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Lawyer Insights

Florida Enacts Sweeping Tort Reform Legislation, Raising Barriers to Insurance Coverage Claims

Florida's recent "tort reform" bill has upped the ante for policyholders seeking to hold insurance companies accountable for bad faith.

By Walter Andrews, Andrea DeField, and Jae Lynn Huckaba
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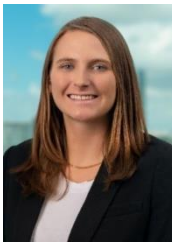

On March 24, 2023, Florida Governor Ron DeSantis signed House Bill (HB) 837 into law. The bill makes it more difficult for personal injury plaintiffs to sue corporate defendants, including by reducing the statute of limitations for negligence to two years and preventing recovery if a jury finds the plaintiff more at fault, but it also makes it more difficult and costly for insurance policyholders of all sizes to sue insurers for bad faith by eliminating fee-shifting for most policyholders and requiring something "more than" negligence for bad faith claims. Most of the bill's provisions apply immediately to lawsuits filed after March 24. As a result, in the days before the law was signed, tens of thousands of lawsuits were filed across Florida, creating a logjam that will take months, if not years, for courts to sort through.

HB 837's Impact on Insurance Coverage Claims:

HB 837 is another in a series of reform legislation recently passed in Florida that significantly impacts policyholders' ability to hold their insurers accountable for the wrongful failure to pay benefits due under the insurance contract. Recent efforts include last year's repeal of the one-way fee-shifting statute for claims brought under residential and commercial property insurance policies. Previously, the fee-shifting statute allowed policyholders to recover attorneys' fees from their insurers when the policyholder prevailed in a coverage action. From a policyholder's perspective, the statute afforded necessary protection against incurring high litigation expenses where an insurer wrongfully denied coverage and protected smaller policyholders who did not have the resources to retain a lawyer. Despite insurer commentary suggesting that the revision of the statute was necessary to curb "frivolous" litigation, the fee shifting provision in Fla. Stat. 627.428 only applied "upon the rendition of a judgment or decree by any [Florida] courts against an insurer and in favor of any . . . insured." Thus, fees were only awarded where a trial or appellate court found that the insurer had not provided coverage to the policyholder where coverage was indeed due—which already protected insurers from having to pay for suits that were not meritorious and provided a substantial disincentive for policyholders to bring frivolous suits.

HB 837 repeals Section 627.428 of the Florida Statutes entirely, extending the repeal of the one-way fee-shifting statute to all types of insurance coverage disputes—not just those under residential and commercial property insurance policies.

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Now, a policyholder can recover attorneys' fees only if it files a declaratory judgment action against the insurer when the insurer issues a "total coverage denial." Note, however, that this does not apply to "any action arising under a residential or commercial property insurance policy." The statute leaves open questions about what constitutes a "total coverage denial," but the bill explicitly states that a liability insurer's defense under a reservation of rights is insufficient to constitute a "total coverage denial" to trigger the potential for a fee award. As a result, policyholders are now forced to litigate coverage actions at their own expense, even where the insurer unreasonably denies coverage and thus necessitates the filing of the coverage action against it. This is significant. Prior to the elimination of Fla. Stat. 627.428, policyholders could be sure that if they needed to file suit against their insurer based on the insurer's improper denial or withholding of benefits due, the policyholder could still be made whole through litigation—by being awarded the amounts due under the insurance contract plus attorneys' fees incurred to litigate the case. Now, however, policyholders cannot be made whole as their attorneys' fees will reduce their recovery of policy benefits necessary to, for example, reimburse them for defense costs spent on a claim against them where the insurer failed to adequately defend them under a liability insurance policy. And, it appears that under no circumstance are fees awardable in any coverage action arising under a residential or commercial property insurance policy.

HB 837's Impact on Insurance Bad Faith Claims:

The bill also alters Florida's bad faith statute and common law bad faith actions. The statute provides that in both statutory and common law bad faith actions, "mere negligence alone is insufficient to constitute bad faith" and imposes a "good faith" standard on policyholders. Juries now may consider the policyholder's conduct "in furnishing information regarding the claim, in making demands of the insurer, in settling deadlines, and in attempting to settle the claim" in order to "reasonably reduce the amount of damages awarded against the insurer." To an extent, most policies already impose a similar standard on policyholders through cooperation provisions, but insurers may try to capitalize on this codified provision and try to focus bad faith litigation on the policyholder's conduct, instead of the insurer's own bad faith conduct, in an attempt to decrease the insurer's exposure to high damage awards. This comparative-fault type standard potentially creates additional fact issues for bad faith litigation. The additional fact issues and the "more than" negligence standard will only increase litigation costs, which policyholders are now responsible for covering on their own.

Further changes to Florida's common law and statutory bad faith causes of action include:

- Policyholders cannot bring a common law or statutory bad faith claim against insurers where the insurer tenders the lesser of (1) the policy limits or (2) the amount demanded by the policyholder within 90 days after receiving both actual notice of a claim and sufficient evidence to support the demanded amount of the claim. The insurer's failure to tender the lesser of the policy limits or the amount demanded is inadmissible in any bad faith action against the insurer. Notably, however, the insurer's failure to tender within 90 days does add an additional 90 days to any applicable statute of limitations.

- In cases involving multiple competing claims against insureds, an insurer can also avoid bad faith exposure by (a) filing an interpleader action to determine the claimants' prorated share of the policy limits or (b) entering into a binding arbitration "agreed to by the insurer and the third-party claimants" where a "qualified arbitrator" determines the claimants' prorated share of the policy limits. This change raises ethical and due process concerns because the insurer chooses and pays for the arbitrator.

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Florida policyholders should consult with and retain experienced coverage counsel to review policies and advise on strategy for the litigation of coverage and bad faith claims in light of these statutory changes. Hunton's insurance coverage team has 28 full-time insurance coverage lawyers with nine licensed in Florida. For additional updates and insurance coverage news, please visit the Hunton Insurance Recovery Blog.

HB 837's Broader Impact on Tort Claims

Outside of the insurance context, the law expands protections for businesses against tort claims, including:

- The statute of limitations for general negligence is shortened from four to two years from the date of the alleged incident. The shorter statute of limitations will apply only to causes of action that accrue after the effective date of the act, March 24, 2023.
- Florida's comparative negligence system changes from a "pure" comparative fault system to a "modified" comparative fault system. Previously, in a "pure" comparative fault system, a claimant's recovery was reduced by their percentage of fault, but did not bar recovery. Under the new "modified" comparative fault system, any party found to be greater than 50% at fault for their own harm will not be able to recover any damages. This change, however, does not apply to medical negligence claims.
- Restrictions are placed on the admissibility of evidence to prove medical expenses in personal injury and wrongful death actions, with a greater focus on amounts actually paid or obliged to be paid in the future.
- In any action where attorney's fees are determined by the court, a "strong presumption" is created that a lodestar fee (based on reasonable rates and hours), without a contingency multiplier, is sufficient and reasonable.
- In premises liability cases involving criminal acts of third parties, juries must consider the fault of all persons who contributed to the injury, and a presumption is created for multi-family residential property owners/operators against liability for the criminal acts of third parties if certain security measures are implemented.

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