rule 1.720, Fla. R. Civ. P., specifies that unless a special circumstance applies as described in the rule, "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.[8]

[1] Fla. Jur. 2d, Arbitration and Award §113.
[2] Section 44.102(1), F.S.
[3] Section 44.102(2)(a), F.S.
[4] *Id.*
[5] Additionally, a court is required or authorized to refer certain family law and dependency matters to litigation, as specified in s. 44.102(2)(c)-(d), F.S.
[6] There is no Florida Statute that has similar provisions.
[7] Rule 1.720(f), Fla. R. Civ. P.
[8] Rule 1.720(b), Fla. R. Civ. P.

"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."[9]

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.[10]

At the conclusion of the mediation process, the mediator must report the result of the mediation to the court.[11] If the parties do not reach an agreement, the mediator must report the lack of agreement to the court "without comment or recommendation."[12] However, 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."[13]

If the parties come to a partial or final agreement, a report of the agreement or a stipulation of dismissal shall be filed with the court.[14]

III. Effect of Proposed Changes:

Overview

The bill reduces the settlement authority that an insurance carrier representative must have at a mediation conference and authorizes a circuit court to compel the attendance of interested nonparties at a mediation conference. With respect to the report that a mediator must provide the court at the conclusion of mediation, the bill restricts what a mediator may disclose in its report to the court if the parties reach no agreement, but the bill expands what may be in the report if the parties reach a partial agreement. To the extent that these issues are addressed differently in the Florida Rules of Civil Procedure, the Supreme Court may choose to conform the rules to the provisions of the bill.

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 in order for a party to be deemed to be in appearance is an insurance representative for any insured party. Moreover, 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. However, this requirement may be modified by court order or stipulation of the parties.[15]

[9] Rule 1.720(c), Fla. R. Civ. P.
[10] Rule 1.720(e), Fla. R. Civ. P.
[11] 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.
[12] Rule 1.730(a), Fla. R. Civ. P.
[13] *Id.*
[14] Rule 1.730(b), Fla. R. Civ. P.
[15] Rule 1.720(b)(3), Fla. R. Civ. P.

Under the bill, an insurance carrier representative attending a mediation conference must have authority to settlement up to the amount of the insurance carrier's "reserve on the claims." The reserve on a claim, though not defined in the bill or the Florida Statutes, appears to be the amount of money set aside by an insurance carrier to pay a claim that has not yet been settled.[16] However, the representative must have the ability to immediately consult during the mediation conference with the person having authority to settle above the reserve, up to the lesser of the policy limit or the plaintiff's last demand. As such, the bill requires less settlement authority than does the current rule for the insurance representative who attends the mediation conference.

Failure to comply with these requirements subjects an insurance carrier representative to sanctions in the same manner as a party who fails to appear while having the required settlement authority. These sanctions, which may be imposed upon motion by the court, include mediation fees, attorneys' fees, and costs. The current rules, on the other hand, do not include the threat of sanctions for the insurance carrier itself, but instead for a party whose insurance representative does not show at all or shows up without proper settlement authority.

Compelling Interested Third Parties to Attend a Mediation Conference

Currently, there appears to be no law or rule authorizing circuit courts to compel interested third parties, such as lienholders, to attend a mediation conference.[17]

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

- The third party claims a lien or other asserted interest on proceeds that a party may receive as part 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 according to law [;]" and
- The third party's presence will facilitate the mediation process.

The designated representative of the third party that was compelled to attend must have the ability to settle its entire claim or have the ability to immediately consult with a person who has this authority.[18]

Finally, 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.

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[16] *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 visited Jan. 9, 2018); INVESTOPEDIA, *Claims Reserve*, https://www.investopedia.com/terms/c/claims-reserve.asp (last visited Jan. 9, 2018).

[17] An example of an interested nonparty would be the Agency for Health Care Administration, which administers the Medicaid program in Florida. Assuming the plaintiff was a Medicaid recipient and that the agency paid to treat the plaintiff for the injuries that were allegedly caused by the defendant, the agency would likely have a reimbursement claim (often referred to as a "lien") on any recovery resulting from a mediated settlement.

[18] The person consulted by the third-party representative must be available to teleconference with the mediator at the mediator's request.

Mediator's Report

The bill modifies what may be in a mediator's report to the court regarding the result of a mediation process. If no agreement is reached at mediation, the report may say only that no agreement was reached. Current rule permits the parties to consent to the report's containing additional information, such as pending motions or issues in discovery.[19]

If a complete agreement is reached in mediation, the mediator's report may state only this. And this appears consistent with current rule, which requires the mediator to report "the existence" of the agreement to the court "without comment" within 10 days of the agreement being signed or transcribed.[20]

If a partial agreement is reached, the report may in general state only this. However, the report may also list any claims or parties that were eliminated from the litigation by virtue of the partial agreement. Beyond this, "no additional information may be disclosed." Current rule, on the other hand, appears more restrictive, as it permits the reporting only of the existence of the agreement, "without comment."[21]

Effective Date

The bill takes effect July 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Section 2 of the bill authorizes a court, upon a party's motion, to compel a lienholder or other interested nonparty to attend a circuit court mediation conference. This raises the issue of whether a circuit court could constitutionally exercise this power over a nonparty to a lawsuit, even with a purported statutory grant of such power. There appears to be no case law on point. However, circuit courts have long exercised power over persons who are not parties to cases, such as over persons compelled to attend jury duty and nonparties subpoenaed to appear as witnesses in criminal or civil cases. Moreover, courts have

[19] Rule 1.730(a), Fla. R. Civ. P.
[20] Further, Rule 1.730(b), Fla. R. Civ. P., prohibits the reporting of any agreement to the court except as provided in the rule.
[21] *Id*.

authority "to do all things that are reasonably necessary for the administration of justice within the scope of [their] jurisdiction, subject to valid existing laws and constitutional provisions."[22] Accordingly, assuming a circuit court has jurisdiction over a given case, the court would appear to have the authority to compel interested nonparties to attend mediation based on the court's inherent powers and those granted to the court under the bill.

Another constitutional issue is whether any of the statutes created by the bill constitute impermissible rules of "practice and procedure," which generally are regarded as the province of only the judiciary.[23] The Legislature's authority, on the other hand, includes the enactment "substantive" law.[24] The Florida Supreme Court has stated that where it "has promulgated rules that relate to practice procedure, and a statute provides a contrary practice or procedure, the statute is unconstitutional to the extent of the conflict."[25] As such, where the statutes created by the bill modify current Florida Rules of Civil Procedure these statutes may be unconstitutional. However, were a court to invalidate procedural provisions of the statutes created by the bill, the court may nonetheless permit any substantive provisions of these statutes to remain in effect if these provisions are "severable" from the invalid portions.[26] Moreover, the Florida Supreme Court has previously acknowledged that procedural statutes, though invalid, are helpful expressions of the will of the Legislature and the Supreme Court has adopted the statutory provisions as rules.[27]

If the constitutionality of the bill is challenged, the Court will likely recognize that the Legislature enacted statues authorizing and in some cases requiring the courts to use mediation before the courts enacted rules of procedure regulating mediation in more detail. Additionally, the differences between the bill and the procedural rules are subtle

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[22] *Rose v. Palm Beach County*, 361 So. 2d 135, 137 (Fla.1978).

[23] Article V, section 2(a) of the Florida Constitution provides the Supreme Court of Florida with exclusive authority to "adopt rules for the practice and procedure in all courts."

[24] The Florida Supreme Court explained the basic distinction between substantive and procedural laws in *Haven Fed. Sav. & Loan Ass'n v. Kirian*, 579 So. 2d 730, 732 (Fla. 1991):

> *Substantive law* has been defined as that part of the law which creates, defines, and regulates rights, or that part of the law which courts are established to administer. *It includes those rules and principles which fix and declare the primary rights of individuals with respect towards their persons and property.* On the other hand, *practice and procedure* "encompass the *course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights* or obtains redress for their invasion. 'Practice and procedure' may be described as the machinery of the judicial process as opposed to the product thereof." It is the method of conducting litigation involving rights and corresponding defenses.

(emphasis in the original) (quoting *In re Fla. Rules of Crim. Pro.*, 272 So. 2d 65, 66 (1972))

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

[26] *See Allen v. Butterworth*, 756 So. 2d 52, 57 (Fla. 2000) ("An unconstitutional portion of a general law may be deleted and the remainder allowed to stand if the unconstitutional provision can be logically separated from the remaining provisions, i.e., if the expressed legislative purpose can be accomplished independently of those provisions which are void, if the valid and invalid provisions are not inseparable, if the Legislature would have passed one without the other, and if an act complete in itself remains after the invalid provisions are stricken.")

[27] *See, e.g., In re Rules of Civil Procedure*, 281 So. 2d 204 (Fla. 1973) (stating that the "Supreme Court has considered [laws enacted by the Legislature relating to practice and procedure] as expressing the intent of the Legislature and has formulated rules of practice and procedure that attempts [sic] to conform with the intent of the Legislature and at the same time further the orderly procedure in the judicial branch.").

and consistent with the purposes of mediation. As such, one might argue that the bill's requirements for the settlement authority of those at a mediation conference and the final reports of mediators are substantive in that they further define what mediation is. Finally, the Court often adopts rules in response to legislation.[28]

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The bill may make it more difficult to schedule a mediation conference and thus to settle a given case. This could arise where, whether or not in good faith, a party moves the court to require each of a large number of lienholders to attend mediation, thus causing a scheduling problem. On the other hand, the bill could reduce the overall costs of fully resolving a case by bringing all interested persons to the mediation table, perhaps to fully resolve not only the claims raised in the complaint but also ancillary matters such as reimbursement claims, subrogation claims, and liens.

C. Government Sector Impact:

The bill may reduce court costs by fostering settlements of not only the claims contained in a lawsuit but of liens or other claims to the proceeds of a mediated settlement. However, the Office of the State Courts Administrator has not provided an analysis of the impact on the bill on judicial workloads.

VI. Technical Deficiencies:

The bill repeatedly refers to "mediation" where it seems to be referring to just one aspect of mediation—a mediation conference. The Legislature may wish to amend the bill accordingly.

Also, "reserve on the claims" is an important term in the bill, but is not defined in the bill and does not appear to be defined in the Florida Statutes. Accordingly, the Legislature may wish to amend the bill to define this term.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 44.407, 44.408, and 44.409.

[28] *See generally, id.*; *Perez v. Bell South Telecommunications, Inc.*, 138 So. 3d 492, 498 n. 12 ("We take comfort here in the fact that the Florida Supreme Court periodically adopts all legislative changes to the Florida Evidence Code to the extent they are procedural.") (citing *In re Amendments to the Florida Evidence Code*, 825 So. 2d 339, 341 (Fla. 2002)); *In re Amendments to the Florida Family Law Rules of Procedure*, 987 So. 2d 65 (Fla. 2008).

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.