

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

ORDER ADOPTING A NEW RULE 16.1 OF THE SUPERIOR COURT RULES OF CIVIL PROCEDURE

This 7th day of December, 2017, **IT IS SO ORDERED** that:

1. A new Superior Court Civil Rule 16.1 is adopted as follows:

Rule 16.1 Mandatory Non-Binding Arbitration.

(a) *Actions Subject to Mandatory Non-Binding Arbitration (“MNA”).*

Notwithstanding and in addition to the ADR provisions contained in Rule 16, all civil actions, except those actions listed in subsection (b) hereof, in which (1) trial is available; (2) monetary damages are sought; (3) any nonmonetary claims are nominal; and (4) counsel for claimant has made an election on the Civil Case Information Sheet for mandatory non-binding arbitration (hereinafter "MNA"), are subject to mandatory non-binding arbitration. The jurisdictional authority of the arbitrator for any case in which such election has been made shall be limited to fifty thousand dollars (\$50,000), exclusive of costs and interest.

(b) *Civil Actions Not Subject to MNA.* The following civil actions shall not be referred to MNA but the parties may stipulate to a form of ADR:

(1) An action involving a matter listed in Superior Court Civil Rules 23 and 81(a);

(2) A replevin, declaratory judgment, foreign or domestic attachment, interpleader, summary proceedings, or mortgage foreclosure action;

(3) Any *in forma pauperis* action where the claims are substantially non-monetary; or

(4) An action to enforce a statutory penalty.

(c) *Definition-Arbitration.* Arbitration is a process by which a qualified neutral individual ("arbitrator") hears all sides of a controversy and renders a fair decision based on the evidence and the law. If the parties stipulate in writing, the decision shall be binding.

(d) *Filing Requirements.* Each plaintiff filing an action subject to MNA and each defendant filing a responsive pleading and/or motion shall simultaneously file the interrogatories and sworn statements required by Civil Rule 3(h) and 5(b), subject to the following conditions:

(1) In an action in which counsel for plaintiff(s), or a plaintiff, if unrepresented, certifies to the Court that a potential defendant(s) cannot be ascertained at the time of the filing of the complaint, the case shall not be subject to MNA until ninety (90) days after the filing of all initial responsive pleadings, during which ninety (90) day period any party may conduct discovery limited to the identity of a potential defendant(s); (*See* Form 33.)

(2) All parties alleging personal injuries must file a responsive and complete answer to Form 30 Interrogatory Number 7, if applicable, and all defendants must file a responsive and complete answer to Form 30 Interrogatory Number 6. Parties are under a continuing obligation to update these answers as additional information becomes known.

(3) All parties alleging personal injuries shall provide to the defending party(s) a medical authorization which complies with HIPPA requirements within five (5) days of the filing of the Answer to the Complaint. Such parties shall also provide, upon request, such additional authorizations which are required to obtain records. The defendant shall notify all other parties of the receipt of all records and shall provide copies of all such records to the party who has alleged the personal injuries. The defendant shall also provide copies to all other parties upon request. All parties who receive copies of the records, except for the party(s) alleging the personal injuries, shall pay a pro-rated share of the costs incurred to obtain and reproduce the records.

(4) The party alleging personal injuries shall, within five (5) days of the entry of appearance by the defendant, serve Defendant with all medical records and reports required by Superior Court Civil Rule 3(h).

(5) All expert witness reports in existence at the time of the filing of the Complaint, upon which a party intends to rely at the arbitration, shall be provided to

opposing party(s) within five (5) days after service of the Answer under Superior Court Civil Rule 5(b). Expert reports received thereafter, upon which either party intends to rely at the arbitration, shall be provided to the opposing party(s) within five (5) days of receipt.

(e) *Discovery.*

(1) The defendant may issue subpoenas *duces tecum* pursuant to Superior Court Civil Rule 45 for records of health care providers who have provided medical care or services to the party alleging personal injuries. The defendant shall notify all other parties of the receipt of all records and shall provide copies of all such records to the party who has alleged the personal injuries. The defendant shall also provide copies to all other parties upon request and all parties who request copies of records shall pay a pro-rated share of the cost incurred to obtain and reproduce the records.

(2) Defendant(s) may not request a medical examination of the plaintiff prior to the arbitration hearing, but may have a medical records review performed.

(f) *Selection of the Arbitrator.* The Parties shall confer and select an arbitrator within twenty (20) days of the filing of the close of all initial pleadings by the parties. Unless otherwise ordered by the Court, if an arbitrator is not selected within twenty (20) days, the parties may not utilize arbitration under this rule. Counsel must confer as to arbitrators in good faith following the filing of the initial pleadings.

(g) *Motions.* The arbitrator shall hear and decide all motions filed by the parties related to the case except:

(1) All case dispositive motions, which, subject to subsection (o), are stayed until after the arbitration has been held;

(2) Motions to compel a party to comply with the selection of an arbitrator or the scheduling of arbitration; and

(3) Motions for relief pursuant to subsections (k) and (o) of this Rule.

(h) *Scheduling.*

(1) Unless otherwise ordered by the Court, an arbitration shall be held within one hundred twenty (120) days of the close of all initial pleadings by the parties.

(2) A Case Scheduling Order will be issued by the assigned Judge in accordance with that Judge's preferences. At the Court's discretion, a conference may be held to arrange for the trial date and, if arbitration has not taken place, the parties will provide a written status report as to when the arbitration will take place. Subject to the Court's discretion, failure to proceed to arbitration within one hundred twenty (120) days of the close of all initial pleadings, shall not prevent the assignment of a trial date.

(i) *Ethics.* Arbitrators shall follow the Delaware Lawyers' Rules of Professional Conduct and shall follow Canon 3(C)(1) of the Delaware Judges' Code of Judicial Conduct.

(j) *Compensation.*

(1) Unless otherwise stipulated in advance by the parties, the arbitrator appointed, except nonretired members of the State Judiciary, shall receive compensation from the parties for services for a minimum of three (3) hours of hearing time at a reasonable rate set by the arbitrator. Each party shall pay that party's share of the total MNA fee in advance of the hearing. It is the obligation of each attorney, or any party appearing pro se, to timely pay any arbitrator's fee when billed. Any attorney who refuses or neglects to pay the arbitrator's fee, after second notice, may be subject to a loss of civil case filing privileges. (*See* Civil Rule 77(h)(E)).

(2) An arbitrator who certifies that he or she has performed services in excess of three (3) hours may receive additional compensation from the parties for such additional time, provided that the arbitrator provides the terms for additional compensation to the parties in writing in advance of the hearing and all parties agree to those terms. Fee agreements will be enforced by the Court upon a Motion filed by the arbitrator.

(k) *The Arbitration Hearing.* Unless otherwise ordered by the Court, the arbitration shall be scheduled and completed as soon as practicable and within the time allowed for conducting MNA by these Rules. Written guidelines setting forth the arbitration procedures, forms and frequently asked questions will be available on the Court's website prior to the effective date.

(1) Unless the date of the hearing is agreed upon by all parties, the arbitrator shall give at least ten (10) days written notice of the hearing to all parties.

(2) The arbitrator, in the arbitrator's discretion, may schedule an informal preliminary conference with the parties.

(3) The arbitration may proceed in the absence of any party who fails to appear, after notice, but an award of damages shall not be based solely upon the failure of a party to appear.

(4) The Rules of this Court may be used to compel the attendance of witnesses and production of documents.

(5) Unless waived by all parties, the testimony shall be under oath or affirmation, administered by a notary public.

(6) The Delaware Uniform Rules of Evidence shall be used as a guide to the admissibility of evidence. Copies or photographs of all exhibits, except exhibits intended solely for impeachment, must be delivered to the arbitrator and all parties at least ten (10) days prior to the hearing. Any party that fails to deliver all

exhibits at least (10) days prior to the date set for hearing forfeits any right to costs allowable under this Rule. The arbitrator shall consider such exhibits without formal proof, unless the arbitrator and the parties have been notified at least five (5) days prior to the hearing that an adverse party intends to raise an issue concerning the authenticity of the exhibit. The arbitrator may refuse to receive into evidence any exhibit, a copy or photograph of which has not been delivered to an adverse party as provided herein. The arbitrator, in his or her discretion, may view or inspect exhibits or the locus involved in the action either with or without the parties and/or their attorneys.

(7) A party at its expense may, with at least ten (10) days prior written notice to the arbitrator and adverse party, have a recording or transcript made of the arbitration hearing.

(8) An arbitrator, in his or her discretion, may limit testimony in the arbitration hearing.

(9) An arbitrator, in his or her discretion, may adjourn the hearing for not more than ten (10) days.

(10) Each party and each attorney, unless excused by the arbitrator, shall appear and participate in the arbitration hearing.

(A) A party, who without being excused, fails to appear at an arbitration hearing shall not be entitled to demand a trial de novo, except upon payment of the total arbitrator's fee and all Court costs incurred by all parties to date.

(B) Failure to appear and participate without just cause by any person whose attendance is required shall subject the offender to sanctions under Superior Court Civil Rule 37(d).

(l) *Arbitrator's Order.* The arbitrator shall certify as part of the order that he or she has not examined and is not familiar with the amount of insurance coverage, unless such was necessary for the arbitration decision, and is not disqualified under Canon 3(C)(1) of the Delaware Judge's Code of Judicial Conduct. In addition:

(1) The arbitrator shall electronically file the original written arbitration order, or notice with the Prothonotary with copies to each party within five (5) days following the close of the arbitration hearing.

(2) The arbitration order shall be entered as an order of judgment by any judge of the Court, upon motion of a party, after the time for requesting a trial de novo has expired. A judgment so entered shall have the same force and effect of a judgment of the Court in a civil action, but shall not be subject to appeal.

(m) *Time for Arbitration Hearing and Appeal-Trial De Novo.* Within twenty (20) days after the electronic filing of the arbitration order any party may

electronically file a written demand for a trial de novo. A demand for a trial de novo is the sole remedy of any party in any action subject to arbitration under this Rule.

(1) Any right of trial by jury shall be preserved inviolate. The stay of motions and discovery provided by this Rule shall automatically terminate upon the service and filing of a demand for trial de novo or the placement of the case upon the Court's trial calendar following the expiration of the time allowed for MNA. The time for responses to motions and discovery shall commence upon the date of the filing of the demand for trial de novo or the placement of the case upon the Court's trial calendar following the expiration of the time allowed for MNA.

(2) Participation by the parties in an arbitration pursuant to this Rule also constitutes compliance with the ADR requirements of Rule 16. In any case not arbitrated, either within the time allowed by this Rule or within the time allowed by the Court, the parties must comply with the ADR provisions of Rule 16.

(3) At the trial de novo, the Court shall not admit evidence that there has been an arbitration proceeding, the nature or amount of the order, nor consider any other matter concerning the conduct or outcome of the arbitration proceeding, except recorded testimony taken at the arbitration hearing may be used in the same manner as testimony taken at a deposition.

(4) If the party who demands a trial de novo fails to obtain a verdict from the jury or judgment from the Court, exclusive of interests and costs, more

favorable to the party than the arbitrator's order, that party shall be assessed the costs of arbitration, and the arbitrator's total compensation. In addition:

(A) If the plaintiff obtains a verdict from the jury or judgment from the Court equal to or more favorable than the arbitrator's order, and the defendant demanded a trial de novo, interest on the amount of the arbitrator's award shall be payable in accordance with the interest provisions of 6 *Del. C.* §2301(a) beginning with the date of the order.

(B) If the defendant obtains a defense verdict or a verdict from the jury or judgment from the Court equal to or more favorable than the arbitrator's order, and the plaintiff demanded a trial de novo, the defendant shall be awarded costs, as described in Superior Court Civil Rule 68, incurred after the date of the arbitrator's order.

(5) An election to participate in an arbitration under this Rule shall not be considered for any purpose, other than as specifically provided under this Rule.

(n) *Judgments.* In the event that no request for trial de novo is timely filed and a judge upon motion has entered an order of judgment, the Prothonotary shall record the order of judgment in the proper docket and judgment index.

(o) *Motions for Relief and Enforcement.* Subject to the other Civil Rules, any party subject to this Rule may file with the Court a motion for relief from or to enforce compliance with any part of this Rule, in part or in its entirety, for good

cause shown including, but not limited to, motions to compel, motions to bypass arbitration, motions requesting additional discovery, and motions to enlarge the time allowed for conducting arbitration. No motion for enlargement of time for the trial date may be filed by a party subject to this Rule.

(p) *Collateral Estoppel*. Awards entered pursuant to arbitration proceedings under this Rule shall not have collateral estoppel effect in any other judicial proceedings.

(q) *MNA Civil Immunity*. All arbitrators shall be immune from civil liability for, or resulting from, any act or omission done or made while engaged in MNA, unless an act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another. No arbitrator shall be compelled to give testimony in any subsequent proceeding in connection with any hearing or conference over which the arbitrator presided, unless so directed by the Court.

2. This Rule shall take effect on January 1, 2018.

oc: Prothonotaries
cc: Superior Court Judges
Superior Court Commissioners
Matthew P. Denn, Attorney General
J. Brendan O'Neill, Public Defender
Court Administrators
Michael Ferry, Director of Operations
Carolyn Meier, LexisNexis
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