HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 187 Civil Remedies Against Insurers
SPONSOR(S): Passidomo
TIED BILLS: None **IDEN./SIM. BILLS:** SB 1494

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Civil Justice Subcommittee	8 Y, 4 N	Cary	Bond
2) Insurance & Banking Subcommittee			
3) Judiciary Committee			

SUMMARY ANALYSIS

Current 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.

The bill provides that before bringing an action alleging bad faith, the insured, the claimant, or anyone acting on behalf of either the insured or the claimant (hereinafter, “claimant”) must provide a written notice of loss to the insurer.

If the insurer timely provides a disclosure statement already required under current law and offers to pay the claimant the lesser of the amount the claimant is willing to accept or the policy’s liability limit within 45 days, in exchange for a full release from liability, then the insurer cannot be found to have acted in bad faith.

This bill does not appear to have a fiscal impact on state or local governments.

The bill provides an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

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. The duty to indemnify refers to the insurer's obligation to issue payment either to the insured or a beneficiary on a valid claim. 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.[1]

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.[2] The common law rule is that a third-party beneficiary who is not a formal party to a contract may sue for damages sustained as the result of the acts of one of the parties to the contract.[3]

Statutory Bad Faith

In addition, a 1982 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.[4] This may be referred to as a first-party claim of bad faith.

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.[5]

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.[6] If a settlement is not reached, the insurer has the burden of showing that there was no realistic possibility of settlement within policy limits.[7] 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 is not allowed.[8]

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[1] 16 Williston on Contracts s. 49:103 (4th ed.).
[2] *Auto. Mut. Indemnity Co. v. Shaw,* 184 So. 852 (Fla. 1938).
[3] *Thompson v. Commercial Union Ins. Co. of New York*, 250 So.2d 259, 261 (Fla. 1971).
[4] Section 624.155, F.S.
[5] Section 624.155(1)(b), F.S.
[6] *Powell v. Prudential Prop. and Cas. Ins. Co.*, 584 So.2d 12, 14 (Fla. 3d DCA 1991).
[7] *Id.*
[8] *DeLaune v. Liberty Mut. Ins. Co.*, 314 So.2d 601, 603 (Fla. 4th DCA 1975).

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

First-Party Claims of Bad Faith

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.[13] 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.[14] 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.[15] An insured's claim against the insurer does not accrue until the conclusion of the underlying litigation for contractual benefits.[16] The action against the insurer must be resolved in favor of the insured,[17] 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.[18] 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.[19] 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.[20] 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.[21]

[9] Section 624.155(3)(a), F.S.
[10] Section 624.155(3)(d), F.S.
[11] *Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.,* 753 So.2d 1278, 1284 (Fla. 2000).
[12] *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).
[13] *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So.2d 263, 265 (Fla. 5th DCA 1987).
[14] *See Blanchard v. State Farm Mut. Auto. Ins. Co.* 575 So.2d 1289 (Fla. 1991).
[15] *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)).
[16] *Blanchard,* 575 So.2d at1291.
[17] *Id.*
[18] *Ruiz*, 899 So.2d at 1129-30.
[19] *Id.* at 1128.
[20] Fla. R. Civ. P. 1.280(b)(3).
[21] *Ruiz*, 899 So.2d at 1130.

Third-Party Claims of Bad Faith

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.[22] 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,[23] or it can be brought by the third party either directly or through an assignment of the insured's rights.[24] 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."[25] 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.[26] 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."[27]

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."[28] 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."[29] In light of this heightened duty on the part of the insurer, Florida courts focus on the actions of the insurer, not the claimant.[30] 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.[31]

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."[32] 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.

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[22] *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So.2d 263, 265 (Fla. 5th DCA 1987).
[23] *See Powell v. Prudential Prop. and Cas. Ins. Co.*, 584 So.2d 12 (Fla. 3d DCA 1991).
[24] *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).
[25] *Zebrowski,* 706 So.2d at 277.
[26] *Id.*
[27] *Id*. (citing *Dunn. v. Nat'l Sec. Fire & Cas. Co.*, 631 So.2d 1103 (Fla. 1993)).
[28] *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 668 (Fla. 2004).
[29] *Id.* (quoting *Boston Old Colony Insurance Co. v. Gutierrez*, 386 So.2d 783, 785 (Fla. 1980)).
[30] *Berges*, 896 So.2d at 677.
[31] *Barry v. GEICO Gen. Ins. Co.*, 938 So.2d 613, 618 (Fla. 4th DCA 2006).
[32] *DeLaune v. Liberty Mut. Ins. Co.*, 314 So.2d 601, 603 (Fla. 4th DCA 1975).

To illustrate the point, in another case, a trial judge granted summary judgment in favor of an insurance company that attempted to contact the injured party's stepfather 2 days after it was informed of the accident and was repeatedly and consistently rebuffed by the plaintiff and her attorney. The plaintiff's attorney, upon questioning by the trial judge, suggested that the insurance company may have tendered the check to the injured party, who was in a coma at the time. After the judge rejected that possibility, the plaintiff's attorney suggested that the insurance company could have tendered payment to the injured party's mother, who the attorney had already admitted was not authorized to accept the check. Nevertheless, despite the insurance company's efforts, which included three attempts to contact the plaintiff or her attorney within the first 10 days after the company learned about the accident, the appellate court overturned the summary judgment, holding that the determination of whether the insurance company acted in bad faith was a matter of fact for determination by the jury.[33]

Effect of the Bill

The bill amends s. 624.155, F.S., to require that a claimant, before bringing an action under the statute or based on the common-law claim of bad faith, must provide a written notice of loss to the insurer. If the insurer timely provides a disclosure statement already required under current law[34] and offers to pay the claimant the lesser of the amount the claimant is willing to accept or the policy's liability limit within 45 days, in exchange for a full release from liability, then the insurer is not liable for bad faith.

B. SECTION DIRECTORY:

Section 1 amends s. 624.155, F.S., regarding a civil remedy.

Section 2 provides an effective date of July 1, 2014.

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:

None.

[33] *Goheagan v. American Vehicle Ins. Co.*, 107 So.3d 433 (Fla. 4th DCA 2012).
[34] Section 627.4137, F.S.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The 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:

None.

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.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.