HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 427 Civil Remedies Against Insurers
SPONSOR(S): Passidomo
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1224

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	7 Y, 8 N	Caridad	Bond
2) Insurance & Banking Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Present law authorizes any party to bring a civil action against an insurer if such party is damaged by an insurer's "bad faith." An insurer acts in bad faith when it does not attempt in good faith to settle claims and, under the circumstances, it could have had it acted fairly and honestly toward its insured and with due regard to his or her interest.

Florida courts recognize a common law duty of good faith on the part of an insurer to the insured in negotiating settlements with third-party claimants. In addition, Florida statute 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.

The bill provides that common law third-party actions for bad faith are subject to the same requirements as an action for bad faith brought pursuant to statute. For instance:

- Before bringing an action under the statute or based on the common-law claim of bad faith, the party claiming bad faith must give the Department of Financial Services (DFS) and the authorized insurer 60 days' written notice of the alleged violation;
- A notice of violation filed with the DFS must include specific information set out in statute, including whether the violation consists of a failure to pay or tender moneys and the amount of such moneys;
- An individual cannot bring an action under the statute or based on the common-law claim of bad faith, if, within 60 days after filing the notice, either the damages are paid or the circumstances giving rise to the violation are corrected;
- The insurer's tender of either the amount demanded in the notice or the applicable policy limits constitutes correction of the circumstances giving rise to the violation; and
- In third-party liability claims, the insured is entitled to a general release from the claimant under the following circumstances:
    - A claimant files a notice of violation and the insurer tenders the amount demanded in the notice or applicable policy limits; or,
    - The insured files the notice and the claimant accepts the insurer's tender.

This bill may have an indeterminate impact on state government. This bill does not appear to have a fiscal impact on local governments.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

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] In addition, 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 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

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[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.*
[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.

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 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

[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.
[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).

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 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.

Effect of Proposed Changes

The bill makes actions based on the common-law claim of bad faith subject to the statutory scheme in s. 624.155, F.S. In making a common-law claim of bad faith subject to the same requirements as a statutory claim of bad faith, the bill provides that:

- Before bringing an action under the statute or based on the common-law claim of bad faith, the party claiming bad faith must give the Department of Financial Services (DFS) and the authorized insurer 60 days' written notice of the alleged violation;

[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)).
[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).

- An individual cannot bring an action under the statute or based on the common-law claim of bad faith, if, within 60 days after filing the notice, either the damages are paid or the circumstances giving rise to the violation are corrected;
- The insurer's tender of either the amount demanded in the notice or the applicable policy limits constitutes correction of the circumstances giving rise to the violation; and
- In third-party liability claims, the insured is entitled to a general release from the claimant under the following circumstances:
    - A claimant files a notice of violation and the insurer tenders the amount demanded in the notice or applicable policy limits; or,
    - The insured files the notice and the claimant accepts the insurer's tender.

A notice of violation filed with DFS must include specific information set out in statute, including:

- The common law duty which the insurer allegedly violated;
- The facts and circumstances giving rise to the violation and, if the violation includes a failure to pay moneys, the amount of such moneys;
- The name of any individuals involved in the violation;
- The specific policy language which is relevant to the alleged violation, unless the individual alleging a violation is a third-party claimant and the authorized insurer has not provided a copy of the policy to such claimant pursuant to a written request;
- A statement that the notice is given in order to perfect the right to pursue the civil remedy authorized by s. 624, 155, F.S., or common law.

The bill provides that a notice which does not comply with the requirements of the section may be returned within 20 days after receipt. DFS must indicate the specific deficiencies contained in the notice.

In addition, the applicable statute of limitations for an action under s. 624.155, F.S., or based on the common-law claim of bad faith, is tolled for 65 days by the mailing of the notice.

B. SECTION DIRECTORY:

Section 1 amends s. 624.155, F.S., regarding civil remedies.

Section 2 provides an effective date of July 1, 2012.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill does not appear to have any impact on state revenues.

2. Expenditures:

   The bill does not appear to have any impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   The bill does not appear to have any impact on local government revenues.

2. Expenditures:

   The bill does not appear to have any impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

D. FISCAL COMMENTS:

The Civil Remedy statute, s. 624.155, F.S., is administered by the Department of Financial Services (DFS). DMS reports there will be minimal to no fiscal impact on the Department.[34]

The Office of Insurance Regulation (OIR) imposes appropriate sanctions for noncompliance with the civil remedies statute. OIR reports it cannot assess the potential for increased regulatory actions arising from non-compliance with the amendments proposed in the bill. However, it may incur an additional strain on regulatory resources if the bill is enacted and there are subsequent violations of the statute that require OIR to pursue actions against companies for non-compliance. OIR cannot estimate the potential for fiscal impact.[35]

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

This bill may implicate Article I, Section 21, of the Florida Constitution, or right of access to courts. Article I, s. 21, provides, "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay." The Florida Supreme Court has explained that, where a right of access to the courts for relief has been provided by statute or common law predating the 1968 Constitution, the legislature may not abolish the cause of action without providing a reasonable alternative; or may only do so where an overpowering public necessity for the abolishment is shown and there is no alternative method for meeting such public necessity.[36] Courts have held that a violation of the right of access to courts is violated where a statute produces a procedural hurdle which is "significantly difficult" to overcome.[37]

The bill requires a claimant bringing an action based on common-law bad faith to file a notice of violation with the department and authorized insurer; the insurer is then permitted 60 days to correct any violation. If the alleged violation is not corrected or the damages are not paid, the individual may bring a bad faith cause of action against the insurer. The bill does not create financial barriers to asserting claims or defenses in court.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

[34] Department of Financial Services, Report for HB 427 (Oct. 31, 2011) (on file with the House Civil Justice Subcommittee).
[35] Florida Office of Insurance Regulation, Report for HB 427 (Dec. 9, 2011) (on file with the House Civil Justice Subcommittee).
[36] *See Kluger v. White*, 281 So. 2d 1 (Fla. 1973).
[37] *See T.A. Enterprises, Inc. v. Olarte, Inc.*, 931 So. 2d 1016, 1018 (Fla. 4th DCA 2006); *see also Nationwide Mut. Fire Ins. Co. v. Pinnacle Medical, Inc.*, 753 So. 2d 55 (holding statute that mandated arbitration of a medical provider's claim as assignee of personal injury protection benefits was not a reasonable alternative to suit).

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.