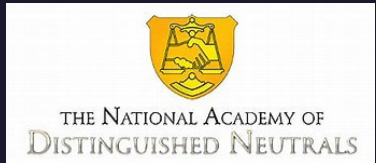




8/5/2022

MEDIATION



Mandatory Non-Binding Arbitration

Avoiding Trial
de Novo



Dispute Resolution Center, Annual Conference
Rosen Hotel, Orlando Florida 8/12/2022

Agenda

Statues and Rules

The Court Order

Case Law

The Hearing

The Award

Trial *de Novo*



Lee, Charlotte, Broward, and Miami Dade Counties



Statutes and Rules

Summary of Statutes, Rules and Case Law

Fla. Statute §682

The Florida Arbitration Code

Fla. Statute §44.103 and §44.104

Fla. R. Civ. Pro. §1.820

Court Order and Insurance Policy Provisions

Statutes and Rules



There are many Arbitration Organizations
That Have Their Own Rules and
Procedures

- Lemon Law, -Administered by the State Attorney General
- Division of Condominiums - Fla. Statute §718.1255 HOAs, Mobile Home Parks
- Department of Professional Regulations, Med Mal F.A.C. § B60.300
- Florida Bar, Fee Grievance Program

Statutes and Rules



For a Complete List, and
Other Must Know Information

Arbitrator's Almanac

<https://www.flcourts.org/content/download/793666/file/arbitrator-almanac-july-2021.pdf>

And See, *Navigating the Non-Binding Arbitration Minefield in Florida*,
Florida Bar Journal, Morman and Whitcomb, Vol. 81, No. 5 May 2007

Statutes and Rules



Today' Focus

Arbitration to Resolve a Dispute
Pursuant to an Insurance Policy

First Party Property

Statutes and Rules



American Integrity Policy –
Approved by OIR

April 2022

“Claim Disputes, Shall be Exclusively and Finally Resolved Through Confidential Binding Arbitration”

“The Arbitrator must be either a retired Florida Circuit Court or Federal court judge, or a member of the Florida Bar with at least ten (10) years of experience as an attorney who has reasonable familiarity with the applicable arbitration rules, knowledge of insurance, contracts”

No Attorney Fee For Policyholder. Carrier pays Arbitrator

The Court Order



Circuit Civil Court
First Party Property Lawsuits

Mandatory Court Ordered
Non-Binding Arbitration

Surplus / Offshore Insurance
Policy Mandatory (Binding)
Arbitration Provision

Court Order For Non Binding Arbitration

- Arbitration Hearing Must Be Held Within Six Months of Order
- Plaintiff's Counsel Takes Administrative Lead
- Contacts Defense Counsel to Select Arbitrator and Schedule
- Reports to Court
- If No Agreement or Notice in 15 days, the Court Appoints

The Court Order

- One or three Arbitrators?
- Transcript. Yes or No? Who Pays?
- Cost of Arbitration Divided Equally
- Maximum Arbitrator Fee \$1,500 a day
- Counsel Must Submit Case Summaries 10 Days Prior to Hearing

The Court Order

- Hearing is Informal Within Bounds of Professional Decorum and Civility
- Rules of Evidence Do Not Apply
- Counsel Presentations Should be Limited to Documents and Argument
- Live Testimony at Hearing is Discouraged
- Failure to Attend Allows Arbitrator to Rule Based on Presentation of Counsel Who Did Attend.

Court Order, Con't

- 
- Why Would a Mediator Branch Out and Accept a Non-Binding Arbitration Assignment?
 - Pros
 - Money
 - Make New Contacts
 - Develop New Skill Sets
 - Responsibility of Rendering Decision
 - Cons
 - Possible Loss of Existing ADR Clients
 - It's More Challenging Than Mediating
 - Ethical Issues



Plaintiff's Counsel
was good
mediation client

Counsel
Immediately
Demanded TdN

Counsel
continues to
recommend
and assign
mediations
cases to me.

Alexander v Quail Pointell, 170 So.3d 817 (5DCA 2015)

Trial court's *sua sponte* order for arbitration that differed from forms did not render arbitration decision invalid

KENDALL v. DIAZ, 215 So.3d 95 3DCA

Differences in the arbitrations clauses financing documents and sales/purchase agreement did not prevent the buyer from arbitrating his dispute with seller.

Case Law

The Hearing

Location /Format

- In Person
- Video
- On Paper

Court Reporter, Transcript

Sanctions?



The Hearing

Evidence

- Documents
- Testimony
- Tangible, Physical Objects



The Hearing

- Hearing is Informal Within Bounds of Professional Decorum and Civility
- Rules of Evidence Do Not Apply
- Counsel Presentation Should be Limited to Documents and Argument
- Live Testimony at Hearing is Discouraged
- Failure to Attend Allows Arbitrator to Rule Based on Presentation of Counsel Who Did Attend.



The Hearing

- Arbitrator has authority to Administer Oaths, & Issue Subpoenas
- If there is a Clearly Prevailing Party, Arbitrator should Assess Fees and Costs
- Arbitrator May Award Attorney Fees if Parties Waive Court Jurisdiction on Issue
- Arbitrator Must Issue Ruling in Ten Days
- Arbitrator May Decide Issues of Fact and Law



The Award

6. The arbitrator also reviewed all relevant Florida District Court of Appeals opinions cited by the parties between 2012 and 2020. The arbitrator was unable find guidance from the Florida Supreme Court regarding application of The Carrier's "suit against us" policy condition.

7. Carrier argues that the policy requires Plaintiff provide a written notice of disagreement with its claim decision(s) as a condition precedent prior to her filing suit. **As Plaintiff offered no evidence that written notice of disagreement prior to filing suit, the pending suit is barred.** The arbitrator notes that the Court originally granted Carrier's Motion for Summary Judgement, then vacated its order and referred the case to non-binding arbitration.

8. Plaintiff argues that Carrier's unilateral estimate and payment of that amount, is a breach of contract by Carrier forfeiting its ability to rely on policy conditions and that the only issues to be decided by the arbitrator is the scope and pricing of the damages.

The Award



The Award

An abstract graphic featuring a network of interconnected nodes and lines. The nodes are represented by small white and red spheres, while the connecting lines are thin blue and orange strands. The background is a dark blue gradient with soft, out-of-focus red and blue bokeh lights, creating a sense of depth and complexity.

- Written
- Reasoned
- 10 Days After Hearing
- Distributed to Parties
- File with Court Under Seal

The Award



- Should Determine Prevailing Party if There is a Clear Winner
- Award should include reasonable taxable costs
- If Parties Waived Trial Court Jurisdiction on the Issue of Attorney Fees, the Award Should Include Fees.

The Award



- Either Party May Demand for a Trial *de Novo* as a Matter of Right
- Within 20 days or Waived
- After 30 Days, Award is Unsealed and Court Enters Judgement Consistent with Award
- If a TdN is requested, then Award Remains Under Seal Until Conclusion of TdN
- Challenges to Award are Limited.

Risk of Requesting a TdN

- ✓ Not for the faint of heart or unwary
- ✓ Right to TdN waived if not requested timely
- ✓ TdN will go on next trial docket
- ✓ Counsel should be ready to try the case at the Arbitration Hearing

Trial de Novo

Risk of Requesting a TdN

Party that Requests TdN
Faces Serious Financial
Consequences Unless They
Do Significantly Better at the
TdN Than the Arbitration
Award

Trial de Novo

If
Plaintiff Request *TdN*
and Judgement is 25%
LESS
then Award, the Plaintiff is
Liable for Attorney Fees and
Cost, Court Costs,
Investigation Expense, &
Expert Costs

Trial de Novo

If Defendant Requests
TdN and the
Judgement is
25% MORE
Than the Arbitration
Award, Then
Defendant
is Liable for Plaintiff's
Attorney Fees and
Costs

Trial de Novo

Judgment Equals =

Net Judgement

+Plus all Taxable Costs

This is the Number Compared to Award to Determine 25% More
or Less than Award

Trial de Novo

Trial *de Novo*

Plaintiff Requests TdN

Arbitration Award \$60,000

TdN Judgement Including taxable costs \$35,000

Defendant is prevailing party and entitled to recover:

Attorney Fees Since Arbitration Hearing \$15,000

Defendant Taxable Costs \$5,500

Arbitration costs \$4,000

Expert Fees \$9,000

Investigatory Expense \$2,500

Total \$36,000

Defendant recovers \$1,000.

Trial *de Novo*

Defendant Requests TdN

Arbitration Award \$60,000

Judgement Verdict \$78,000

Plaintiff is prevailing party and entitled to recover:

Attorney Fees Since Arbitration Hearing \$30,000

Arbitration costs \$4,000

Taxable Costs \$6,000

Expert Fees \$6,000

Investigatory Expense \$2,500

Total \$48,000

Defendant pays \$126,500. More than twice the award



If Arbitrator awards
a very low number,
Plaintiff can request
a TdN with minimal
risk

If Arbitrator awards
a very high number,
Defendant can
request a TdN with
minimal risk

Does the
Arbitrator
have wiggle
room?

- 
- Arbitrating Takes Many Forms and Different Types are Governed by Different Statutes and Rules
 - Expect Courts and Insurance Carriers to Increasingly Rely on Arbitration Moving Forward
 - Counsel Should be Prepared to Try the Case at the Time of Arbitration
 - Accept the Award in All but the Most Egregious Circumstances
 - Recognize When a Loss is a Win.

Summary

Thank You

Curtis Hutchens

Curtishutchens@CHMediation.com

CHMediation.com

