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 Judiciary Committee

BILL:	CS/SB 1592
INTRODUCER:	Judiciary Committee and Senator Thrasher
SUBJECT:	Civil Remedies Against Insurers
DATE:	March 24, 2011 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	O'Connor	Maclure	JU	**Fav/CS**
2.			BC	
3.				
4.				
5.				
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

This bill creates specific statutory standards for a bad faith claim against an insurer which "apply equally and without limitation or exception to all common law remedies and causes of action for bad faith failure to settle." The bill specifies that a bad faith claim arises where the insurer acts "arbitrarily and contrary to the insured's interests in failing to settle claims within the policy limits if, under all the circumstances existing at the relevant time, it could and should have done so, had it acted fairly and honestly toward its insured." Only an insured person or that person's assignee has a cause of action under the bill, thus eliminating a direct cause of action brought by a third-party claimant against an insurer without an assignment from the insured. In a bad faith action arising out of failure to settle with a third-party claimant, the insurer's duty to offer policy limits does not arise unless a plaintiff shows that during settlement negotiations the third party submitted a detailed written demand to settle with the insurer within policy limits which meets criteria specified in the bill. The bill also provides a process for insurers to facilitate settlement within policy limits in the event of multiple third-party claims.

This bill substantially amends sections 624.155 and 627.311, Florida Statutes.

II. Present Situation:

Obligations of Insurer to Insured

An insurer generally owes two major contractual duties to its insured in exchange for premium payments—the duty to indemnify and the duty to defend.[1] The duty to indemnify refers to the insurer's obligation to issue payment either to the insured or a beneficiary on a valid claim.[2] 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.[3]

Statutory and Common Law Bad Faith

Florida courts for many years have recognized an additional duty that does not arise directly from the contract, the common law duty of good faith on the part of an insurer to the insured in negotiating settlements with third-party claimants.[4] Additionally, a Florida statute, enacted in 1982, 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.[5]

The statute provides that any party has a claim 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.[6]

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.[7] If a settlement is not reached, the insurer has the burden of showing that there was no realistic possibility of settlement within policy limits.[8] Failure to settle on its own, however, does not mean that an insurer acts in bad faith, because liability may be unclear or damage minimal. Negligent failure to settle does not rise to the level of bad faith. Negligence may be considered

[1] 16 Williston on Contracts s. 49:103 (4th ed.).
[2] *Id.*
[3] *Id.*
[4] *Auto. Mut. Indemnity Co. v. Shaw,* 184 So. 852 (Fla. 1938).
[5] Section 624.155, F.S.
[6] Section 624.155(1)(b), F.S.
[7] *Powell v. Prudential Prop. and Cas. Ins. Co.*, 584 So. 2d 12, 14 (Fla. 3d DCA 1991).
[8] *Id.*

by the jury because it is relevant to the question of bad faith, but a cause of action based solely on negligence does not lie.[9]

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.[10] The insurer has 60 days after the required notice is filed to pay the damages or correct the circumstances giving rise to the violation.[11] Because first-party claims are only statutory, that cause of action does not exist until the 60-day curing period provided in the statute expires without payment by the insurer.[12] 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.[13]

First- and Third-Party Claims

A first-party bad faith claim occurs when an insured sues his or her insurer claiming that the insurer refused to settle the insured's own claim in good faith.[14] A common example of a first-party bad faith claim is when an insured is involved in an accident with an uninsured motorist and does not reach a settlement with his or her own uninsured motorist liability carrier for costs associated with the accident.[15] Before a first-party bad faith claim was recognized in statute, Florida courts rejected such claims because the insured is not exposed to liability and thus there is no fiduciary duty on the part of the insurer like there is when a third party is involved.[16] An insured's claim against the insurer does not accrue until the conclusion of the underlying litigation for contractual benefits.[17] The action against the insurer must be resolved in favor of the insured,[18] because the insured cannot allege bad faith if it is not shown that the insurer should have paid the claim.

In a first-party action, there is never a fiduciary relationship between the parties, but an arm's length contractual one based on the insurance contract. At the time of the action itself, the insurer and the insured are adverse parties, but the nature of the claim raises complicated issues relating to the availability of certain evidence for discovery. Bad faith cases create unique issues during discovery because there are necessarily two separate phases of litigation—first regarding the underlying insurance claim and second regarding the bad faith claim. The Florida Supreme Court has held that first-party bad faith claimants are entitled to discovery of all materials contained in the underlying claim and related litigation file up to the date of the resolution of the underlying claim, which is the same as the standard for third-party claims.[19] The Court reasoned that

[9] *DeLaune v. Liberty Mut. Ins. Co.*, 314 So. 2d 601, 603 (Fla. 4th DCA 1975).
[10] Section 624.155(3)(a), F.S.
[11] Section 624.155(3)(d), F.S.
[12] *Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.,* 753 So. 2d 1278, 1284 (Fla. 2000).
[13] *Macola v. Gov. Employees Ins. Co.*, 953 So. 2d 451, 458 (Fla. 2007) (holding that an insurer's tender of the policy limits to an insured in response to the filing of a civil remedy notice, after the initiation of a lawsuit against the insured but before entry of an excess judgment, does not preclude a common law cause of action against the insurer for third-party bad faith).
[14] *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263, 265 (Fla. 5th DCA 1987).
[15] *See Blanchard v. State Farm Mut. Auto. Ins. Co.* 575 So. 2d 1289 (Fla. 1991).
[16] *Allstate Indemnity Co. v. Ruiz*, 899 So. 2d 1121, 1125 (Fla. 2005) (citing *State Farm. Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995)).
[17] *Blanchard*, 575 So. 2d at1291.
[18] *Id.*
[19] *Ruiz*, 899 So. 2d at 1129-30.

insurers are required to produce claim file materials regardless of whether they may be considered work product because they are generally the only source of direct evidence on the central issue of the insurance company's handling of the insured's claim.[20] In general, adverse parties are not compelled to produce materials prepared in anticipation of litigation without a showing to the court that the party seeking discovery needs the materials to prepare his or her case and cannot obtain the equivalent by other means without undue hardship.[21] Although plaintiffs are not required to make such a showing under Florida law for the contents of the claim file, they are required to do so in order to compel production of materials in preparation of the bad faith claim itself.[22]

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, thus exposing the insured to liability in excess of his or her insurance coverage.[23] A third-party claim can be brought by the insured, having been held liable for judgment in excess of policy limits by the third-party claimant,[24] or it can be brought by the third party either directly or through an assignment of the insured's rights.[25] Florida courts have interpreted s. 624.155, F.S., as authorizing a direct third-party claim because the statute makes an action available to "any party."[26] However, because a cause of action under s. 624.155, F.S., is predicated on the failure of the insurer to act "fairly and honestly toward its insured," the duty only runs to the insured; no such duty is owed by the insurance company to a third-party claimant.[27] Therefore, unless there is a judgment in excess of policy limits against the insured, "a third-party plaintiff cannot demonstrate that the insurer breached a duty toward its insured."[28]

In third-party cases, it is important to note that when the insured brings such a claim, there is a shift in the relationship between the insured and the insurer from the time when the underlying insurance contract is at issue and when the bad faith claim is brought. During settlement negotiations and any subsequent legal actions incident to the insurance claim, the insurer is acting pursuant to its contractual duties to indemnify and defend the insured. Upon filing a claim for bad faith, the insurer and insured become adverse.

When the insured brings a bad faith claim after being held liable to a third party in excess of policy limits, the insurer owes no duty to the insured because they are adverse parties at that point. However, even though the posture of the parties in a bad faith case is adverse, it is the insurer's behavior during the time when it was acting under a duty to the insured that is examined by courts. The Florida Supreme Court has defined the insurer's duty to the insured as a "fiduciary obligation to protect its insured from a judgment exceeding the limits of the insurance

[20] *Id.* at 1128.
[21] Fla. R. Civ. P. 1.280(b)(3).
[22] *Ruiz*, 899 So. 2d at 1130.
[23] *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263, 265 (Fla. 5th DCA 1987).
[24] *See Powell v. Prudential Prop. and Cas. Ins. Co.*, 584 So. 2d 12 (Fla. 3d DCA 1991).
[25] *See Thompson v. Commercial Union Ins. Co.* 250 So. 2d 259 (Fla. 1971) (recognizing a direct third-party claim under the common law before the enactment of s. 624.155, F.S.); *State Farm Fire and Cas. Co. v. Zebrowski*, 706 So. 2d 275 (Fla. 1997).
[26] *Zebrowski*, 706 So. 2d at 277.
[27] *Id.*
[28] *Id*. (citing *Dunn. v. Nat'l Sec. Fire & Cas. Co.*, 631 So. 2d 1103 (Fla. 1993)).

policy."[29] A fiduciary obligation is a high standard, which requires the insurer "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."[30] In light of this heightened duty on the part of the insurer, Florida courts focus on the actions of the insurer, not the claimant.[31] Although the focus in a bad faith case is on the conduct of the insurer, the conduct of the claimant is not entirely ignored, because it is relevant to whether there was a realistic opportunity for settlement.[32] A court, for example, will 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 ten days made it virtually impossible to make an intelligent acceptance."[33] 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.

III. Effect of Proposed Changes:

This bill creates specific statutory standards for a bad faith claim against an insurer and specifies that these standards "apply equally and without limitation or exception to all common law remedies and causes of action for bad faith failure to settle." The bill also expressly disapproves all prior judicial decisions that are inconsistent with the section as amended. The bill further enumerates three specific cases that are intended to be disapproved. The list of cases in the bill is not exhaustive. The current statute expressly permits both statutory and common law remedies, stating that its provisions do not "preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state."[34] This provision is retained in the bill, but it is limited as discussed above.

The bill specifies that a bad faith claim arises where the insurer acts "arbitrarily and contrary to the insured's interests in failing to settle claims within the policy limits if, under all the circumstances existing at the relevant time, it could and should have done so, had it acted fairly and honestly toward its insured." The amended standard requires an additional showing that the insurer's actions were arbitrary. The current statute only requires a plaintiff to show that the insurer did not act "fairly and honestly toward its insured and with due regard for her or his interests."[35]

Only an insured person or that person's assignee has a cause of action under the bill, thus eliminating the direct cause of action allowed under current law brought by a third-party claimant against an insurer without an assignment from the insured. The bill does not prohibit an

[29] *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 668 (Fla. 2004).
[30] *Id.* (quoting *Boston Old Colony Insurance Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980)).
[31] *Berges*, 896 So. 2d at 677.
[32] *Barry v. GEICO Gen. Ins. Co.*, 938 So. 2d 613, 618 (Fla. 4th DCA 2006).
[33] *DeLaune v. Liberty Mut. Ins. Co.*, 314 So. 2d 601, 603 (Fla. 4th DCA 1975).
[34] Section 624.155(8), F.S.
[35] Section 624.155(1)(b)1., F.S.

assignment of the insured's rights to a third party, or a third-party claim brought by the insured in reaction to a judgment in excess of policy limits. In a bad faith action arising out of failure to settle with a third-party claimant, the insurer's duty to attempt in good faith to settle does not arise unless a plaintiff shows that during settlement negotiations the third party submitted a detailed written demand to settle with the insurer within policy limits which meets criteria specified in the bill. These criteria include that the written demand must not contain conditions for acceptance other than payment of the specified amount, and must contain a detailed explanation of the facts giving rise to the claim with relevant information relating to specific injuries and damages, witnesses, and other relevant documents and records.

The bill further provides that with respect to third-party claims, the insurer cannot be held liable for bad faith if the insurer pays the lesser of either the requested settlement amount or the insured's policy limits in exchange for a release of liability within the later of 60 days after the notice of the claim, 60 days after the insurer's receipt of the demand to settle, or 30 days after the accident or incident giving rise to the claim. The bill provides the insurer with an affirmative defense if the third-party claimant or the insured fail to fully cooperate in providing all relevant information. This provision will direct courts to analyze the conduct of both the claimant and the insurer during settlement negotiations, where currently the main focus is on conduct of the insurer.[36]

Currently, there are no statutory guidelines for the contents of demands to settle. However, as a condition precedent to bringing a bad faith action, all claims, including first- and third-party, require 60 days' written notice of the violation to the Department of Financial Services (DFS) and the insurer.[37] This section is retained in the bill, but it specifies that it does not apply to actions relating to a third party, because third-party claims are subject to the settlement-negotiation guidelines discussed previously. The bill also adds the requirement that the notice be sent by certified mail to the claim handler, if known, and include corrective action the insurer could take.

The bill also provides a process not currently outlined in statute for insurers to facilitate settlement within policy limits in the event of multiple third-party claims arising out of a single occurrence totaling more than policy limits. In this situation, the bill specifies that the insurer is not liable beyond policy limits if within 90 days of the notice of competing claims, the insurer files an interpleader[38] to join competing claims and distribute policy limits on a prorated basis or makes policy limits available to the claimants through binding arbitration agreed to by all parties. Bad faith is not automatically presumed under this section if the insurer does not accept a demand to settle for policy limits, pay an appraisal award for damage to property, or file an interpleader.

Finally, the bill deletes an obsolete provision. The bill also contains a severability provision stating that if any portion is held invalid, that invalidity will not affect other valid portions.

The bill provides an effective date of July 1, 2011.

[36] *See Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 677 (Fla. 2004).
[37] Section 624.155(3)(a), F.S.
[38] Fla. R. Civ. P. 1.240.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The private sector impact of this bill is indeterminate. Plaintiffs in bad faith actions will have additional guidelines to follow and will be limited to causes of action provided in statute.

C. Government Sector Impact:

The government sector impact of this bill is indeterminate. The Department of Financial Services may have decreased workload in processing civil remedy notices because the bill eliminates this requirement in third-party claims.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

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

CS by Judiciary on March 22, 2011:
The committee substitute:

- Moves the definition of "third-party claim" to a different portion of the bill;

- Changes the standard of bad faith on the part of the insurer from "[a]cting in gross disregard of the insured's interest by failing to accept a good faith written demand to settle claims within the policy limits if, under all the circumstances existing at the relevant time, it could and should have done so, had it acted fairly and honestly toward its insured," to "[a]cting arbitrarily and contrary to the insured's interests in failing to settle claims within the policy limits if, under all the circumstances existing at the relevant time, it could and should have done so, had it acted fairly and honestly toward its insured";
- Removes the requirement that a demand to settle include a statement that it is a demand to settle under the section;
- Revises the timeline during which the insurer can cure alleged bad faith with respect to third-party claims from the later of 60 days after receipt of the demand to settle or 90 days after the insurer's receipt of the notice of the claim, to the later of 60 days after notice of the claim, 60 days after the insurer's receipt of the demand to settle, or 30 days after the incident giving rise to the claim;
- Specifies that binding arbitration is to be agreed to by all parties;
- Deletes a provision stating that the insurer does not owe a fiduciary duty to first-party claimants and setting separate standards for discovery in first- and third-party claims;
- Deletes a provision eliminating the possibility of adding any form of multiplier or enhancement to an award for fees and costs;
- Deletes a provision stating that any common law causes of action for bad faith failure to settle under an insurance contract is replaced by the section;
- Restores existing statutory language stating that the civil remedy provided does not preempt any common law remedy and expands the provision to specify that the legal standards established in the section apply without limitation or exception to all common law remedies;
- Includes language disapproving a list of court decisions to prevent the circumvention of the section by resort to common law; and
- Deletes a provision stating that damages recoverable in uninsured motorist bad faith actions cannot exceed two times the policy limits.

B. Amendments:

None.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.