

We respectfully write concerning the proposed creation of a rule regulating extraordinary dispositive motions. In our view, extraordinary dispositive motions must be limited to truly extraordinary circumstances, and not become an ordinary defense tactic. If a system of arbitration is to claim fundamental fairness, a claimant who gives up the right to a trial before a jury, overseen by a professional judge guiding the procedures, with the right of appellate review, and a special verdict form showing that the fact finder considered each cause of action, at least a claimant must be ensured a full hearing. If arbitration is to be a panel of law, equity, and fact, then the facts must be heard.

Extraordinary dispositive motions must have a full oral hearing. To deny a full oral hearing, with the opportunity of cross-examination, would deny the very essence of a fairness.

Extraordinary dispositive motions may only be granted where the moving party can establish that there is no possibility of establishing liability under any facts or circumstances.

Dispositive motions may not be granted where there are disputed facts. Dispositive motions may not be granted based upon pleading issues.

A panel denying a dispositive motion shall award costs and actual attorneys' fees to the party defending the motion.

The notice time period for the motion should be increased to at least ninety (90) days, to permit additional discovery. If discovery responses are pending from the moving party, or if a motion to compel further discovery response from the moving party is pending, the dispositive motion should not be heard before the further discovery is produced or the motion to compel is heard by the panel.

The grant of a dispositive motion shall be accompanied by a reasoned decision and be subject to a *de novo* review by the director of arbitration.

Any grant of a dispositive motion which is not on its face in compliance with the standards set forth in rule 12504 shall be reversed by the director of arbitration and actual attorneys' fees and costs shall be awarded.

After twelve (12) months, a review of statistical information gathered about all motions brought under this rule should be made. If more than ten percent (10%) of filed claims are dismissed pursuant to the changes made to the rule, another rule making process should be undertaken. Dispositive motions erode the basic agreement of the arbitration system and should be limited to the most unusual and extraordinary circumstances.

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