The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Banking and Insurance

BILL:	SB 1464
INTRODUCER:	Senator Brandes
SUBJECT:	Fair Settlement Act
DATE:	March 15, 2019
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Billmeier	Knudson	BI	**Pre-meeting**
2.			JU	
3.			RC	

I. Summary:

SB 1464 revises the civil remedy statute in s. 624.155, F.S., whereby any person may bring a civil action for extra-contractual damages when such person is damaged because an insurer acted in bad faith.

The bill requires the insured or claimant, when giving the required 60 days' written notice to the insurer and the Department of Financial Services before filing a bad faith action under s. 624.155, F.S., specify the amount of money necessary to cure the alleged violation. The bill repeals the requirement that the Department of Financial Services review notices and return those which lack required information.

The bill creates a separate notice requirement for statutory or common-law bad faith actions for failure to settle a liability insurance claim. Instead, as a condition precedent to a statutory or common-law bad faith action for failure to settle a liability insurance claim, the insured, the claimant, or anyone on behalf of the insured or the claimant must provide the insurer a written notice of loss.

The bill provides that the insurer does not violate the duty to attempt in good faith to settle the claim and is not liable for bad faith failure to settle if the insurer complies with a request for a disclosure statement as described in s. 627.4137, F.S., and, within 45 days after receipt of the written notice of loss, offers to pay the claimant the lesser of the limits of liability coverage applicable to the claimant's insurance claim or the amount that the claimant is willing to accept in exchange for a full release of the insured from any liability arising from the incident and the written notice loss.

The bill allows an insurer to avoid liability beyond available policy limits if two or more third-party claimants in a liability claim make competing claims arising out of a single occurrence which in total exceed the available policy limits. To limit liability, the insurer must, within

90 days after receiving notice of the competing claims in excess of the available policy limits, file an interpleader action under the Florida Rules of Civil Procedure. The bill provides that the competing third-party claimants are entitled to a prorated share of the policy limits as determined by the trier of fact. The bill provides that an insurer's interpleader action does not alter or amend the insurer's obligation to defend its insured.

The bill requires the trier of fact, in evaluating whether an insurer did not attempt in good faith to settle claims when it could and should have done so, to consider whether the insured, claimant, or representative of the insured or claimant made good faith efforts to cooperate with the insurer in the investigation of the claim.

II. Present Situation:

Obligations of Insurer to Insured

A liability insurer generally owes two major contractual duties to its insured in exchange for premium payments—the duty to indemnify and the duty to defend. The duty to indemnify refers to the insurer's obligation to issue payment either to the insured or a beneficiary on a valid claim.The duty to defend refers to the insurer's duty to provide a defense for the insured in court against a third party with respect to a claim within the scope of the insurance contract.[1] The Florida Supreme Court explained the difference between indemnity policies and liability policies:

> Under indemnity policies, the insured defended the claim and the insurance company simply paid a claim against the insured after the claim was concluded. Under liability policies, however, insurance companies took on the obligation of defending the insured, which, in turn, made insureds dependent on the acts of the insurers; insurers had the power to settle and foreclose an insured's exposure or to refuse to settle and leave the insured exposed to liability in excess of policy limits.[2]

Historically, damages in actions for breaches of insurance contracts were limited to those contemplated by the parties when they entered into the contract.[3] As liability policies began to replace indemnity policies as the standard insurance policy form, courts recognized that insurers owed a duty to act in good faith towards their insureds.[4]

Common Law and Statutory Bad Faith

Florida courts for many years have recognized an additional duty that does not arise directly from the insurance contract, the common law duty of good faith on the part of an insurer to the insured in negotiating settlements with third-party claimants.[5] The common law rule is that a third-party beneficiary who is not a formal party to a contract may sue for damages sustained as

[1] *See* 16 Williston on Contracts s. 49:103 (4th Ed.).
[2] *See State Farm Mutual Automobile Insurance Company v. Laforet*, 658 So.2d 55, 58 (Fla. 1995).
[3] *Id.*
[4] *Id*.
[5] *See Auto. Mut. Indem. Co. v. Shaw*, 184 So. 852 (Fla. 1938).

the result of the acts of one of the parties to the contract.[6] This is known as a third-party claim of bad faith.

At common law, the insured cannot raise a bad faith claim against the insurer outside of the third-party claim context.[7] In 1982, the Legislature enacted s. 624.155, F.S. Section 624.155, F.S., recognizes a claim for bad faith against an insurer not only in the instance of settlement negotiations with a third party but also for an insured seeking payment from his or her own insurance company. This is known as a first-party claim of bad faith.

Section 624.155, F.S., provides that any party may bring a bad faith civil action against an insurer, and defines bad faith on the part of the insurer as:

- Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured with due regard for her or his interests;
- Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or
- Except as to liability coverages, failing to promptly settle claims, when the obligation to settle the claim has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.[8]

In order to bring a bad faith claim under the statute, a plaintiff must first give the insurer 60 days written notice of the alleged violation.[9] The insurer has 60 days after the required notice is filed to pay the damages or correct the circumstances giving rise to the violation.[10] Because first-party claims are only statutory, that cause of action does not exist until the 60-day cure period provided in the statute expires without payment by the insurer.[11] Third-party claims, on the other hand, exist both in statute and at common law, so the insurer cannot guarantee avoidance of a bad faith claim by curing within the statutory period.[12]

In interpreting what it means for an insurer to act fairly toward its insured, Florida courts have held that when the insured's liability is clear and an excess judgment is likely due to the extent of the resulting damage, the insurer has an affirmative duty to initiate settlement negotiations.[13] If a settlement is not reached, the insurer has the burden of showing that there was no realistic possibility of settlement within policy limits.[14] Failure to settle on its own, however, does not mean that an insurer acts in bad faith. Negligent failure to settle does not rise to the level of bad

[6] *See Thompson v. Commercial Union Insurance Company*, 250 So.2d 259 (Fla. 1971).
[7] *See Laforet*, 658 So.2d at 58-59.
[8] *See* s. 624.155(1)(b)1.-3., F.S.
[9] *See* s. 624.155(3)(a), F.S. The notice must be on a form approved by the Department of Financial Services. If the Department returns the notice for lack of specificity, the day period does not begin until a proper notice is filed. The notice form can be found at https://apps.fldfs.com/CivilRemedy/ (last accessed on March 13, 2019).
[10] *See* s. 624.155(3)(d), F.S.
[11] *See Talat Emterprises vv. Aetna Casualty and Surety Company*, 753 So.2d 1278, 1284 (Fla. 2000).
[12] *See Macola v. Government Employees Insurance Company*, 953 So.2d 451 (Fla. 2006).
[13] *See Powell v. Prudential Property and Casualty Insurance Company*, 584 So.2d 12, 14 (Fla. 3d DCA 1991).
[14] *Id*.

faith. Negligence may be considered by the jury because it is relevant to the question of bad faith but a cause of action based solely on negligence is not allowed.[15]

Third-Party Claims of Bad Faith

A third-party bad faith claim arises when an insurer fails in good faith to settle a third party's claim against the insured within policy limits and exposes the insured to liability in excess of his or her insurance coverage.[16] The Florida Supreme Court has described an insurer's duty to its insureds:

> An insurer, in handling the defense of claims against its insured, has a duty to use the same degree of care and diligence as a person of ordinary care and prudence should exercise in the management of his own business. For when the insured has surrendered to the insurer all control over the handling of the claim, including all decisions with regard to litigation and settlement, then the insurer must assume a duty to exercise such control and make such decisions in good faith and with due regard for the interests of the insured. This good faith duty obligates the insurer to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same. The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so. Because the duty of good faith involves diligence and care in the investigation and evaluation of the claim against the insured, negligence is relevant to the question of good faith. The question of failure to act in good faith with due regard for the interests of the insured is for the jury.[17]

In light of this heightened duty on the part of the insurer, Florida courts focus on the actions of the insurer, not the claimant.[18] Whether an insurer acted in bad faith is determined by the totality of the circumstances:

> In Florida, the question of whether an insurer has acted in bad faith in handling claims against the insured is determined under the totality of the circumstances standard. Each case is determined on its own facts and ordinarily the question of failure to act in good faith with due regard for the interests of the insured is for the jury.[19]

The focus in a bad faith case is on the conduct of the insurer but the conduct of the claimant is relevant to whether there was a realistic opportunity for settlement.[20] A court, for example, will

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[15] *See DeLaune v. Liberty Mutual Insurance Company*, 314 So.2d 601,603 (Fla. 4th DCA 1975).
[16] *See Opperman v. Nationwide Mutual Fire Insurance Company*, 515 So.2d 263, 265 (Fla. 5th DCA 1987).
[17] *Boston Old Colony Insurance Company v. Gutierrez*, 386 So.2d 783, 785 (Fla. 1980)(internal citations omitted).
[18] *See Berges v. Infinity Insurance Company*, 896 So.2d 665, 677 (Fla. 2005)(explaining that "the focus in a bad faith case is not on the actions of the claimant but rather on those of the insurer in fulfilling its obligations to the insured").
[19] *See Berges*, 896 So.2d at 680 (internal quotations and citations omitted).
[20] *See Barry v. GEICO General Insurance Company*, 938 So.2d 613, 618 (Fla. 4th DCA 2006).

look at the terms of a demand for settlement to determine if the insurer was given a reasonable amount of time to investigate the claim and make a decision whether settlement would be appropriate under the circumstances. One court held that dismissal of a bad faith claim was proper where the settlement demand in question gave a 10-day window, pointing out that "[i]n view of the short space of time between the accident and institution of suit, the provision of the offer to settle limiting acceptance to 10 days made it virtually impossible to make an intelligent acceptance."[21] Although in this particular circumstance the court found that 10 days was not enough, it is not clear exactly what time period or other conditions for acceptance would be permissible, because courts look at the facts on a case-by-case basis and the current statute is silent on this point.

In *Berges v. Infinity Insurance Company*, dissenting justices expressed concern that there "is a strategy which consists of setting artificial deadlines for claims payments and the withdrawal of settlement offers when the artificial deadline is not met."[22] It was argued that it is a "common practice for a party contemplating litigation to submit a settlement offer that remains outstanding for only a finite period and that a person injured by a policyholder may set any deadlines he desires—even an arbitrary or unreasonable one."[23] Justice Wells concluded that set time periods in which all insurers must make decisions on claims and issue payments are needed.[24]

The majority in *Berges* held that courts must look to the totality of the circumstances. "The question of bad faith in this case extends to [the insurer's] entire conduct in the handling of the claim, including the acts or omissions [of the insurer] in failing to ensure payment of the policy limits within the time demands."[25] Another court argued that setting a "minimum amount of time before any finding of bad faith is possible runs counter to the analysis of ordinary care and prudent business practice… Juries are empaneled to apply the appropriate criteria to the particular facts of a given situation and to decide whether the insurer acted prudently."[26]

In *Harvey v. Geico General Insurance Company*,[27] the Florida Supreme Court explained that the critical inquiry in a bad faith case is whether "the insurer diligently, and with the same haste and precision as if it were in the insured's shoes, worked on the insured's behalf to avoid an excess judgment."[28] The court said an insurer has an affirmative duty to initiate settlement negotiations in cases where liability is clear and a judgment in excess of policy limits is likely.[29] The court said the lower court misapplied precedent when it said an insurer cannot be liable for bad faith when the insured's own actions were at least in part responsible for the excess judgment.[30]

[21] *DeLaune v. Liberty Mut. Ins. Co.*, 314 So.2d 601, 603 (Fla. 4th DCA 1975).
[22] *Berges*, 896 So.2d at 685 (Wells, J., dissenting).
[23] *Id.* at 692 (Cantero, J., dissenting).
[24] *Id*. at 686 (Wells, J., dissenting).
[25] *Berges*, 896 So.2d at 627.
[26] *Snowden ex. rel. Estate of Snowden v. Lumbermans Mutual Casualty Company*, 358 F.Supp.2d 1125, 1129 (N.D. Fla. 2003).
[27] 259 So.3d 1 (Fla. 2018).
[28] *Harvey*, 259 So.3d at 7.
[29] *Harvey*, 259 So.3d at 7.
[30] *Harvey*, 259 So.3d at 11.

The Good Faith Duty in a Multiple Claimant Situation

In 2003, the Fourth District Court of Appeal considered how an insurer should carry out its duty of good faith in a case with multiple claimants where the total damages far exceeded policy limits.[31] In that case, the insured caused an automobile accident where five teens were killed and seven more were seriously injured. The insurance company settled with three of the claimants and exhausted policy limits on those settlements. Numerous claimants filed third-party bad faith claims against the insurer alleging the insurer entered into settlements without due regard for the interests of the insured.[32]

The court held that the same duties of good faith set forth in *Boston Old Colony* applied when there were multiple claimants. The insurer must investigate all claims, keep the insured informed, and minimize the amount of excess judgments by reasoned claim settlement. The insurer may still decide to settle some claims and exclude others but the decision must be made "in keeping with its good faith duty."[33]

In *Hernandez v. Travelers Insurance Co.*,[34] the court considered whether an insurance company, which may be liable to several persons because of the negligence of its insured, could file an interpleader action (an action where the court determines the distribution of the funds up to policy limits). The court held that interpleader is not allowed under such circumstances. The court explained:

> The plaintiff insurance company has only the derivative liability from its insured. One of its liabilities is to defend its insured in the courts. It may not discharge that liability by depositing a sum of money and saying to the courts, "divide it up." If the defendants were all claiming the proceeds of a single fund and liability could exist as to only one of the claimants, an interpleader would be appropriate. In the present cause, one action cannot determine the entire controversy and liability may exist as to more than one claimant.[35]

Disclosure Statements

Section 627.4137, F.S., requires an insurer to provide, within 30 days of the written request of the claimant, a statement, under oath, of a corporate officer or the insurer's claims manager or superintendent setting forth the following information with regard to each known policy of insurance, including excess or umbrella insurance:

- The name of the insurer.
- The name of each insured.
- The limits of the liability coverage.
- A statement of any policy or coverage defense which such insurer reasonably believes is available to such insurer at the time of filing such statement.
- A copy of the policy.

[31] *Farinas v. Florida Farm Bureau General Ins. Co.*, 850 So.2d 555 (Fla. 4th DCA 2003).
[32] *Farinas*, 850 So.2d at 557-558.
[33] *Farinas*, 850 So.2d at 561.
[34] 356 So.2d 1342 (Fla. 3rd DCA 1978).
[35] *See Hernandez*, 356 So.2d at 1344.

In addition, the insured, or her or his insurance agent, upon written request of the claimant or the claimant's attorney, must disclose the name and coverage of each known insurer to the claimant and shall forward such request for information on all affected insurers. The insurer shall then supply the information required in this subsection to the claimant within 30 days of receipt of such request. Section 627.4137(2), F.S., requires that the disclosure statement be amended immediately upon discovery of facts calling for an amendment to such statement.

III. Effect of Proposed Changes:

The bill revises the requirement that an insured or claimant give 60 days' written notice to the insurer and the Department of Financial Services before filing an action for bad faith failure to settle. The bill amends s. 624.155(3)(b), F.S., to require that the notice required under s. 624.155(3)(a), F.S., contain the specific amount of money necessary to cure the alleged violation. This would require, for example, an insured in a first-party claim to notify the insurer and the Department of Financial Services of the specific amount necessary to cure the alleged violation. The bill repeals the requirement that the Department of Financial Services review the notices and return those which lack required information.

Under the bill, the notice requirements of s. 624.155(3), F.S., no longer apply to statutory or common-law bad faith actions for failure to settle a liability insurance claim. Instead, this bill provides that, as a condition precedent to a statutory or common-law bad faith action for failure to settle a liability insurance claim, the insured, the claimant, or anyone on behalf of the insured or the claimant must provide the insurer a written notice of loss.

If the insurer complies with a request for a disclosure statement as described in s. 627.4137, F.S., and, within 45 days after receipt of the written notice of loss, offers to pay the claimant the lesser of the limits of liability coverage applicable to the claimant's insurance claim or the amount that the claimant is willing to accept in exchange for a full release of the insured from any liability arising from the incident and the written notice loss, the insurer does not violate the duty to attempt in good faith to settle the claim and is not liable for bad faith failure to settle. Current law provides that bad faith is determined based on the totality of the circumstances. This bill would provide that an insurer is not liable for bad faith failure to settle if the insurer complies with the provisions of this bill.

The bill requires the trier of fact, in evaluating whether an insurer committed an act under subparagraph (1)(b)1., to consider whether the insured, claimant, or representative of the insured or claimant made good faith efforts to cooperate with the insurer in the investigation of the claim. Subparagraph (1)(b)1 is the statutory provision authorizing a person to bring a bad faith civil action when damaged by an insurer's not attempting in good faith to settle claims when it could and should have done so. The bill does not make clear how the trier of fact should weigh the insured's conduct against the insurer's conduct.

The bill provides that if two or more third-party claimants in a liability claim make competing claims arising out of a single occurrence which in total exceed the available policy limits of one or more of the insured parties who may be liable to the third-party claimants, an insurer is not liable beyond the available policy limits for failure to pay all or any portion of the available

policy limits to one or more of the third-party claimants, if within 90 days after receiving notice of the competing claims in excess of the available policy limits, the insurer files an interpleader action under the Florida Rules of Civil Procedure. The competing third-party claimants are entitled to a prorated share of the policy limits as determined by the trier of fact. The bill provides that an insurer's interpleader action does not alter or amend the insurer's obligation to defend its insured. This will allow an interpleader action similar to what the court rejected in *Hernandez v. Travelers Insurance Co.*

This act shall take effect July 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

Lines 98-99 toll the statute of limitations for the mailing of a "subsequent" notice required by subsection (3). The bill removes the ability of the Department of Financial Services to return notices so there should not be "subsequent" notices.

Lines 104 and 110 require that the claimant file a "written" notice of loss. It is not clear how that would operate with insurers that handle claims filing via telephone.

Lines 121-126 provides that the insurer can limit liability by filing an interpleader action within 90 days of receiving notice of competing claims in excess of policy limits. It is unclear when and how an insurer would receive such notice.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 624.155 of the Florida Statutes.

IX. Additional Information:

A. Committee Substitute – Statement of Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

B. Amendments:

None.