

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: CS/SB 1684

INTRODUCER: Banking and Insurance Committee and Senator Farmer

SUBJECT: Insurance Rates

DATE: April 5, 2017

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Billmeier	Knudson	BI	Fav/CS
2.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1684 provides that attorney fees awarded pursuant to s. 440.34, F.S., and s. 627.428, F.S., may not be included in an insurer's rate base and may not be used to justify a rate or rate change. This bill will bar the inclusion of such attorney fees in rate making in property, casualty, surety, motor vehicle, workers' compensation, employer liability, title, wet marine, credit life or credit disability, and health insurance.

Section 627.428, F.S., requires an insurer to pay its insured's attorney fees if the insured prevails in an action against an insurer. That section applies to many insurance lines. Section 440.34, F.S., applies to workers' compensation insurance.

The bill takes effect July 1, 2017.

II. Present Situation:

Insurance Rates

Section 627.062, F.S., specifies the rate filing process for property and casualty insurers and provides rating standards for these insurers. The rating law applies to property, casualty and surety insurance and prohibits rates that are excessive, inadequate, or unfairly discriminatory. At the same time, an insurer is allowed a reasonable rate of return. The Office of Insurance Regulation (OIR) regulates insurer rate and form filing.

A rate is excessive if:

- It is likely to produce a profit from Florida business that is unreasonably high in relation to the risk involved or if expenses are unreasonably high in relation to the services rendered.
- The rate structure established by a stock insurance company provides for replenishment of surpluses from premiums, when the replacement is attributable to investment losses.¹

A rate is inadequate if:

- It is clearly insufficient, together with the investment income attributable to them to sustain projected losses and expenses in the class of business to which it applies.
- If discounts or credits are allowed that exceed a reasonable reflection of expense savings and reasonably expected loss experience from the risk or group or risks.²

A rate is unfairly discriminatory if:

- The rating plan, including discounts, credits, or surcharges fails to clearly and equitably reflect consideration of the policyholder's participation in a risk management program pursuant to s. 627.0625, F.S.
- As to a risk or group of risks, the application of premium discounts, credits, or surcharges among the risks does not bear a reasonable relationship to the expected loss and expense experience among the various risks.³

Section 627.0651, F.S., is the rating law for motor vehicle insurance. It is similar to the law for property. Rates must not be excessive, inadequate, or unfairly discriminatory. At the same time, an insurer is allowed a reasonable rate of return. Workers' compensation insurance rate filings must meet the requirements of ss. 627.062, F.S., and 627.072, F.S.⁴ Section 627.410, F.S., governs health insurance filings and rates. The OIR reviews health insurance filings to determine the reasonableness of benefits in relation to premiums charged.

Attorney Fees in Insurance Litigation

Section 627.428, F.S., provides, in part:

Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

This statute allows the insured or the insured's assignee⁵ to recover attorney's fees if the insured or assignee prevails in an action against an insurer. Florida courts have interpreted the statute

¹ ss. 627.062(2)(e)1. and 2., F.S.

² ss. 627.062(2)(e)3. and 5., F.S.

³ ss. 627.062(2)(e)4. and 6., F.S.

⁴ s. 627.151, F.S.

⁵ *All Ways Reliable Bldg. Maintenance, Inc. v. Moore*, 261 So.2d 131 (Fla. 1972).

broadly to allow recovery of fees when the insurer ultimately settles the case before trial.⁶ Fees are awarded pursuant to the statute even if the insurer does not act in bad faith.⁷ The Florida Supreme Court recently explained the purpose of the statute:

The need for fee and cost reimbursement in the realm of insurance litigation is deeply rooted in public policy. Namely, the Legislature recognized that it was essential to "level the playing field" between the economically-advantaged and sophisticated insurance companies and the individual citizen. Most assuredly, the average policyholder has neither the finances nor the expertise to single-handedly take on an insurance carrier. Without the funds necessary to compete with an insurance carrier, often a concerned policyholder's only means to take protective action is to hire that expertise in the form of legal counsel... For this reason, the Legislature recognized that an insured is not made whole when an insurer simply grants the previously denied benefits without fees. The reality is that once the benefits have been denied and the plaintiff retains counsel to dispute that denial, additional costs that require relief have been incurred. Section 627.428, F.S., takes these additional costs into consideration and levels the scales of justice for policyholders by providing that the insurer pay the attorney's fees resulting from incorrectly denied benefits.⁸

Section 440.34, F.S., provides attorney fees to claimant's attorney if they prevail in workers' compensation cases. The statute's attorney fee cap was recently declared unconstitutional by the Florida Supreme Court.⁹ The court held that attorney fees pursuant s. 440.34, F.S., must be "reasonable."¹⁰

Attorney Fees in Insurance Rates

Generally, attorney fees, including those paid pursuant to s. 627.428, F.S., are expenses that insurers can use to justify a rate.¹¹ However, motor vehicle insurers cannot use attorney fees to justify a rate or rate change if those fees are related to bad faith or punitive damages.¹² Medical malpractice insurers are likewise prohibited from using attorney fees related to bad faith to justify a rate or rate change.¹³

Section 627.062(10), F.S., provides that an insurer cannot include interest paid to a policyholder when an insurer does not act on a claim within statutory time limits.

⁶ *Johnson v. Omega Ins. Co.*, 200 So.3d 1207, 1215 (Fla. 2016)(noting that "it is well settled that the payment of a previously denied claim following the initiation of an action for recovery, but prior to the issuance of a final judgment, constitutes the functional equivalent of a confession of judgment").

⁷ *Johnson v. Omega Ins. Co.*, 200 So.3d 1207, 1216 (Fla. 2016)(noting "the insurer's intentions do not factor into a policyholder's recovery of fees; it is the fact that the denial of benefits was ultimately incorrect that triggers the statute"); *Ins. Co. of N. Am. v. Lexow*, 602 So.2d 928, 531 (Fla. 1992)("INA's good faith in bringing this suit is irrelevant. If the dispute is within the scope of s. 627.428, F.S., and the insurer loses, the insurer is always obligated for attorney's fees").

⁸ *Johnson v. Omega Ins. Co.*, 200 So.3d 1207, 1215-1216 (Fla. 2016)(internal citations omitted).

⁹ *Castellanos v. Next Door Co.*, 192 So.3d 431 (Fla. 2016).

¹⁰ *Id.*

¹¹ See, e.g., s. 627.062(2)(b), F.S. (requiring the OIR to consider expenses when reviewing a rate filing).

¹² s. 627.0651(12), F.S.

¹³ s. 627.062(7)(a), F.S.

III. Effect of Proposed Changes:

The bill amends s. 627.062, F.S., to provide that attorney fees paid pursuant to s. 440.34, F.S., or s. 627.428, F.S., may not be included in the insurer's rate base and may not be used to justify a rate or rate change. These provisions will bar the use of attorney fees paid pursuant to s. 440.34, F.S., or s. 627.428, F.S., in rate making in property, casualty, surety, motor vehicle, workers' compensation, employer liability, title, wet marine, credit life or credit disability, and health insurance.

The bill takes effect July 1, 2017.

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 OIR reports that if insurers are not allowed to use attorney fees to set rates, the OIR might be forced to approve rates that are insufficient to cover the costs of the policy.¹⁴ Another concern is that insurers will simply pay all claims and never litigate over potential fraudulent claims or even claims where there is no coverage. This could lead to rate increases.¹⁵ These concerns were raised by the OIR about a prior version of this bill which excluded more attorney fees from rate base than this version of the bill. The OIR has not completed its analysis of the committee substitute.

¹⁴ Office of Insurance Regulation, *Analysis of SB 1684* (March 28, 2017) at p. 2 (on file with the Committee on Banking and Insurance).

¹⁵ *Id.* at p. 5.

C. Government Sector Impact:

The OIR believes that if property insurers were to stop writing policies in parts of the state where litigation is the highest, many property owners would likely buy property insurance from Citizens.¹⁶

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 627.062 and 627.428.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Banking and Insurance on April 3, 2017:

The bill provides that attorney fees awarded pursuant to s. 440.34, F.S., and s. 627.428, F.S., may not be used to justify a rate or rate change. The original bill provided that attorney fees in which the insurer prevailed in the action and the attorney fees an insurer paid defending an action could not be used to justify a rate or rate change.

B. Amendments:

None.

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

¹⁶ *Id.* at p. 5.