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Key issues for policyholders under Florida's new tort reform bill

Blog The Policyholder Perspective

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On the heels of last year's special session on Florida's property insurance crisis, which, among other things, eliminated one-way fee shifting in property insurance cases, the Florida Legislature has now passed even more aggressive pro-insurer legislation as part of a broader tort reform bill aimed at addressing "frivolous" litigation. House Bill 837 is not limited to property insurance issues, and instead includes various measures aimed at protecting insurance companies from liability for bad faith conduct and prevailing party attorney fees across all kinds of coverage disputes. HB 837 raises several important issues for policyholders and insurance litigation overall going forward. We discuss some of these issues below.

Fee-shifting allowed only in certain declaratory judgment actions

First, HB 837 appears to extend last year's fee-shifting repeals to all lines and types of insurance coverage disputes, not just property insurance disputes, while creating a new limited fee-shifting statute for certain kinds of insurance disputes brought as declaratory judgment actions. This would allow for fee-shifting in declaratory judgment actions brought after an insurer has made a "total coverage denial." The phrase "total coverage denial" is not defined, but according to the bill, would not include situations where a liability insurer provides a defense under a reservation of rights. The bill does not say whether an insurer who also claims a right to reimbursement for defense costs paid on the insured's behalf effectively seeks a total denial of coverage.

From a public policy standpoint, these changes further erode longstanding Florida law allowing policyholders to recover the fees they incur in successfully prosecuting (or defending) coverage disputes against their insurers. Indeed, the Florida Supreme Court has explained that these statutes are "deeply rooted in public policy," "afford a level process and make an already financially burdened insured whole again, and [ ] discourage insurance companies from withholding benefits on valid claims." *Johnson v. Omega Ins. Co.*, 200 So. 3d 1207, 1209 (Fla. 2016). This appears to be lost on some insurance company advocates who applaud these changes as necessary to "level the playing field for insurers," which is exactly backwards ("Florida Insurance Crisis: Attorney Fees Slashed, but Are the Reforms Enough?", 2022).

Also, far from being narrowly tailored to address perceived frivolous litigation against insurers, these changes will have a disproportionate impact on policyholders with meritorious claims. Declaratory judgment actions are often needed when insurance companies take meritless positions in evaluating a claim—even if those positions fall just shy of a "total coverage denial." This would include, for example, disputes over coverage for an underlying lawsuit even though an insurer has agreed to defend the suit under a reservation of rights, an insurer's decision to appoint a favored lawyer to defend, applicable policy limits (or sublimits) and deductibles, and the number of "occurrences" at issue. As a result, this provision is prone to manipulation by insurers seeking to insulate themselves from exposure to fee-shifting in deciding how to respond to certain claims.

What's more, declaratory judgment actions are regularly brought by insurers themselves, who often agree to defend an insured in a lawsuit subject to a reservation of rights while simultaneously seeking a declaration that there is no coverage for the suit. Clearly, disallowing fee-shifting in such cases does nothing to curb frivolous litigation against insurance companies.

All of these issues are likely to generate significant litigation, including litigation surrounding the scope of the phrase "total coverage denial," and how this new fee-shifting statute should be interpreted against the backdrop of existing Florida case law on fee-shifting issues. Because the bill states that it only applies prospectively to policies issued and actions filed after the effective date, it will likely take some time for these issues to be resolved.

New(ish) standards & duties in bad faith litigation

HB 837 also includes several changes to Florida's civil remedy statute, including two new sections providing that, in both statutory and common law bad faith actions, (a) "[m]ere negligence alone is insufficient to constitute bad faith," and (b) the "insured, claimant, and representative of the insured or claimant have a duty to act in good faith in furnishing information regarding the claim, in making demands of the insurer, in setting deadlines, and in attempting to settle the claim," which a jury may consider to "reasonably reduce the amount of damages awarded against the insurer."

At first blush, these provisions appear to reflect significant changes to Florida's bad-faith law. Indeed, some insurance-industry advocates have said the significance "cannot be overstated," and have already jumped to the conclusion that this may create "an avenue for dismissing bad-faith lawsuits that simply allege mere negligence" (Levin, Bloom, and Jacobs, 2023). This is largely hyperbole.

First, the notion that "mere negligence" alone is insufficient to prove bad faith is not new. *See Harvey v. GEICO Gen. Ins. Co.*, 259 So. 3d 1, 9 (Fla. 2018). This is just a codification of existing Florida law.

Also, the duty of good faith described in new § 624.155(5)(b) largely mirrors the duties that policyholders already have under most policies—in the first-party property context, for instance, an insured's "post-loss" duties already include furnishing information reasonably requested by the insurer, and in third-party liability cases, an insured has a duty to cooperate with the carrier's investigation and defense of the lawsuit. Existing case law on these issues could serve as useful analogs for courts interpreting this statute for the first time.

At the same time, we expect carriers to argue that this eliminates Florida Supreme Court precedent holding that the focus in bad faith litigation is on the insurer, not the insured (or claimant). Depending on how Florida courts interpret these provisions, this would vastly expand the scope of bad faith litigation, which is already highly fact-intensive, resulting in even lengthier and more expensive litigation overall.

It is not clear, however, that courts will interpret this provision as broadly as some insurers would like. For example, courts might strictly construe § 624.155(5)(b) to apply only in certain cases (such as bad faith failure to settle cases), or might find that certain aspects of existing bad faith case law survives this legislation. This is particularly true because, at least in the first-party context, some courts have said § 624.155 is in derogation of the common law and must be strictly construed.

New safe harbor defense and procedural devices for liability Insurers to avoid bad faith exposure

HB 837 also creates a new safe harbor defense for liability insurers that would bar any bad faith action as long as the insurer "tenders the lesser of the policy limits or the amount demanded by the claimant within 90 days after receiving actual notice of a claim which is accompanied by sufficient evidence to support the amount of the claim."

Also included are two new procedural devices for cases involving multiple completing claims against an insured (or insureds). Under new § 624.155(6), an insurer can now shield itself from bad faith exposure by either (a) filing an interpleader action to determine the claimants' prorated share of the policy limits, or (b) entering into a binding arbitration proceeding agreed to by the insurer and the claimants, where a "qualified arbitrator" (paid for by the insurer) determines the claimants' prorated share of the policy limits.

These new procedures raise significant issues for policyholders dealing with claims or lawsuits brought against them. First, § 624.155(6) raises serious procedural and potential due process concerns by allowing insurers and claimants to engage in binding arbitration, apparently without the insured's participation or consent, with an arbitrator selected and paid for by the insurance company.

New § 624.155(4) could also severely hamstring insureds faced with presuit settlement demands (or other settlement opportunities) that fail to track the new statutory timeframe afforded to insurance companies. Under Florida law, bad faith may be inferred when an insurance company unreasonably delays in engaging in settlement negotiations. Indeed, in some cases involving catastrophic injuries or mass torts, where liability is clear and damages in excess of policy limits are likely, carriers have an *affirmative* duty to initiate settlement negotiations. *Powell v. Prudential Prop. & Cas. Ins. Co.*, 584 So. 2d 12, 14 (Fla. 3d DCA 1991).

Now, however, when a claimant sends a presuit settlement demand with a 30-day deadline to accept in order to avoid the filing of a lawsuit, how is the insured supposed to respond when its carrier has another 60 days to make a decision? This makes it impossible for the policyholder to comply with the terms of the demand and avoid the threatened lawsuit.

It is unclear why the Florida Legislature thinks insurance companies should be allowed to delay compensating victims and protecting their insureds against clear and significant exposure. Or why the property and casualty industry as a whole—which is doing quite well financially— needs "protection" from legitimate claims and suits. But that is the reality Florida policyholders are now facing under HB 837.

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