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A Look At Florida's Aggressively Pro-Insurer Tort Reform

By **Garrett Nemeroff and Hugh Lumpkin** (April 7, 2023, 5:46 PM EDT)

Garrett Nemeroff

Hugh Lumpkin

On the heels of last year's special session regarding Florida's property insurance crisis, which eliminated one-way fee shifting in property insurance cases, the Florida Legislature has **now passed** even more aggressive pro-insurer legislation as part of a broader tort reform bill aimed at curbing so-called frivolous litigation.

Unlike last year's changes, however, H.B. 837, effective as of March 24, is not limited to property insurance issues. Instead, it includes various new measures aimed at protecting insurance companies from bad faith liability and prevailing party attorney fees across all kinds of coverage disputes.

H.B. 837 raises several important issues for policyholders and insurance litigation overall going forward. We discuss some of these issues below.

Fee-Shifting Allowed Only in Certain Declaratory Judgment Actions

Perhaps the most significant change is that H.B. 837 extends last year's historic fee-shifting repeals to all lines and types of insurance coverage disputes, not just property insurance cases.

At the same time, H.B. 837 creates a new, limited fee-shifting statute, codified at Section 86.121 of the Florida Statutes, that applies only in certain kinds of coverage disputes — namely, declaratory judgment actions involving a total coverage denial.

The phrase "total coverage denial" is undefined, but according to the bill, would not include situations where a policyholder is sued — for example, in a construction defect suit alleging property damage, or a professional malpractice suit filed against an accountant or lawyer — and the insurer agrees to defend the suit subject to a reservation of rights.

The bill does not say whether an insurer that also claims a right to reimbursement for defense costs paid on the insured's behalf effectively seeks a total denial of coverage.

Regardless, there is no question these changes will hurt Florida policyholders embroiled in coverage disputes with their insurance companies.

In its 2016 decision in Johnson v. Omega Insurance Co., the Florida Supreme Court explained that fee-shifting statutes in insurance litigation are "deeply rooted in public policy ... afford a level process and make an already financially burdened insured whole again, and ... discourage insurance companies from withholding benefits on valid claims."[1]

H.B. 837 largely does away with these protections, preventing policyholders from recovering the legal fees they incur in successfully prosecuting or defending all kinds of coverage-related litigation against their insurers.

This appears to be lost on some insurance company advocates who applaud these changes as necessary to level the playing field for insurers — which is exactly backwards.[2]

Also, far from being narrowly tailored to address perceived frivolous litigation against insurers, H.B. 837 will have a disproportionate impact on policyholders with meritorious claims.

Declaratory judgment actions are often needed to resolve a wide range of coverage disputes — not just those involving total coverage denials.

This includes, for example, disputes over coverage for an underlying lawsuit when the insurance company has tentatively agreed to defend the suit under a reservation of rights; an insurer's decision to appoint a favored lawyer to handle the defense; applicable policy limits, or sublimits, and deductible issues; and issues regarding the number of occurrences.

As a result, this provision is prone to manipulation by insurers seeking to insulate themselves from exposure to fee-shifting in deciding how to respond to certain claims.

What's more, declaratory judgment actions are regularly brought by insurers themselves, who often agree to defend a suit filed against their policyholder under a reservation of rights while simultaneously seeking a declaration — often in federal court — that there is no coverage for that suit.

Clearly, repealing fee-shifting in cases brought by insurance companies themselves does nothing to protect insurance companies from perceived frivolous litigation. In that sense, H.B. 837 reflects a gross overcorrection.

All of these issues are likely to generate significant litigation in their own right, including litigation surrounding the scope of the phrase "total coverage denial," and how this new fee-shifting statute should be interpreted against the backdrop of existing Florida case law on fee-shifting issues.

Because the bill only applies prospectively to actions filed after the effective date, March 24, it will likely take some time for these issues to be meaningfully addressed by Florida courts.

In the meantime, we expect to see a major increase in the use of offers of judgment under Section 768.79 — which H.B. 837 applies to "any civil action involving an insurance contract" — as a mechanism to recover prevailing party attorney fees in coverage litigation going forward.

Newish Standards and Duties in Bad Faith Litigation

H.B. 837 also includes several changes to Florida's civil remedy statute, including two new sections providing that, in both statutory and common law bad faith actions,

- Mere negligence alone is insufficient to constitute bad faith; and

- The insured, claimant, and representative of the insured or claimant have a duty to act in good faith in furnishing information regarding the claim, in making demands of the insurer, in setting deadlines, and in attempting to settle the claim, which a jury may consider to reasonably reduce the amount of damages awarded against the insurer.

At first blush, these provisions appear to reflect significant changes to Florida bad faith law. Indeed, some insurance industry advocates have said the significance cannot be overstated, and have already jumped to the conclusion that this may create "an avenue for dismissing bad-faith lawsuits that simply allege mere negligence."[3] That is largely hyperbole.

First, the notion that mere negligence alone is insufficient to prove bad faith is not new. Florida courts treat an insurer's negligence as a relevant factor, not a dispositive one.[4] Thus, this section just codifies existing Florida law.

Second, bad faith litigation is notoriously fact-driven, and the question of bad faith is almost always a question of fact for the jury to decide. This makes it highly unlikely that anything in H.B. 837 will suddenly support dispositive motions in favor of insurers.

Also, the new duty of good faith imposed on insureds and claimants under Section 624.155(5)(b) largely mirrors the duties that insureds already have under most policies.

In the first-party property context, for instance, an insured's post-loss duties already include furnishing

information reasonably requested by the insurer, and in third-party liability cases, an insured has a duty to cooperate with the carrier's investigation and defense of the lawsuit.

Existing case law on these issues could serve as useful analogs for courts interpreting this statute for the first time.

At the same time, we expect carriers to argue that Section 624.155(5)(b) changes Florida law by allowing a jury to focus on the actions of the insured or claimant in bad faith cases.

Current Florida Supreme Court precedent makes clear that the focus in bad faith cases is "not on the actions of the claimant but rather on those of the insurer in fulfilling its obligations to the insured," as the court said in its 2018 decision in Harvey v. Geico.[5]

Far from curbing excessive litigation, this argument would vastly expand the scope of bad faith litigation, which is already highly fact-intensive, resulting in even lengthier and more expensive litigation overall.

It is not clear, however, that courts will interpret this section as broadly as some insurers would like. For example, courts might construe Section 624.155(5)(b) to apply only in certain kinds of cases, such as bad faith failure to settle cases where, as discussed in the legislative history, insurers complain about being set up by unreasonable demands made by insureds and claimants.

Courts also might find that certain elements of existing bad faith doctrines survive this legislation. This is particularly true because, at least in the first-party context, some courts have said Section 624.155 is in derogation of the common law and must be strictly construed.

Certainly, courts can look to the mere negligence is not sufficient section and apply that rule both ways, requiring carriers to establish some misconduct far exceeding a lack of due care in order to obtain a reduced verdict under this section.

Courts faced with insurers' attempts to shift the focus away from their own misconduct can also rely on existing tools — including the rules of evidence and civil procedure — to ensure that policyholders receive a fair trial, and to avoid arguments that could confuse the jury.

New Safe Harbor and Procedural Devices for Liability Insurers to Avoid Bad Faith Exposure

H.B. 837 also creates a new safe harbor defense for liability insurers that would bar any bad faith action as long as the insurer "tenders the lesser of the policy limits or the amount demanded by the claimant within 90 days after receiving actual notice of a claim which is accompanied by sufficient evidence to support the amount of the claim."

Also included are two new procedural devices for cases involving multiple competing claims against an insured, or insureds.

Under new Section 624.155(6), an insurer can now shield itself from bad faith exposure by either (1) filing an interpleader action to determine the claimants' prorated share of the total available policy limits, or (2) entering into a binding arbitration proceeding agreed to by the insurer and the claimants, where a qualified arbitrator, paid for by the insurer, determines the claimants' prorated share of the policy limits.

These new procedural devices raise significant issues for policyholders dealing with claims or lawsuits brought against them. New Section 624.155(4) could severely hamstring policyholders faced with presuit settlement demands or other settlement opportunities that fail to track the new statutory timeframe afforded to insurance companies.

Under Florida law, bad faith may be found when an insurance company unreasonably delays in engaging in settlement negotiations.

In cases involving catastrophic injuries or mass torts, where liability is clear and damages in excess of policy limits are likely, Florida courts, such as the Florida Third District Court of Appeal in its 1991 decision in Powell v. Prudential Property & Casualty Insurance Co., have held that carriers have an affirmative duty to immediately initiate settlement negotiations.[6]

Now, for example, when a claimant sends a presuit settlement demand with a 30-day deadline to accept in order to avoid the filing of a lawsuit, how is the insured supposed to respond when its carrier has

another 60 days to make a decision? This makes it impossible for the policyholder to comply with the terms of the demand and avoid the threatened lawsuit.

Also, Section 624.155(6) raises serious procedural and potential due process concerns by allowing insurers and claimants to engage in binding arbitration, apparently without the insured's participation or consent, with an arbitrator selected and paid for by the insurance company.

It is unclear why the Florida Legislature thinks insurance companies should be allowed to delay compensating victims and protecting their insureds against clear and significant exposure. Or why the property and casualty industry as a whole needs protection from legitimate claims and suits. But that is the reality Florida policyholders are now facing under H.B. 837.

Conclusion

Florida's new tort reform law is an unwarranted gift to insurance companies that seeks to strip Florida policyholders of key rights while doing little to curb excessive litigation, much of which is brought by insurance companies themselves.

But whether the law will have the sweeping impact that some insurers would like — and that insurance-company advocates will certainly urge — remains to be seen.

Garrett Nemeroff is counsel and R. Hugh Lumpkin is a partner at Reed Smith LLP.

[1] Johnson v. Omega Ins. Co., 200 So. 3d 1207, 1209 (Fla. 2016).

[2] Florida Insurance Crisis: Attorney Fees Slashed, but Are the Reforms Enough?, Fla. Justice Reform Inst. (June 1, 2022), https://www.fljustice.org/2022_0601-florida-insurance-crisis--attorney-fees-.html. Even the legislative history acknowledges that these changes "may make it more difficult for clients to find attorneys willing to take their cases." See Fla. H.R. Staff Analysis, H.B. 837 (Mar. 9, 2023), available at https://www.flsenate.gov/Session/Bill/2023/837.

[3] See David Levin, Jason Bloom & Greggory Jacobs, Fla. Bill Would Rein in Personal Injury Litigation Excesses, Law360 (Mar. 9, 2023), https://www.law360.com/florida/articles/1583240?nl_pk=8074c57c-de93-4b0e-8d96-d45ef16f30ff&utm_source=newsletter&utm_medium=email&utm_campaign=florida&utm_content=2023-03-10&read_more=1&nlsidx=0&nlaidx=17.

[4] See Harvey v. GEICO Gen. Ins. Co., 259 So. 3d 1, 9 (Fla. 2018).

[5] Harvey, 259 So. 3d at 10 (internal quotation marks omitted).

[6] Powell v. Prudential Prop. & Cas. Ins. Co., 584 So. 2d 12, 14 (Fla. 3d DCA 1991).
