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 924
INTRODUCER:	Senator Brandes
SUBJECT:	Civil Actions Against Insurers
DATE:	January 27, 2020 REVISED:

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

I. Summary:

SB 924 amends the civil remedies statute of the Insurance Code specific to third-party bad faith causes of action. The bill provides the insured or claimant has the burden of proving the insurer acted in bad faith through reckless disregard for the insured's rights and that this reckless disregard caused damaged to the insured or claimant. The bill codifies legal precedent that the conduct of the insurer or claimant is relevant to the trier of fact. The bill creates an affirmative defense where the conduct of the insured or claimant causes an excess judgment. The bill requires the insurer to advise the insured of settlement opportunities, probable outcome of litigation, and possibility of an excess judgment with steps to avoid such judgment. The bill precludes a third-party bad faith determination against the insurer if the insurer was ready and willing to settle for policy limits within 45 days of receiving the notice of loss. Finally, the bill precludes liability beyond policy limits in an interpleader case of two or more third-party claimants to a single claim if the insurer brings the interpleader action within 90 days of receiving notice of the competing claims.

The bill takes effect July 1, 2020.

II. Present Situation:

Common Law and Statutory Bad Faith

Bad faith law was designed to protect insureds who have paid their premiums and who have fulfilled their contractual obligations by cooperating fully with their insurer in the resolution of claims. Bad faith jurisprudence holds insurers accountable for failing to fulfill their obligations.[1] There are two distinct but very similar types of bad faith causes of action that may be initiated against an insurer: first-party and third-party.

[1] *Harvey v. GEICO General Insurance Company*, 251 So.3d 1, 6, (Fla. 2018)(quoting *Berges v. Infinity Insurance Company*, 896 So.2d 665 at 682).

Florida courts have recognized common law third-party bad faith causes of action since 1938.[2] A third-party bad faith cause of action 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.[3] Third-party bad faith causes of actions arose in response to the argument that there was a practice in the insurance industry of rejecting without sufficient investigation or consideration claims presented by third parties against an insured, thereby exposing the insured individual to judgments exceeding the coverage limits of the policy while the insurer remained protected by a policy limit.[4] With no actionable remedy, insureds in this state and elsewhere were left personally responsible for the excess judgment amount.[5] Florida courts recognized common law third-party bad faith causes of action in part because the insurers had the power and authority to litigate or settle any claim, and thus owed the insured a corresponding duty of good faith and fair dealing in handling these third-party claims.[6]

In contrast to common law third-party bad faith causes of action, Florida courts do not recognize a common law first-party bad faith cause of action by the insured against its own insurer.[7] If an insurer acts in bad faith in settling a claim filed by its insured, the only common law remedy available to the insured is a breach of contract action against its own insurer with recoverable damages limited to those contemplated by the parties to the policy.[8]

The 1982 Legislature's enactment of s. 624.155, F.S., created a statutory first-party bad faith cause of action,[9] codified Florida Supreme Court precedent authorizing a common-law third-party bad faith cause of action,[10] and eliminated the distinction between statutory first- and third-party bad faith causes of action.[11]

Section 624.155, F.S., provides that any party may bring a bad faith 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.[12]

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[2] *Auto Mut. Indem. Co. v. Shaw*, 184, So. 852 (Fla. 1938).
[3] *Opperman v. Nationwide Mutual Fire Insurance Company*, 515 So.2d 263, 265 (Fla. 5th DCA 1987).
[4] *Allstate Indem. Co. v. Ruiz*, 899 So.2d 1121, 1125 (Fla. 2005).
[5] *Id*.
[6] *Id*.
[7] *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 58-59 (Fla. 1995).
[8] *Talat Enterprises, Inc. v. Aetna Cas. and Sur. Co.*, 753 So.2d 1278, 1281 (Fla. 2000).
[9] Chapter 82-243, s. 9, L.O.F.
[10] *Macola v. Government Employees Ins. Co.*, 953 So.2d 451, 456 (Fla. 2006). *See also State Farm Fire & Cas. Co. v. Zebrowski*, 706 So.2d 275, 277 (Fla. 1997).
[11] *Id*.
[12] Section 624.155(1)(b)(1)-(3), F.S.

Civil Remedy Notice

As a condition precedent to bringing a bad faith action under s. 624.155, F.S., the insured must have provided the insurer and the Department of Financial Services at least 60 days written notice of the alleged violation.[13] The notice must specify the following information:

- The statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated;
- The facts and circumstance giving rise to the violation;
- The name of any individual involved in the violation;
- A reference to specific policy language that is relevant to the violation, if any. If the person bringing the civil action is a third-party claimant, she or he shall not be required to reference the specific policy language if the authorized insurer has not provided a copy of the policy to the third party claimant pursuant to written request; and
- A statement that the notice is given in order to perfect the right to pursue the civil remedy authorized under s. 624.155, F.S.[14]

The 60-day window contemplated under s. 624.155, F.S., provides insurers with a final opportunity to comply with their claim-handling obligations when a good-faith decision by the insurer would indicate that contractual benefits are owed.[15] If the insurer in turn fails to respond to a civil remedy notice within the 60-day window, there is presumption of bad faith sufficient to shift the burden to the insurer to show why it did not respond.[16]

In *Talat Enterprises, Inc. v. Aetna Cas. and Sur. Co.,* the Florida Supreme Court addressed the question of whether an insurer that paid all contractual damages within the 60-day window, but none of the extra-contractual damages, satisfied the requirement for payment of damages under s. 624.155(3)(c), F.S., thereby precluding the claimant's bad faith action. The Florida Supreme Court answered in the affirmative, explaining:

> Section 624.155 does not impose on an insurer the obligation to pay whatever the insured demands. The 60-day window is designed to be a cure period that will encourage payment of the underlying claim, and avoid unnecessary bad faith litigation. Surely an insurer need not immediately pay 100percent of the damages claimed to flow from bad faith conduct in order to avoid the chance that the insured will succeed on a bad faith cause of action. If the insurer may avoid a bad faith action only by paying in advance every penny of the damages that it faces if it loses at trial, the insurer would have no reason to pay.[17]

[13] Section 624.155(3), F.S.
[14] Section 624.155(3)(b)(1)-(5), F.S.
[15] *See Talat Enterprises, Inc.*, 753 So.2d at 1284.
[16] *Fridman v. Safeco Ins. Co. of Illinois*, 185 So.3d 1214, 1220, (Fla. 2016); *Imhof v. Nationwide Mut. Ins. Co.*, 643 So.2d 617, 619 (Fla 1994).
[17] *See Talat Enterprises, Inc.*, 753 So.2d at 1282. (quoting *Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.*, 952 F.Supp. 773, 778 (M.D.Fla.1996)).

Legal Standard of Proof

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.[18] In Florida, the question of whether an insurer has acted in bad faith in handling claims against the insured is determined under a "totality of the circumstances" standard.[19] In *Harvey v. Geico General Insurance Company*, 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."[20] The claimant bringing the bad faith action has the burden of proving the insurer acted in bad faith by a preponderance of the evidence.[21]

Offer of Settlement

Under Florida law, an 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.[22] In considering whether the insurer has given fair consideration to a settlement offer that is not unreasonable under the facts, Florida courts look to whether there was a realistic opportunity for settlement.[23]

Duty to Advise Insured of Settlement Opportunities

Florida courts have interpreted the duty of good faith insurers owe to insureds in handling their claims to include the duty to advise the insured of settlement opportunities. In *Harvey v. Geico General Insurance Company*, the Florida Supreme Court reaffirmed its 1980 decision in *Boston Old Colony Ins. v. Gutierrez* recognizing the insurer's duty to advise the insured of settlement opportunities:

> 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.[24]

Conduct of the Claimant in the Settlement Context

Florida courts place the focus in a bad faith case on the conduct of the insurer.[25] However, Florida courts do not completely ignore the conduct of the claimant. In *Barry v. GEICO General*

[18] *Boston Old Colony Insurance Company v. Gutierrez*, 386 So.2d 783, 785 (Fla. 1980).
[19] *Berges v. Infinity Insurance Company*, 896 So.2d 665, 680 (Fla. 2005).
[20] See *Harvey*, 259 So.3d at 7.
[21] Cadle v. GEICO General Insurance Company, 838 F.3d 1113, 1119 (11th Cir. 2016).
[22] *Boston Old Colony Insurance Company v. Gutierrez*, 386 So.2d 783, 785 (Fla. 1980).
[23] *Barry v. GEICO General Insurance Company*, 938 So.2d 613, 618 (Fla. 4th DCA 2006).
[24] See *Harvey*, 259 So.3d at 6-7 (quoting *Boston Old Colony Insurance Company*, 386 So.2d at 785).
[25] *Id.*

Ins. Co., the 4th District Court of Appeals of Florida addressed the question of whether the trial court abused its discretion in shifting the focus to the motives of the claimant in a bad faith case where the claimant refused the insurer's settlement offer. The appeals court denied the trial court abused its discretion, explaining:

> Although Barry is correct that the focus of an insurance bad faith case is not on the motive of the claimant but of the insurer in fulfilling its duty to its insured, that does not mean that all inquiries into prior conduct and motives are irrelevant and prejudicial. In a bad faith case, the insurer has the burden to show that there was no realistic possibility of settlement within the policy limits. This question is decided based upon the totality of the circumstances. The conduct of Capelli and her attorney would be relevant to the question of whether there was any realistic possibility of settlement. Despite Capelli's testimony at trial that she would have settled the case if GEICO had not made the mistake, her actions and those of her attorney suggested otherwise. The jury could have concluded that the failure of her attorney to notify GEICO of his representation coupled with her refusal to meet with Stone on the settlement, among other incidents, showed that she did not want to settle with GEICO for the policy limits. Thus, GEICO did not inject irrelevant information into the case, and therefore we reject Barry's argument as to the cumulative nature of the errors.[26]

Interpleader Actions

Interpleader is an equitable remedy by which a court determines the rightful claimant of two or more claimants making the same claim against a third party.[27] Interpleader serves the purpose of allowing the defendant to avoid multiple litigations and multiple liability stemming from the same claim.[28] It is not intended to prevent multiple recoveries under the claim.[29] In the insurance context, insurers use interpleaders if claims are made by different parties.[30] For example, when a life insurer is presented with two or more competing life insurance claims, the insurer deposits the life insurance proceeds under the policy with the court until the court decides the rightful beneficiary.

Under common law, Florida courts recognize four requirements to maintain an interpleader action:

- The claims to the stake were dependent or had common origin;
- The same thing, debt, or stake was claimed by the defendants;
- The plaintiff had "no interest in the subject matter—that is, in strict interpleader as distinguished from a suit in the nature of interpleader"; and
- The plaintiff was appearing that "no act on his part … caused the embarrassment of conflicting claims and the peril of double vexation."[31]

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[26] *Id*.
[27] Barron's Dictionary of Insurance Terms, 267 (6th ed. 2013)
[28] *Paul v. Harold Davis, Inc.*, 20 So.2d 795, 796 (1945).
[29] *Id*.
[30] *See supra* at Note 30.
[31] *Red Beryl, Inc. v. Sarasota Vault Depository, Inc.*, 176 So.3d 375, 383 (Fla. 2nd DCA 2015); *Riverside Bank of Jacksonville v. Fla. Dealers & Growers Bank*, 151 So.2d 834, 836 (Fla. 1st DCA 1963).

In contrast to common law, the Florida Rules of Civil Procedure provides that the only requirement to maintain an interpleader action is whether the stakeholder is or may be exposed to double or multiple liability for competing claims to a single fund.[32]

Rule 1.240, as adopted by the Florida Supreme Court, provides in pertinent part:

> Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not grounds for objection to the joinder that the claim of the several claimants or the titles on which their claims depend do not have common origin or are not identical but are adverse to and independent of one another, or that the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants.[33]

Reckless Disregard Standard Under s. 624.155, F.S.

Section 624.155, F.S., prohibits the award of punitive damages under the section unless the acts giving rise to the violation occur with such frequency as to indicate a general business practice and these acts are:

- Willful, wanton, and malicious;
- In reckless disregard for the rights of any insured; or
- In reckless disregard for the rights of a beneficiary under a life insurance contract.

Section 624.155, F.S., does not define "reckless disregard." In the absence of a statutory definition supplied by the Legislature, the courts follow the common law definition.[34]

In *Farmer v. Brennan*, the Supreme Court of the United States (SCOTUS) recognized the common law definition of "recklessness" in the civil liability sphere to mean conduct or actions that objectively entail "an unjustifiably high risk of harm that is either known or so obvious that it should be known."[35]

SCOTUS in *Safeco Ins. Co. of America v. Burr* similarly recognized and applied the common law of "reckless disregard," citing to the Restatement (Second) of Torts at s. 500:

> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.[36]

Florida courts, in turn, have distinguished between the "reckless disregard" and "willful, wanton, and malicious" standards under s. 624.155, F.S. For example, the Florida 4th District Court of Appeals in *Howell-Demarest v. State Farm Mut. Auto. Ins. Co*. noted that in the context of punitive damages under s. 624.155, F.S., the "reckless disregard" standard appears to be less stringent than the "willful, wanton, and malicious" standard that is necessary to support a

[32] Fla. R. Civ. P. 1.240.
[33] *Id*.
[34] *Morissette v. US*, 342 U.S. 246, 263 (1952).
[35] *Farmer v. Brennan*, 511 U.S. 825, 836 (1994).
[36] *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 69 (2007).

punitive damage award in general and equivalent to the criminal standard as applied to manslaughter.[37] However, the same court in *Home Ins. Co. v. Owens*, previously noted that the "culpable negligence" standard for manslaughter is defined as "reckless indifference to the rights of others," observed:

> As a consequence, any supposed variation between [the willful, wanton, and malicious standard] and the [reckless disregard standard] becomes somewhat amorphous and perhaps even circular.[38]

III. Effect of Proposed Changes:

Section 1 amends s. 624.155, F.S., to provide an insured or claimant bringing either a statutory or common law third-party bad faith action has the burden to prove the insurer acted in bad faith. The claimant must prove the insurer acted in reckless disregard for the rights of the insured and that the insurer's reckless disregard caused damaged to the insured or claimant.

The bill provides that the conduct of the insured or claimant is relevant for the trier of fact to consider when deciding a third-party bad faith claim. The bill creates an affirmative defense to a third-party bad faith claim where the conduct of the insured or claimant, in whole or in part, caused an excess judgment.

The bill requires the insurer to advise the insured of settlement opportunities, the probable outcome of litigation, the possibility of an excess judgment, the steps to avoid an excess judgment, and defend the insured against an action when the complaint alleged facts that fairly and potentially bring the action within policy coverage. The bill precludes the insurer from a determination of third-party bad faith if the insurer satisfied this paragraph's requirements and stood ready and willing to settle for the policy limits within 45 days of receiving written notice of the loss.

The bill further provides the insurer is not liable beyond the policy limits if the insurer brings an interpleader action against two or more third-party claimants to a single claim within 90 days of receiving notice of the competing claims. The bill provides that competing third-party claims are entitled to a prorated share of the policy limits, determined by the trier of fact.

Section 2 provides an effective date of July 1, 2020.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

[37] *Howell-Demarest v. State Farm Mut. Auto. Ins. Co.*, 673 So.2d 526, 528-529 (Fla. 4th DCA 1996).
[38] *Home Ins. Co. v. Owens*, 573 So.2d 343, 346 (Fla. 4th DCA 1990).

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:

None.

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.