

A Paradigm Shift: Legislative Changes Impacting Florida Bad Faith Litigation

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It is undeniable that over the last several months, there has been a sea change in the area of bad faith law in Florida, both in the first and third party arenas. Such change has been long overdue as Florida has been home to the vast majority of property insurance lawsuits in the United States. As a result of the ailing property insurance market in Florida, the Legislature passed a series of laws in an effort to curb the tide of property insurance litigation, with the most recent change signed into law on December 16, 2022 (“SB 2A”). Following that positive development, the Florida Legislature and Governor DeSantis enacted Florida’s Tort Reform Bill (“HB 837”) on March 24, 2023, which changed tort law in Florida and spurred record filings in anticipation of the law going into effect.

What follows is a synopsis of the tort reform changes related to the area of third-party bad faith, specifically the time to respond to a demand and the procedure for an insurer to interplead policy limits or pursue binding arbitration in the event multiple parties have competing claims. To contrast the first party changes, a brief overview of the salient first party changes is included at the end. It should be noted that our esteemed colleague, Frank Ramos, has provided an extensive overview of the entirety of HB 837, and this article is meant to be a brief summary of the key portions of HB 837 addressing certain scenarios in the third-party arena as well as first-party.

First, HB 837 creates a safe harbor from bad faith liability under § 624.155(4) if the insurer tenders the lesser of the policy limits or the amount demanded by the claimant within 90 days after receiving notice of the claim, with “sufficient evidence” to support the claim. Unsurprisingly, the term “sufficient evidence” is undefined in the statute. If the insurer does not tender within the 90 day period, the existence of the 90 day period and information related to it is not admissible to support an allegation of bad faith against the insurer. The statute also tolls any applicable statute of limitations for an additional 90 days if the insurer fails to tender payment. We can look forward to much debate and litigation over the term “sufficient evidence,” but common sense (often in short supply in Florida...) would dictate that the carrier will need to show compelling evidence that it did not have enough information to meaningfully evaluate a claim.

Similarly, a 90 day safe harbor period also applies to situations involving two or more third-party claimants with competing claims arising out of a single occurrence, and § 624.155(6) outlines a procedure for insurers to insulate themselves from liability beyond the available policy limits. Specifically, an insurer is not liable beyond the available policy limits if, within 90 days of receiving notice of the competing claims in excess of the policy limits, the insurer either (i) files an interpleader action under the Florida Rules of Civil Procedure or (ii) pursuant to binding arbitration, makes the entire amount of the policy limits available to the competing third-party claimants before a qualified arbitrator agreed to by all claimants and the insurer at the expense of the insurer.

Historically, the use of an interpleader action in these scenarios was not an option for insurers but HB 837 has provided this much needed change. In the case of an interpleader action, if the competing claims of the third-party claimants exceed the available policy limits, then they are entitled to a prorated share of the policy limits as determined by a trier of fact. It should be noted that the filing of the interpleader action does not alter or amend the insurer's obligation to defend its insured.

If binding arbitration is chosen as the method to resolve the competing third-party claims, then the arbitrator determines the prorated shares of the claimants based on the comparative fault, if any, of each claimant, and the total likely outcome at trial based on the total of the economic and non-economic damages submitted for consideration. This method of resolution requires a third-party claimant to execute and deliver a general release to the insured party whose claim is resolved by the proceeding.

One of the things a trier of fact may consider is whether the insured, the claimant, or representative of the insured or claimant acted in good faith. Due to the passage of HB 837, § 624.155(5) specifically elucidates that 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. If there was been non-compliance with this duty, the trier of fact may reasonably reduce the amount of damages awarded against the insurer but this duty does not create a separate cause of action.

The passage of HB 837 has provided insurers with straightforward procedures to respond to a claim from a single claimant, as well as competing claims from two or more third-party claimants arising out of a single occurrence that exceed available policy limits. It is absolutely crucial that insurers, as well as their counsel, familiarize themselves with the newly revamped § 624.155 in order to take advantage of the safe harbors provided to avoid potential bad faith liability. And while HB 837 is literally a generational change in bad faith law, it is certainly not a "cure all" for poor claims handling. It is still imperative that the insurer's file reflect the following:

- (1) Prompt and thorough investigation and evaluation of a claim;
- (2) Keep the insured advised every step of the way through the process;
- (3) If additional information is needed to evaluate the claim, aggressively and promptly take every step possible to procure that information.

Moreover, HB 837 still leaves us with areas of uncertainty that will most likely require judicial intervention in the future. For example, it would have been helpful for the Legislature to affirmatively state that an excess verdict is not, in and of itself, dispositive evidence on the question of bad faith. And as noted above, the term "sufficient evidence" is undefined in the statute, and is expected to become a point of contention.

In the first party arena, the changes to bad faith in the first-party property context from the passage of SB 2A were fewer, but they are by no means less notable in their potential effect on litigation in Florida. A plain reading of the recently signed law makes it abundantly clear that SB 2A has created significant impediments to an insured bringing a bad faith claim against an insurer. For example, the amended § 624.1551 specifically requires a finding of breach of contract through

adverse adjudication by a court of law before a bad faith lawsuit brought under § 624.155(1)(b) can be filed. More importantly, the amendment states that acceptance of a proposal for settlement or payment of an appraisal award does not meet the requirement of an adverse adjudication. While the difference between an insurer's appraiser's final estimate and the appraisal award may be evidence of bad faith, it is still not deemed an adverse adjudication and does not, on its own, give rise to a bad faith cause of action.