

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 751 Duty of Good Faith
SPONSOR(S): Civil Justice Subcommittee, Andrade
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	11 Y, 5 N, As CS	Jones	Poche
2) Government Operations & Technology Appropriations Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Florida law imposes a duty of good faith on an insurer in negotiating the settlement of a claim with the insured or a third party. This means the insurer must attempt in good faith to settle a claim when, under the circumstances, it can settle if it acts fairly and honestly toward its insured and with due regard to his or her interest. An insurer acting in bad faith may harm:

- The insured party, by failing to settle a third party's claim against the insured, exposing the insured to greater liability; or
- A third party to the insurance contract, by failing to settle its claim against the insured.

In Florida, either an insured or a third party to the insurance contract can sue the insurer for bad faith. A jury decides whether the insurer acted in bad faith and determines the amount of damages.

CS/HB 751 codifies the requirement of an insurer to act in good faith towards its insured. This means the insurer must attempt in good faith to settle a claim when possible, acting fairly and honestly toward the insured and with due regard to his or her interests.

The bill allows any party alleging bad faith on the part of an insurer to file a complaint with the Department of Financial Services (DFS). The complaint must:

- State specifically the insurer's violation giving rise to the claim; and
- If filed by the insured, show that the notice requirement of s. 624.155(3), F.S., has been met and that the time for resolution has expired.

Within 20 days, DFS must determine whether the complaint meets these requirements, and if not, dismiss the complaint without prejudice and notify the complainant.

The bill appears to have an indeterminate negative fiscal impact on state expenditures and appears to have no impact on local governments.

The bill provides an effective date of July 1, 2019.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Insurance and Insurer Obligations

Insurance is a contract, commonly referred to as a "policy," under which, for stipulated consideration called a "premium," one party, the insurer, agrees to compensate the insured for losses from specified perils. Floridians often obtain two major categories of insurance: property insurance and liability insurance. Property insurance protects individuals from the loss of or damage to property and in some instances, personal liability pertaining to the property. Automobile liability insurance covers an insured against lawsuits arising out of the insured's negligent operation of an automobile.¹

A liability insurer owes two major contractual duties to its insured in exchange for premium payments:

- The duty to indemnify, which requires the insurer to issue payment on a valid claim either to the insured or a third-party beneficiary; and
- The duty to defend, which requires the insurer to provide a defense in court on behalf of the insured against a third party that files a lawsuit within the scope of the insurance contract.²

Common Law and Statutory Bad Faith

Common Law Bad Faith

As early as 1938, Florida courts 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.³ Under a liability policy, the insured's role is essentially limited to selecting the policy and paying the premium.⁴ The insured surrenders to the insurer all control over the negotiations and decisionmaking as to third-party claims.⁵ The insured's role is to cooperate with the insurer's efforts to adjust the loss.⁶ The insurer makes all the decisions with regard to handling third-party claims and has the power to settle and foreclose an insured's exposure to liability, or to refuse to settle and leave the insured exposed to liability in excess of the policy limits.⁷

As a result, the relationship between an insurer and an insured is fiduciary in nature, similar to that of attorney and client, because the insurer owes a duty to refrain from acting solely on the basis of its own interests when settling third-party claims.⁸ The insurer owes a duty to the insured to "exercise the utmost good faith and reasonable discretion in evaluating the claim" and negotiating for a settlement within the insured's policy limits.⁹

If the insurer fails to act in the best interests of the insured in settling a third-party claim, the third party may sue the insured and obtain a judgment in excess of the policy limits. In turn, the insured has the

¹ In Florida, every owner or operator of an automobile is required to maintain liability insurance up to certain limits. Additionally, every owner or registrant of an automobile is required to maintain personal injury protection. Ss. 324.022, 627.733, F.S.

² 16 Williston on Contracts s. 49:103 (4th ed.).

³ *Auto. Mut. Indemnity Co. v. Shaw*, 184 So. 852 (Fla. 1938).

⁴ Rutledge R. Liles, *Florida Insurance Bad Faith Law: Protecting Businesses and You*, FLA. BAR JOURNAL (March 2011), <https://www.floridabar.org/the-florida-bar-journal/florida-insurance-bad-faith-law-protecting-businesses-and-you/>.

⁵ *Id.*

⁶ *Id.*

⁷ *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So. 2d 55, 58 (Fla. 1995).

⁸ *Baxter v. Royal Indem. Co.*, 285 So. 2d 652, 655 (Fla. 1st DCA 1973), *cert. discharged*, 317 So. 2d 725 (Fla. 1975).

⁹ *Id.*

right to bring a bad faith action against the insurer.¹⁰ Alternatively, the third party winning the judgment against the insured can bring a bad faith action against the insurer directly or through an assignment of the insured's rights.¹¹

Statutory Bad Faith

In 1982, the Legislature enacted s. 624.155, F.S., which provides that any person may bring a bad faith claim against an insurer for "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."¹² Section 624.155 is an alternative method for asserting a bad faith claim and does not preempt the common law remedy.¹³

A party may obtain relief under either the statutory or common law cause of action, but not both.¹⁴ To bring a bad faith claim under s. 624.155, a plaintiff must give the insurer 60 days' written notice of the alleged violation.¹⁵ The insurer has 60 days to pay the damages or correct the circumstances giving rise to the violation.¹⁶ However, because some bad faith claims exist both under s. 624.155 and common law, the insurer cannot always guarantee avoidance of a bad faith claim by curing within the statutory period.¹⁷

"Acting Fairly" to Settle Claims

A court in a bad faith case focuses on the insurer's conduct during the time it was acting under a duty to the insured.¹⁸ 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 damage, the insurer has an affirmative duty to initiate settlement negotiations.¹⁹ If a settlement is not reached, the insurer has the burden to show there was no realistic possibility of settlement within policy limits.²⁰ Failure to settle, however, does not by itself necessarily constitute bad faith.

An example of a bad faith case is *Berges v. Infinity Insurance Company*, 896 So. 2d 665 (Fla. 2004). In *Berges*, the insured, Mr. Berges, had purchased an automobile liability policy from Infinity Insurance Company (Infinity) with limits up to \$20,000. Mr. Berges allowed a friend to drive his vehicle, and the friend caused an accident, killing another driver, Mrs. Taylor, and injuring a passenger.

Mrs. Taylor's estate (the Estate) delivered a demand letter to Infinity for the policy limits of \$20,000, on the condition that the amount must be paid within 25 days. The offer was never shared with Mr. Berges. Infinity accepted the offer verbally within the deadline, but the written acceptance did not reach the Estate until after the deadline due to a mailing error, and the offer was revoked. Further, there was disagreement as to whether the Estate's offer was valid because the Estate had not yet obtained probate court authority to negotiate and complete the settlement.

¹⁰ Rutledge, *supra*; *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263, 265 (Fla. 5th DCA 1987); see *Powell v. Prudential Prop. and Cas. Ins. Co.*, 584 So. 2d 12 (Fla. 3d DCA 1991).

¹¹ 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 & Cas. Co. v. Zebrowski*, 706 So. 2d 275 (Fla. 1997).

¹² S. 624.155(1)(b), F.S.; Fla. Standard Jury Instr. 404.4 (Civil).

¹³ S. 624.155(8), F.S.

¹⁴ *Id.*

¹⁵ S. 624.155(3)(a), F.S.

¹⁶ S. 624.155(3)(d), F.S.

¹⁷ *Macola v. Gov. Employees Ins. Co.*, 953 So.2d 451, 458 (Fla. 2007) (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).

¹⁸ *Id.* at 677.

¹⁹ See *Powell v. Prudential Prop. & Cas. Ins. Co.*, 584 So. 2d 12, 14 (Fla. 3d DCA 1991).

²⁰ *Id.*

The case proceeded to trial, and the Estate won a jury verdict against Mr. Berges for a total of about \$1.4 million, far exceeding Ms. Berges's policy limits. Mr. Berges, in turn, filed a bad faith action against Infinity. The jury awarded a verdict on the bad faith claim for about \$1.9 million.

On appeal, the Florida Supreme Court upheld the jury verdict, reiterating that "[i]n 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."²¹ The Court also stated that "[e]ach case is determined on its own facts and ordinarily '[t]he question of failure to act in good faith with due regard for the interests of the insured is for the jury."²²

Berges established that whether an insurer acted in good faith is a question for the jury, not the court. This makes it virtually impossible for an insurer to win a bad faith claim on summary judgment, regardless of whether the bad faith claim is meritorious.²³ Practically, this means that whenever a plaintiff files a bad faith insurance claim, the case will go to a jury, regardless of the merits of the case.

The dissent in *Berges* expressed concern about the potential limitlessness of bad faith damages, cautioning that the Court "has the responsibility to reserve bad faith damages, which is limitless, court-created insurance, to egregious circumstances of delay and bad faith acts." The dissent also stated that it is the Court's duty to "not allow . . . claims that are the product of sophisticated legal strategies and not the product of actual bad faith." The problem in sending all bad faith cases to the jury, as expressed in the dissent, is that:

What the jury knows in these cases is that there is a tragically and grievously injured victim, that the insured had very low limits of insurance, and that if the jury finds against the insurer, then all of the victim's damages will be paid by the insurer. It is these very facts which are not allowed to be known by a jury in liability cases because of the known prejudicial influence these facts are known to have on jury verdicts.²⁴

The district courts of appeal have also raised warnings about abuses in insurance bad faith litigation. In 2006, the Second District Court of Appeal noted the improper use of bad faith lawsuits:

The number of bad faith cases filed in the courts appears to be exponentially increasing, but the increase does not appear to be directly linked to the actions of the insurers. Instead, plaintiff's attorneys are filing bad faith actions over issues that it seems could be simply resolved, like the wording of the release in this case.²⁵

In 2011, the Third District Court of Appeal concluded an opinion in a bad faith case by stating:

[U]ntil there is a substantial change in the statutory scheme or the rationale explained in the majority opinion in *Berges*, however, juries will continue to render verdicts regarding an insurer's alleged bad faith when the pertinent facts are in dispute.²⁶

²¹ *Berges*, 896 So. 2d at 680.

²² *Id.*

²³ See Florida Senate Committee on Judiciary, *Interim Report 2012-132: Insurance Bad Faith* (November 2011), <http://www.flsenate.gov/PublishedContent/Session/2012/InterimReports/2012-132ju.pdf> (last visited Mar. 9, 2019).

²⁴ *Berges*, 896 So. 2d at 686 n.12 (Wells, J., dissenting).

²⁵ *Allstate Ins. Co. v. Regar*, 942 So. 2d 969, 973 (Fla. 2d DCA 2006).

²⁶ *United Auto. Ins. Co. v. Estate of Levine ex rel. Howard*, 87 So. 3d 782, 788 (Fla. 3d DCA 2011).

Insurance Costs in Florida

Florida is the second-least affordable state for automobile insurance,²⁷ due in part to Florida's bad faith legal landscape. In 2017, the estimated total claim costs attributed to third-party bad faith actions were \$1.25 billion.²⁸

Florida is one of only five states—including Kentucky, Massachusetts, Montana, and New Mexico—allowing a nonparty to the insurance contract to sue an insurer for bad faith.²⁹ Since bad faith claims are not subject to policy limits, the potential recovery for claimants is great.³⁰ The threat of a limitless bad faith recovery can cause an insurer to settle a claim, even if the claim is of questionable merit, to avoid a costly legal defense and a potentially exorbitant bad faith verdict.³¹ This, in turn, can drive up insurance premiums for Florida's insureds.

Other State Solutions to Insurer Bad Faith Claims

In light of the costs brought on by insurer bad faith cases, other states have implemented statutory solutions. As noted above, only five states, including Florida, allow a nonparty to the insurance contract to sue the insurer for bad faith. Some states instead allow third-party bad faith claimants to pursue administrative remedies.

An example is West Virginia, which in 2005 enacted the Third-Party Bad-Faith Act (Act). The Act eliminated the right of a third-party claimant to file a bad faith lawsuit against another person's insurer. Instead, the Act provided an administrative remedy, requiring a complaint to be filed with the Commissioner of Insurance, who investigates the complaint and imposes appropriate fines and penalties. Within five years of the Act's passage, the estimated reduction in West Virginia automobile liability coverage costs was \$200 million.³²

Effect of Proposed Changes

CS/HB 751 amends s. 624.155, F.S., and creates s. 624.156, F.S., to codify the requirement that an insurer must attempt to settle a claim in good faith, acting fairly and honestly toward its insured. Under the bill, any person—whether an insured or a nonparty to the insurance contract—alleging bad faith on the part of an insurer may file an administrative complaint with the Department of Financial Services (DFS). If the complainant is an insured, he or she must first comply with the notice requirements of s. 624.155(3), F.S.

To be sufficient, the complaint must:

- State with specificity the action or inaction by the insurer that provides the basis for the bad faith allegation.
- If filed by the insured, show that the notice requirement of s. 624.155(3), F.S., has been met and that the time for resolution has expired.

Within 20 days after receiving a complaint, DFS must determine whether the complaint meets these requirements. If not, DFS must dismiss the complaint without prejudice and notify the complainant.

²⁷ FLORIDA HOUSE OF REPRESENTATIVES, Civil Justice Subcommittee Meeting Packet, Insurance Research Council (Feb. 20, 2019), [https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=3022&Session=2019&DocumentType=Meeting Packets&FileName=cjs 2-20-19.pdf](https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=3022&Session=2019&DocumentType=Meeting%20Packets&FileName=cjs%202-20-19.pdf) (last visited Mar. 9, 2019).

²⁸ *Id.*

²⁹ FLORIDA HOUSE OF REPRESENTATIVES, Civil Justice Subcommittee Meeting Packet, Pinnacle Actuarial Resources, Inc. (Feb. 20, 2019), [https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=3022&Session=2019&DocumentType=Meeting Packets&FileName=cjs 2-20-19.pdf](https://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=3022&Session=2019&DocumentType=Meeting%20Packets&FileName=cjs%202-20-19.pdf) (last visited Mar. 9, 2019).

³⁰ *Id.*

³¹ *Id.*

³² Insurance Research Council, Third-Party Bad-Faith Reforms Enacted in 2005 Reduced Auto Liability Coverage Costs by an Estimated \$200 Million in the First Five Years According to a New Report From the Insurance Research Council, https://www.insurance-research.org/sites/default/files/downloads/IRCVVBadFaith_101111.pdf (last visited Mar. 9, 2019).

The bill provides an effective date of July 1, 2019.

B. SECTION DIRECTORY:

Section 1: Amends s. 624.155, F.S., relating to civil remedy.

Section 2: Creates s. 624.156, F.S., relating to duty of good faith; action for violation of duty.

Section 3: Provides an effective date of July 1, 2019.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The bill may have a negative fiscal impact on state expenditures by requiring DFS to determine the sufficiency of insurer bad faith complaints and issue insufficiency determinations to complainants.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

Not applicable.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 13, 2019, the Civil Justice Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Removed language establishing the sole remedy for insurer bad faith allegations.
- Removed provisions requiring referral of bad faith claims to the Division of Administrative Hearings for a hearing on whether bad faith occurred and, if so, determining damages.

This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.