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IDAHO OFFERS MORE THAN JUST POTATOES TO VICTORIOUS PARTIES IN
ARBITRATION

By
Nathan C. Volpi*

I. IDAHO ENACTS FEE SHIFTING STATUTE

The recently passed Idaho House Bill 593 establishes new rules to govern arbitration proceedings involving insurers and worker's compensation claims within the state.¹ The new rules, which were approved by Governor Otter and came into effect on July 1, 2010, create grounds for Idaho's insured to force their insurance providers to pay for attorney's fees incurred during any arbitration between them and their insurance provider.² To litigants of insurance and worker's compensation claims, these rules will sound familiar as Idaho previously created a similar rule for awarding attorney's fees in lawsuits against insurers.³ This expansion transfers over all of those same rules, including the standing exemption for surety and fidelity insurers, as well as special rules governing worker's compensation.⁴

II. GROUNDS CREATED FOR MAKING INSURERS PAY IN ARBITRATION

Idaho House Bill 593 amends section 41-1839 of the Idaho Code to allow the insured to recover attorney's fees against their insurer if they can establish at

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¹ H.B. 593, 60th Leg., 2nd Reg. Sess. (Ida. 2010).

² Idaho Legislature, H.B. 593, *available at*, <http://legislature.idaho.gov/legislation/2010/H0593.htm> (last visited Nov. 19, 2010).

³ H.B. 593, Statement of Purpose, *available at* <http://legislature.idaho.gov/legislation/2010/H0593SOPBookmark.htm> (last visited Nov. 19, 2010).

⁴ Compare IDAHO CODE ANN. I 41-1839(1) (1996), *with* IDAHO CODE ANN. I 41-1839(1) (2010), *and* H.B. 593, 60th Leg., 2nd Reg. Sess. (Ida. 2010) (noting the previous existence of all of the statute's current provisions minus the references to arbitration until they were inserted by the House Bill).

arbitration that the insurer failed to "pay the amount justly due" to the insured party under the insurance policy.⁵ Attorney's fees are not shifted to the insurer lightly, however, and several provisions exist to protect the insurer.⁶ First, the insured party must furnish "proof of loss as provided in such [insurance] policy, certificate or contract" and provide the insurer with at least a period of thirty day to "pay to the person entitled thereto the amount justly due under such policy."⁷ Second, the insured party must wait until the end of the thirty day period before they are permitted to initiate arbitration proceedings and they must prevail in the proceeding before they can request an award of attorney's fees.⁸ Attorney's fees cannot be awarded piecemeal during the course of the arbitration and must be given only at the end, if at all, because the statute ties them to the arbitral award.⁹ Attorney's fees are given as part of the final arbitral award and not as a separate consideration in and of themselves.¹⁰ Thus, if the arbitrator does not render an award, then no attorney's fees can be awarded. In addition, if the insured party does not prevail at the arbitration, and if the arbitrator concludes either that the insurer has already paid the insured the amount owed or "that no amount is justly due," then the insured party is not entitled to attorneys' fees.¹¹ Although it is the arbitrator's decision whether attorney's fees should be awarded to the insured party, the arbitrator must rely on the courts to enforce the payment through court order.¹²

⁵ IDAHO CODE ANN. I 41-1839(1) (2010).

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ IDAHO CODE ANN. I 41-1839(1) (2010).

¹¹ *Id.* at I 41-1839(2).

¹² *Id.* at I 41-1839(1).

III. WHEN A COURT CAN SHIFT A LAWYER'S COST

Though arbitrators are technically the ones tasked with determining whether attorney's fees should be shifted, Idaho Code section 41-1839(1) provides that the court should only order the insurer to "pay such further amount as the court shall adjudge reasonable."¹³ Thus, it is the courts that determine the amount of attorney's fees to be shifted, even though the arbitrator decides whether attorney's fees should be shifted at all.¹⁴

Whether a shift of attorney's fees is 'reasonable' is not the only grounds for which a court may order the shift, however. Idaho's courts are granted their own, discretionary power to award attorney's fees as well.¹⁵ Idaho Code section 41-1839(4) provides that "attorney's fees may be awarded by the court when it finds, from the facts presented to it, that a case was brought, pursued or defended frivolously, unreasonably or without foundation."¹⁶ As a result, there are two situations in which an insurer can find the costs of the insured's attorney's fees shifted onto them: when an arbitrator awards, and a court orders, the shift or when a court finds that an insurer has mounted a frivolous defense.¹⁷

IV. SURETY AND FIDELITY INSURERS RECEIVE EXEMPTIONS

While the majority of the insurance industry within Idaho will have to adapt to the new arbitration rules established by House Bill 593, two specific fields of insurance law, surety and fidelity coverage, will not experience nearly as noticeable a change in their future arbitration proceedings.¹⁸ Subsection 3 of

¹³ *Id.*

¹⁴ *Id.*

¹⁵ IDAHO CODE ANN. at II 41-1839(1) & (4).

¹⁶ *Id.* at I 41-1839(4).

¹⁷ *Id.* at I 41-1839.

¹⁸ *Id.* at I 41-1839(3).

section 41-1839 of the Idaho Code prevents the statute, with a very limited exception, from applying to any “actions or arbitrations against surety insurers by creditors of or claimants against a principal” and “actions or arbitrations against fidelity insurers by claimants against a principal.”¹⁹ This partial-exemption has long been provided to surety and fidelity insurers involved in litigation in Idaho and has now been expanded to apply when surety and fidelity insurers are the targets of an arbitration proceeding.²⁰

The exemption of fidelity insurance providers from the requirements of section 41-1839 can only be overcome if the insured meets the double burden of prevailing against the principal and then prevailing against the fidelity insurer in an arbitration proceeding.²¹ The insured can potentially leap the first of these hurdles if they acquire an acknowledgement by the claimant, in writing, of the claimant’s liability for the matter in question.²² Once liability is established, the claimant can seek attorney fee shifting provided they meet all of the prerequisites established for seeking the same against insurers.²³

Claimants seeking to shift their attorney’s fees to surety insurance providers have a slightly easier time than fidelity insurance claimants, but some control of their fate is surrendered to the surety insurance provider in return.²⁴ Unlike a claimant arbitrating a fidelity insurance claim, a claimant arbitrating a surety insurance claim must provide the surety with notice “of their claim, in writing, at least sixty days prior to such action or arbitration against the surety.”²⁵ Once a claimant has provided the surety with notice, the surety, not the arbitrator, has the power to determine what “portion or amount of such claim...” is owed to the creditor or claimant.²⁶ The surety then bears the responsibility of paying the

¹⁹ *Id.* at I 41-1839(3) (2010).

²⁰ H.B. 593, 60th Leg., 2nd Reg. Sess. (Ida. 2010).

²¹ IDAHO CODE ANN. II 41-1839(1) & (3) (2010).

²² *Id.* at I 41-1839(3).

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ IDAHO CODE ANN. I 41-1839(3) (2010).

creditor or claimant that amount.²⁷ The statute further provides that payment of this amount “shall not prejudice any right of the surety to indemnification and/or subrogation...” as long as it is done in good faith.²⁸ Thus the surety possesses the power to determine, subsequent to receiving notification of arbitral proceedings, whether a creditor or claimant shall receive any immediate relief.²⁹

V. CONCLUSION

With the passage of House Bill 593, insurance providers in Idaho may now be liable for the attorney’s fees of their insured should they lose against them in arbitration.³⁰ The fee shifting aspect of House Bill 593 provides an incentive to insured, with a grievance against their insurance provider, to seek alternative dispute resolution by potentially lowering the financial burden that a full arbitration can entail.³¹ While under the new rules costs incurred in arbitration will be determined by the courts, judges are cautioned to only shift fees when they find “from the facts presented to [them], that a case was brought, pursued or defended frivolously, unreasonably or without foundation.”³² Even when a court finds that one of these three criteria has been met, the statute further cautions a judge to only require the insurer to pay the amount a court “shall adjudge reasonable.”³³

Although surety and fidelity insurers remain somewhat insulated from the new rules, they will not be completely impervious.³⁴ With the passage of this legislation, Idaho has mandated that arbitration proceedings should apply the same rules as their judicial counterparts, at least when it comes to attorney’s fees. A

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ H.B. 593, 60th Leg., 2nd Reg. Sess. (Ida. 2010).

³¹ IDAHO CODE ANN. I 41-1839(1) (2010).

³² *Id.*

³³ *Id.* at I 41-1839(1).

³⁴ *Id.* at I 41-1839(4).

level of judicial oversight remains and practitioners of insurance arbitration should find that they face an experience very similar to their partners in litigation when it comes to arguing over attorney's fees.