Florida Tort Legislation

Passage of House Bill (HB) 837

Its History, Consequences, and Effects

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The Florida legislature drafted and Governor DeSantis signed sweeping tort legislation changing the panacea of tort and insurance law for decades. Before addressing the law and its implications, the question is – How did we get here?

It started with a drumbeat to reform windstorm claims, often driven by attorneys' fees. Insurers were fleeing the Florida property market, and many expected the next significant hurricane would drive more out. And then Hurricane Ian hit, devastating Southwest Florida and causing over 50 billion in damage. In December 2022, the Governor and the Republican lawmakers, who held a supermajority in the House and Senate, worried about an insurance industry collapse, reformed property damage claims and litigation, including one-way attorneys' fees that favored plaintiffs. The insurance and commercial industry were pleasantly surprised and thought – if we can reform property damage litigation in Florida, can we reform personal injury litigation? And they got to work.

How Did It Pass?

Past efforts for sweeping Florida tort reform had fallen short. This time it passed because:

- **Politics had changed.** Although some view Florida as a purple state, it is solidly red as far as the legislature and executive are concerned. Despite that, plaintiff bar lobbyists historically had an outsized effect on the conservative majority. With the legislature moving further to the right and looking to flex its muscle, it took up one conservative cause after another. And tort reform has always been front and center of the conservative agenda. Adding to that, the upcoming presidential campaign and Governor DeSantis wanting to show his conservative bona fides, it was not a question of whether tort reform would happen but how widespread it would be.

- **The Industry copied the plaintiff's bar.** The insurance and corporate industry took a page from the plaintiff's bar and pushed tort reform through lobbying, print and social media, advertising, etc. The industry had a story to tell, they told it and shared it repeatedly.

- **The defense bar staged an offensive.** Historically, the Florida civil defense bar has primarily remained on the sidelines over tort reform battles. This time, many leading defense firms and the Florida Defense Lawyers Association staged a full frontal assault and outflanked the plaintiff's bar. Their efforts

caught the plaintiff's bar by surprise and made some bitter. More on that in a bit.

The conservative political climate, an organized and astute industry, and a defense bar that articulated why reform was necessary before one legislative committee after another left an indelible mark on Florida tort law. It was masterfully played and orchestrated, and many in the Industry remain stunned by what they pulled off.

Unintended Consequences

Before addressing the law's effects, let's address its unintended consequences:

- **A flood of lawsuits.** Plaintiff's firms, looking to avoid the effects of the new laws, filed complaints for all their pre-suit claims. Morgan & Morgan alone filed over 25,000 complaints. Some estimates are that plaintiff firms filed over 100,000 suits before the Governor signed the bill. This will strain our county clerks and judiciary and require insurers and defense firms to add to their teams and enhance their training and litigation management to prepare for the onslaught of lawsuits.

  The FDLA wrote the Florida Supreme Court seeking relief and asking for an administrative order allowing additional time to respond to these Complaints. Plaintiff's bar responded, stating that insurers and defense firms asked for tort reform and should live with the consequences. We will see what administrative orders, if any, are entered to address this deluge of lawsuits.

- **Attacks on the defense bar.** Returning to the comment of the plaintiff's bar bitterness directed to the defense bar, there are reports of plaintiff lawyers attacking defense lawyers for their role in the legislation. Beyond that, there has been chatter of plaintiff firms planning on refusing to agree to extensions to respond to complaints, discovery, etc. Some in the plaintiff's bar have taken the legislation personally and are prepared to vent their frustration and bitterness on defendants and their counsel. Expect less collegiality, cooperation, and professionalism.

- **A tale of two cities.** We will be handling two cases – those for which the new law applies and those that don't. The changes are so drastic that we must treat pre-legislation cases differently than post-legislation cases and develop protocols for our teams to handle each effectively and efficiently.

- **The next battle.** Having rewritten both windstorm and PI claims, the Industry is preparing for the next battle for additional tort reform. Their past victories portend future ones, and lines will be drawn over additional changes to tort legislation. Past reform will lead to future reform.

What the Law Says and Its Effects

So what does the new law say? Here is a summary of its salient provisions:

- **Effective Date.** This law generally applies to causes of action filed after the act's effective date of March 24, 2023 (The shortening of the statute of limitations for negligence causes of action from 4 to 2 years applies to cause of action accruing after March 24, 2023. The laws' changes apply to insurance contracts issued or renewed after March 24, 2023).

- **Effects of the effective date.**

    - **A flood of lawsuits.** To avoid the effect of this law, plaintiff attorneys filed tens of thousands of lawsuits to get them under the wire.

- **Medical Bills.** The law limits the introduction of evidence for medical damages at trial.

- **Past Medical Care**. The law limits evidence of past paid medical bills to the amount paid for services regardless of the source of the payment. Thus, if a health insurer paid for a medical bill, the amount the insurer paid is admissible at trial. Plaintiff cannot introduce into evidence the amount the provider billed.

    As to unpaid medical bills:

    - If a Plaintiff has health care coverage, what the health insurer must pay under an insurance contract or regulation (plus the plaintiff's contribution, such as a co-pay or deductible) is admissible at trial.

    - If a Plaintiff has health care coverage but chooses to fund medical care through a letter of protection, only evidence of the amount his healthcare insurer would have paid if he had submitted his bills to the insurer (plus the plaintiff's contribution) is admissible.

    - If a plaintiff does not have health care coverage, then evidence of 120% of the Medicare reimbursement rate being in effect on the date of the claimant's incurred medical services may be introduced at trial. If there is no applicable Medicare rate for a service, 170 percent of the applicable state Medicaid rate is admissible.

    - Suppose a plaintiff receives services pursuant to a letter of protection, and the medical bill is assigned to a third party. In that case, the only evidence of the amount the third party agreed to pay the provider for the right to receive payment is admissible.

- **Future Medical Care.** The law limits evidence as to future medical care:

- If a plaintiff has health care coverage or is eligible for health care coverage, the only evidence of the amount for which future charges could be satisfied if submitted to such health care coverage (plus the plaintiff's portion such as co-pays and deductibles) is admissible.

- If a plaintiff does not have health care coverage or has health care coverage through Medicare or Medicaid, or is eligible for such health care coverage, evidence of 120% of the Medicare reimbursement rate in effect at the time of trial for the medical treatment or services the claimant will receive, or if there is no applicable Medicare rate for a service, 170% of the applicable state Medicaid rate, is admissible.

- **Discovery of health contracts.** Contracts between providers, insurers, and HMOs are neither subject to discovery nor admissible.

- **Damages for medical expenses.** The law prohibits recovery for amounts above the amounts paid for medical services, and it also prohibits an award for damages from exceeding the amount:

    - Actually paid by or on behalf of the claimant to his provider.

    - Necessary to satisfy charges for unpaid medical services at the time of trial.

    - Required to provide for any reasonable and necessary future medical treatment.

- **Effect of changes to the admissibility of medical expenses.**

    - **Defense experts who opine on the appropriateness of the amount of medical bills are no longer necessary.** As medical bills skyrocketed, these experts played a more significant role on the defense side, and now they are potentially obsolete.

    - **Plaintiff-oriented doctors, especially surgeons, will rethink their medical treatment and billing approach.** The law closes the spigot on exorbitant medical bills and discourages unnecessary treatment and surgeries.

    - **Lower medical expenses, past and future, boarded for the jury should reduce non-economic damages awards and nuclear**

verdicts. Likewise, it should increase the likelihood of settlements at mediation.

- **More reasonable life care plans.**

- **Reduced abuse of letters of protection.**

- **Letters of Protection.** If a Plaintiff receives medical services subject to a letter of protection, the plaintiff must disclose the following:

    - A copy of the letter of protection

    - All billing for his medical expenses, itemized and coded (in effect on the date the services were rendered).

        - For providers billing at the provider level, the relevant codes are found in the American Medical Association's Current Procedural Terminology (CPT) or the Healthcare Common Procedure Coding System (HCPCS).

        - For providers billing at the facility level for expenses incurred in a clinical or outpatient setting, the relevant codes are found in the International Classification of Diseases (ICD) and, if applicable, the American Medical Association's Current Procedural Terminology (CPT).

        - For providers billing at the facility level for expenses incurred in an inpatient setting, the relevant codes are found in the International Classification of Diseases (ICD).

    - Whether the provider sold the accounts receivable to a third party, the name of the party, and the dollar amount paid by the third party.

    - Whether the plaintiff had health insurance at the time of treatment and the identity of the health care coverage provider.

    - Whether the claimant was referred for treatment under a letter of protection and, if so, the identity of the person who made the referral.

- **Effects of changes as to Letters of Protection.**

    - **Brings letters of protection to the foreground.** Juries will hear more about letters of protection, what they mean, the financial relationship they create, and the doctor's financial interest in the case's outcome.

    - **Reduce opaqueness.** The law creates transparency about letters of protection, what they are, and who benefits. There are no more secrets about who stands to gain from them.

- **Modification to the attorney-client privilege.** There is no attorney-client privilege in communications related to an attorney's referral of a client for treatment. This overturns the Florida Supreme Court's 4-3 decision in *Worley v. Central Florida YMCA*, which found that "the defense could not seek discovery information about the relationship between Plaintiff's attorneys and medical providers to whom they referred clients, finding the attorney-client privilege protected that."

  The financial relationship between a law firm and a medical provider, including the number of referrals, frequency, and financial benefit obtained, is relevant to the issue of the bias of a testifying medical provider.

- **Effect of changes as to the modification of the attorney-client privilege.**

    - **Even the playing field.** Until now, plaintiff's counsel could address the alleged bias of the defense medical expert, but defense counsel was hamstrung in showing the financial relationship between plaintiff's counsel and plaintiff's treaters. Defense counsel may address a treater's relationship with a plaintiff's lawyer.

    - **Suggest collusion.** A relationship where a plaintiff lawyer sends his clients to the same doctors and has a referral relationship with them suggests to a jury something is afoot. Where juries are constantly judging whether to trust or discount a witness's testimony, this relationship may go a long way to undermine these treaters' testimony.

- **Comparative Negligence.** The law changes Florida's comparative negligence system from a pure comparative negligence system to a modified one (except for medical negligence cases) so that a plaintiff who is more at fault for their injuries than the defendant may not generally recover damages from the defendant.

- **Effect of changes to comparative negligence.**

    - **Avoids outsized awards against nominally negligent defendants.** In matters where the plaintiff was significantly at fault, plaintiff attorneys argue for more considerable damages so that defendants with low negligence pay an outsized portion of damages, which drives up

settlement and increases the likelihood of trials. Under the law, defendants can prevail outright at trial (i.e., a plaintiff who walks into the street and is struck by a vehicle).

- **Negligent Security.** The law will provide a presumption against liability if the property owner follows and completes their checklist of measures.

    - **Requirements for Presumption Against Negligence**. The law provides three requirements that a property owner must show they followed before the incident giving rise to the negligence claim.

        - A list of physical property safety measures to be taken on the property.

        - A crime prevention analysis.

        - Crime prevention training for all employees.

    - **Physical Property Safety Measures.** The first requirement includes the implementation of the following safety measures:

        - A security camera system at points of entry and exit that records and maintains footage for at least 30 days. The goal of this precaution is to assist in offender identification and apprehension.

        - A lighted parking lot that provides light from dusk until dawn.

        - Lighting in the hallways, laundry rooms, common areas, and porches from dusk until dawn.

        - A deadbolt measuring at least one inch in each dwelling unit door.

        - A locking device on each window and each exterior sliding door, and another on other doors not used for community purposes.

        - Locked gates with key or fab access along pool fence areas.

        - A peephole or door viewer on each dwelling unit door that does not include a window or that does not have a window next to the door.

- **Crime Prevention Analysis**. By January 1, 2025, the property owner must complete a "crime prevention environmental design" that is no more than three years old for the property. The assessment must be performed by a law enforcement agency or a Florida Prevention Through Environmental Design Practitioner (FCP). The property owner must remain in substantial compliance with this assessment.

- **Crime Prevention Training**. By January 1, 2025, the property owner must provide proper crime deterrence and safety training to its current employees. This training is to familiarize employees with security principles, devices, measures, and standards outlined in the checklist of physical measures listed in requirement one.

- **Proposed Curriculum.** The Florida Crime Prevention Training Institute of the Department of Legal Affairs shall develop best practices for owners and operators to implement such training.

- **The fault of the assailant.** The individual who performed the criminal act may be included on the verdict form.

- **Trespassers.** Trespassers do not have a claim for negligent security.

- **Effect of changes as to negligent security claims.**

    - **Reduction of negligent security cases**. These changes will reduce the number of negligent security cases. Between defining the standard of care and placing assailants on the verdict form, the likelihood of prevailing on these matters and the amounts one can recover for them is reduced. Plaintiff lawyers will be hesitant to accept these cases.

    - **Battle of the Experts.** Before the law changed, negligent security cases were typically a battle of the experts, in which each side's expert testified about the foreseeability of the criminal action that occurred and the reasonableness of the steps the property owner took to maintain the property in a safe condition. Plaintiff's expert typically testified that the property didn't have sufficient patrols, lighting, guards, security cameras, and lighting. The new legislation incentivizes property owners to implement these security measures to be presumed not to be negligent and will reduce the cost of expert retention.

- **Bad Faith.** The law modifies bad faith law to:

- Allow an insurer to avoid third-party bad faith liability if the insurer tenders the policy limits or the amount demanded by the claimant within 90 days after receiving actual notice of the claim.

- Failure of an insurer to tender within 90 days is not bad faith and is inadmissible in a bad faith action.

- If the insurer fails to tender within 90 days, any applicable statute of limitations is extended by 90 days.

- Clarify that negligence alone is not enough to demonstrate bad faith.

- Require a claimant to act in good faith concerning furnishing information, making demands, setting deadlines, and attempting to settle the insurance claim.

- The trier of fact may consider whether the insured, the third-party claimant, or their representative did not act in good faith and, if so, reasonably reduce the damages awarded against the insurer.

- Allow an insurer, when there are multiple claimants in a single action, to limit the insurer's bad faith liability by paying the total amount of the policy limits at the outset.

- If two or more third-party claimants have competing claims arising out of a single occurrence, which in total may exceed the insured's available policy limits, the law provides that the insurer does not commit bad faith by failing to pay all or any portion of the available limits to one or more of the third party claimants if, within 90 days after receiving notice of the competing claims, the insurer must either:

    - Files an interpleader action

    - Pursuant to binding arbitration agreed to by the parties, makes the entire amount of the policy limits available for payment to the competing third-party claimants before a qualified arbitrator selected by the insurer and the third-party claimants at the insurer's expense.

- **Effect of changes to bad faith law.**

- **End "set-up" claims.** Before this law, the system incentivized plaintiff lawyers to devise situations that led to a bad faith claim to obtain larger settlements. This law ends that.

- **Reduce bad faith claims.** Allowing insurers enough time to apprise a claim will result in more comprehensive claims handling and fewer bad faith claims. Rushed claims handling due to stringent time restraints led to many bad faith claims.

- **Contingency Fee Multiplier.** The law creates a presumption that the lodestar fee is sufficient and reasonable in a case in which attorney fees are determined by or awarded by the court. A claimant may overcome this presumption only in a rare and exceptional circumstances and only if they can demonstrate that they could not have otherwise reasonably retained competent counsel.

- **Effect of changes to contingency fee multiplier.**

    - **Reduce runaway attorney fees.** Removing multipliers will reduce the threat of runaway of attorney fees.

- **One Way Attorneys fees.** One-way attorney fee provisions for plaintiffs are limited to where the insurer denied coverage and the insured prevailed in a declaratory action.

- **Effect of elimination of one-way attorneys fees.**

    - **Reduce insurance claims.** Plaintiffs may be subject to attorneys' fees and are less likely to file questionable claims.

    - **Increase the likelihood of settlement.** Plaintiffs facing a possible attorneys' fee claim may be more inclined to settle on reasonable terms.

- **Statute of Limitations.** The statute of limitations for general negligence is reduced from four to two years.

- **Effect of changes to the statute of limitations.**

    - **Possibly fewer claims.** With a shorter statute of limitations, some claims may not be filed timely.

    - **Reduced likelihood of loss of evidence.** Cases filed close to the 4-year deadline may make tracking relevant witnesses and evidence

difficult. With a 2-year deadline, one is more likely to track down relevant evidence.

What happens now?

This law changes the tort litigation landscape in Florida. Expect challenges to its constitutionality. The Florida Supreme Court leans right and may be inclined to leave the law and its provisions alone. It may, however, having issued administrative orders in response to the COVID pandemic, issues administrative orders to ensure courts and counsel have the structure and protocols to deal with the onslaught of new suits.

And what should you do to respond to all the new lawsuits?

- **Scale Up.** Consider expanding your legal team. You will be deluged with cases. You will be flooded with time-sensitive policy limits demands if you're a carrier. Plaintiff's bar has made clear that the time frame for these demands will be short (Morgan & Morgan is making thousands of five-day policy limits demands), and they will argue that the lack of claims professionals to evaluate these claims is not a defense to bad faith. Expect plaintiff firms to discuss which carriers have the fewest boots on the ground.

  If you head a claims department, transfer claims professionals from other jurisdictions, rehire recent retirees and scour pools of eligible applicants. For most insurance VPs, who have been struggling for years to hire claims personnel (despite herculean efforts by the insurance industry, many young adults are not pursuing a career in insurance), this is the last thing you want to hear. It is, however, the reality.

  If you head a defense firm, you have struggled to hire and keep associates. Just as the hiring boom was waning, this happened. Look to your local state attorneys' and public defenders' offices, local law schools, and recruiters, and institute a training program to teach them how to handle a large volume of time-sensitive matters.

- **Bad Faith.** Expect most suits filed before the statute's passage to have a time-sensitive policy limit demand of only a few days. Do not expect courts to provide grace to law firms or legal or claims departments who do not have the resources to investigate these claims thoroughly. Create a protocol for each type of case you handle (non-commercial auto, commercial auto, slip and falls, trip and falls, negligent security, etc.), teach it to your team, and organically modify it in response to what works and what doesn't. This ensures everyone is appropriately and thoroughly investigating all claims and will serve as evidence of proper claims handling in any subsequent bad faith claim.

- **Develop protocols.** Large caseloads demand litigation management. Develop protocols, checklists, and procedures for your team to effectively and efficiently litigate

when handling many deadlines. As with addressing time-sensitive demands, have a litigation plan for each type of case, and modify it with your team's feedback.

- **Share orders.** Trial courts will enter numerous orders on response times, discovery issues, and applications of the new law. Defense firms should develop means to share helpful orders.

- **Collaborate.** In addition to developing litigation management plans, meet regularly with your team to evaluate what is working and what isn't.

- **Work with opposing counsel.** Despite anecdotes of plaintiff attorneys planning on behaving obstreperous, everyone will need extensions, accommodations, and patience. Do your part to lower the temperature and work cooperatively with opposing counsel.

- **Keep your cases straight.** Have two case lists – those that fall under the new law and those that don't, and work each set appropriately.

- **Seek out opportunities to streamline.** Large caseloads demand efficiencies. Through a feedback loop with your team, learn where forms, shortcuts, and other measures can help your team work faster and more efficiently.

- **Judges will be overwhelmed.** What will happen will be reminiscent of the foreclosure deluge after the banking crash. Judges had more cases they could handle and expected counsel to work out as much as possible, reducing the number of hearings. Despite any animosity this law will engender between the plaintiffs and the defense bar, courts expect attorneys to get along and not file countless motions to compel, for sanctions, etc.

- **Possible repercussions.** Carriers, businesses, and defense firms who led the fight for this legislation may find the least amount of cooperation from the plaintiff's bar. Everyone knows who stuck their necks out, and they may be targeted with shorter time frames for demands, fewer extensions, and fewer courtesies. Be prepared if this happens.

- **Educate.** There will be innumerable resources interpreting the new legislation and advice on handling the influx of matters. Select what works best for your team and share it with them.

- **Support.** Your team will be overextended and anxious from all the deadlines. Support them.

Conclusion

To say this legislation is a game-changer is an understatement. In-house counsel, claims professionals and defense firms must prepare for the onslaught of cases and the changes this legislation brings.

If you are interested in a free webinar for your in-house counsel team, claims team, or defense firm on any of the topics below, please contact me at framos@cspalaw.com.

- The New Tort Litigation – What It is and How to Prepare for It
- Litigation Management for Your In House or Claims Department
- Litigation Management for Your Defense Firm
- How to Investigate Time-Sensitive Demands
- The Anatomy of Defending an Auto Case
- The Anatomy of Defending Premises Case
- The Anatomy of Defending Products Case