# Civil Justice Subcommittee

## Monday, April 4, 2011
## 2:15 PM
## 404 HOB

# REVISED

**Dean Cannon**
**Speaker**

**Eric Eisnaugle**
**Chair**

# Committee Meeting Notice

## HOUSE OF REPRESENTATIVES

### Civil Justice Subcommittee

**Start Date and Time:** Monday, April 04, 2011 02:15 pm

**End Date and Time:** Monday, April 04, 2011 05:15 pm

**Location:** 404 HOB
**Duration:** 3.00 hrs

**Consideration of the following bill(s):**

HB 1187 Civil Remedies Against Insurers by Baxley

**NOTICE FINALIZED on 03/31/2011 16:16 by Jones.Missy**

# HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1187 Civil Remedies Against Insurers
**SPONSOR(S):** Baxley and others
**TIED BILLS:** None **IDEN./SIM. BILLS:** CS/SB 1592

| REFERENCE | ACTION | ANALYST | STAFF DIRECTOR or BUDGET/POLICY CHIEF |
|---|---|---|---|
| 1) Civil Justice Subcommittee | | Woodburn | Bond |
| 2) Economic Affairs Committee | | | |
| 3) Judiciary Committee | | | |

## SUMMARY ANALYSIS

Present 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 when 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:

- Specific statutory standards for a bad faith claim against an insurer and replaces any related common law causes of action currently available in Florida.
- That a bad faith claim arises where the insurer acts in gross disregard of the insured's interest by failing to accept a good faith written demand to settle within policy limits.
- That only an insured person or that person's assignee has a cause of action under the bill, thus eliminating a direct cause of action brought by a third-party claimant against an insurer without an assignment from the insured.
- That in a bad faith action arising out of failure to settle with a third-party claimant, the insurer's duty to offer policy limits does not arise unless a plaintiff shows that during settlement negotiations the third party submitted a detailed written demand to settle with the insurer within policy limits that meets criteria specified in the bill.
- A process for insurers to facilitate settlement within policy limits in the event of multiple third-party claims.

The bill provides evidentiary standards for bad faith cases, stating that an insurer does not have a fiduciary relationship with a first-party claimant and retains the right to protect privileged work product. With respect to third-party claims, the insurer's work product is immune from discovery until the underlying claim for payment on the insurance policy is final.

The bill prohibits the inclusion of a multiplier or enhancement with an award for attorneys' fees and costs and limits damages recoverable in bad faith actions involving uninsured motorist coverage to two times the policy limits.

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

## FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

**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.[1] The duty to indemnify refers to the insurer's obligation to issue payment either to the insured or a beneficiary on a valid claim.[2] 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.[3]

**Statutory and 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.[4] Additionally, a Florida statute, enacted in 1982, 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.[5]

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.[6]

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.[7] If a settlement is not reached, the insurer has the burden of showing that there was no realistic possibility of settlement within policy limits.[8] 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 does not lie.[9]

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.[10] The insurer has 60 days after the required notice is filed to pay the damages or correct the circumstances giving rise to the violation.[11] Because first-party claims are only statutory, that cause of action does not exist until the 60-day curing period provided in the statute

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

expires without payment by the insurer.[12] 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.[13]

**First- and Third-Party Claims**

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.[14] 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.[15] 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.[16] An insured's claim against the insurer does not accrue until the conclusion of the underlying litigation for contractual benefits.[17] The action against the insurer must be resolved in favor of the insured,[18] 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.[19] 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.[20] 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.[21] 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.[22]

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.[23] 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,[24] or it can be brought by the third party

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[12] *Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1278, 1284 (Fla. 2000).
[13] *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).
[14] *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263, 265 (Fla. 5th DCA 1987).
[15] *See Blanchard v. State Farm Mut. Auto. Ins. Co.* 575 So. 2d 1289 (Fla. 1991).
[16] *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)).
[17] *Blanchard,* 575 So. 2d at1291.
[18] *Id.*
[19] *Ruiz*, 899 So. 2d at 1129-30.
[20] *Id.* at 1128.
[21] Fla. R. Civ. P. 1.280(b)(3).
[22] *Ruiz*, 899 So. 2d at 1130.
[23] *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263, 265 (Fla. 5th DCA 1987).
[24] *See Powell v. Prudential Prop. and Cas. Ins. Co.*, 584 So. 2d 12 (Fla. 3d DCA 1991).

either directly or through an assignment of the insured's rights.[25] 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."[26] 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.[27] 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."[28]

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."[29] 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."[30] In light of this heightened duty on the part of the insurer, Florida courts focus on the actions of the insurer, not the claimant.[31] 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.[32] 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."[33] 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.

**Effect of the Bill: Common Law & Statutory Remedies**

The bill creates specific statutory standards for a bad faith claim against an insurer and replaces any related common law causes of action currently available in Florida, making the statute as revised by the bill the exclusive remedy.

The bill specifies that a bad faith claim arises where the insurer acts in gross disregard of the insured's interest by failing to accept a good faith written demand to settle within policy limits. The bill provides that only an insured person or that person's assignee has a cause of action under the bill. If the claim is for a third-party claim, the insurer does not violate the duty of good faith if the claimant did not provide a demand to settle which:

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[25] *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).
[26] *Zebrowski,* 706 So. 2d at 277.
[27] *Id.*
[28] *Id.* (citing *Dunn. v. Nat'l Sec. Fire & Cas. Co.*, 631 So. 2d 1103 (Fla. 1993)).
[29] *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 668 (Fla. 2004).
[30] *Id.* (quoting *Boston Old Colony Insurance Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980)).
[31] *Berges*, 896 So. 2d at 677.
[32] *Barry v. GEICO Gen. Ins. Co.*, 938 So. 2d 613, 618 (Fla. 4th DCA 2006).
[33] *DeLaune v. Liberty Mut. Ins. Co.*, 314 So. 2d 601, 603 (Fla. 4th DCA 1975).

- Is in writing, signed by the third party claimant or the claimant's authorized representative and delivered to the insurer and the insured;
- States that it is a demand to settle made pursuant to this section;
- States a specified amount within the insured's policy limits which the third party claimant offers to settle its claim in full and to release the insured from liability
- It is limited to one claimant and one line of coverage, or if not, separately designates a demand for each claimant and each line of coverage, each of which may be accepted independently;
- Is submitted by a person having legal authority to accept payment and to execute the release;
- Does not contain any conditions for acceptance other than payment of the specific amount demanded; and
- Includes a detailed explanation of the coverage and liability issues and the facts giving rise to the claim, including:

    1. An explanation of injuries and damages claimed;
    2. The names of known witnesses; and
    3. A listing or copy of all relevant documents including medical records. The third party claimant has a duty to supplement this information as it becomes available.

The bill provides that the insurer does not violate the statutory good faith requirement if within 60 days after the insurer's receipt of the demand or within 90 days of the receipt of the claim (whichever is later) offers to pay the amount requested or the policy limits. The bill provides the insurer with an affirmative defense if the third-party claimant or the insured fail to fully cooperate in providing all relevant information.

The bill also provides a process for insurers to facilitate settlement within policy limits in the event of multiple third-party claims arising out of a single occurrence totaling more than policy limits. In this situation, the bill specifies that the insurer is not liable beyond policy limits if within 90 days of the notice of competing claims, the insurer files an interpleader[34] to join competing claims and distribute policy limits on a prorated basis or makes policy limits available to the claimants through binding arbitration. Bad faith is not automatically presumed under this section if the insurer does not accept a demand to settle for policy limits, pay an appraisal award for damage to property, or file an interpleader.

The bill contains evidentiary standards for bad faith cases, providing that an insurer does not have a fiduciary relationship with a first-party claimant and retains the right to protect privileged work product. The bill provides that the privileged claim file will be produced upon a showing by the insured that he or she needs the materials to prepare the case and cannot obtain the equivalent by other means without undue hardship.[35] This provision provides that the claim file is to be considered work product and creates a distinction between first- and third-party claims in regard to discovery of the file. With respect to third-party claims, the insurer's work product under the bill is immune from discovery until the underlying claim for payment on the insurance policy is final. Thereafter, discovery is to be determined under the Florida Rules of Civil Procedure as described above.

The bill also prohibits the inclusion of a multiplier or enhancement with an award for attorneys' fees and costs and limits damages recoverable in bad faith actions involving uninsured motorist coverage to two times the policy limits.

Finally, the bill contains a severability provision stating that if any portion is held invalid, that invalidity will not affect other valid portions.

B. SECTION DIRECTORY:

Section 1 amends s. 624.155, F.S., regarding civil remedies.

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[34] Fla. R. Civ. P. 1.240.
[35] Fla. R. Civ. P. 1.280(b)(3).

Section 2 amends s. 627.311, F.S., regarding public records and meetings.

Section 3 amends s. 627.727, F.S., regarding motor vehicle insurance.

Section 4 provides a severability clause.

Section 5 provides an effective date.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:
   None.

2. Expenditures:
   None.

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. This bill does not appear to affect county or municipal governments.

2. Other:
   None.

B. RULE-MAKING AUTHORITY:
None.

C. DRAFTING ISSUES OR OTHER COMMENTS:
None.

## IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

n/a

A bill to be entitled

An act relating to civil remedies against insurers; amending s. 624.155, F.S.; revising provisions relating to civil actions against insurers; providing a definition; revising the grounds for bringing an action based on the insurer's failure to accept an offer to settle within policy limits; providing who may bring such an action; providing requirements for bringing such an action; providing for the release of an insured if the insurer offers to settle a third-party claim within a specified time under certain circumstances; providing that the insurer has an affirmative defense if a third-party claimant or the insured fails to cooperate with the insurer; providing that an insurer is not liable for two or more claims that exceed the policy limits if it files an interpleader action or makes the policy limits available under arbitration; specifying responsibility for the payment of liens; providing that an insurer is not liable for amounts in excess of the policy limits if it makes timely payment of the appraisal amount; providing that certain refusals to act by the insurer are not presumptive evidence of bad faith; revising requirements relating to the preaction notice of a civil action sent to the Department of Financial Regulation and the insurer; specifying work-product protection requirements; prohibiting an award of fees and costs from including any form of multiplier or enhancement; providing that the provisions of the act replace the common law; amending s.

627.311, F.S.; conforming a cross-reference; deleting an obsolete provision; amending s. 627.727, F.S.; revising and limiting the damages that are recoverable from an uninsured motorist carrier in a civil action; providing for severability; providing an effective date.

Be It Enacted by the Legislature of the State of Florida:

Section 1. Section 624.155, Florida Statutes, is amended to read:

624.155 Civil remedy.—

(1) As used in the section, the term "third-party claim" means a claim against an insured, by one other than the insured, on account of harm or damage allegedly caused by an insured and covered by a policy of liability insurance.

(2) ~~(1)~~ Any person may bring a civil action against an insurer if ~~when~~ such person is damaged:

(a) By the insurer's ~~a~~ violation of ~~any of~~ the following ~~provisions by the insurer~~:

1. Section 626.9541(1)(i), (o), or (x);

2. Section 626.9551;

3. Section 626.9705;

4. Section 626.9706;

5. Section 626.9707; or

6. Section 627.7283.

(b) By the insurer's commission of any of the following acts ~~by the insurer~~:

1. Acting in gross disregard of the insured's interest by

failing to accept a ~~Not attempting in~~ good faith written demand to settle claims within the policy limits if ~~when~~, under all the circumstances existing at the relevant time, it could and should have done so, had it acted fairly and honestly toward its insured ~~and with due regard for her or his interests~~;

2. Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or

3. Except as to liability coverages, failing to promptly settle claims, when the obligation to settle a 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.

Notwithstanding the ~~provisions of the~~ above ~~to the contrary~~, a person pursuing a remedy under this section need not prove that such act was committed or performed with such frequency as to indicate a general business practice.

(3) If a civil action is brought against an insurer pursuant to subparagraph (2)(b)1.:

(a) Only an insured or the insured's assignee may bring such an action.

(b) With respect to a third-party claim, an insurer does not violate the duty set forth in subparagraph (2)(b)1. if the third-party claimant does not provide a demand to settle which:

1. Is in writing, signed by the third-party claimant or the claimant's authorized representative, and delivered to the insurer and the insured;

2. States that it is a demand to settle made pursuant to this section;

3. States a specified amount within the insured's policy limits for which the third-party claimant offers to settle its claim in full and to release the insured from liability;

4. Is limited to one claimant and one line of coverage or, if not so limited, separately designates a demand for each claimant and each line of coverage, each of which may be accepted independently;

5. Is submitted by a person having the legal authority to accept payment and to execute the release;

6. Does not contain any conditions for acceptance other than payment of the specific amount demanded and compliance with the disclosure requirements of s. 627.4137; and

7. Includes a detailed explanation of the coverage and liability issues and the facts giving rise to the claim, including an explanation of injuries and damages claimed; the names of known witnesses; and a listing and copy, if available, of relevant documents, including medical records, which are available to the third-party claimant or authorized representative at the time of the demand to settle. The third-party claimant and his or her representatives have a continuing duty to supplement this information as it becomes available.

(c) With respect to a third-party claim, an insurer does not violate the duty set forth in subparagraph (2)(b)1. if, within 60 days after the insurer's receipt of the third-party claimant's written demand to settle, or within 90 days after the insurer's receipt of the notice of the claim, whichever is

later, the insurer offers to pay the lesser of:

1. The amount requested in the third-party claimant's written demand to settle; or

2. The insured's policy limits, in exchange for a release of liability.

(d) An insurer has an affirmative defense to any such action if the third-party claimant, the insured, or their representatives fail to fully cooperate in providing all relevant information and in presenting the claim.

(4) Notwithstanding subsection (3), if two or more third-party claimants make competing claims arising out of a single occurrence, which in total exceed the available policy limits of one or more of the insured parties who may be liable to the third-party claimants, an insurer is not liable beyond the available policy limits for failure to pay all or any portion of the available policy limits to one or more of the third-party claimants if, within 90 days after receiving notice of the competing claims in excess of the available policy limits, the insurer:

(a) Files an interpleader action under the Florida Rules of Civil Procedure. If the claims of the competing third-party claimants are found to be in excess of the policy limits, the third-party claimants are entitled to a prorated share of the policy limits as determined by the trier of fact. An insurer's interpleader action does not alter or amend the insurer's obligation to defend its insured; or

(b) Pursuant to binding arbitration, makes the entire amount of the policy limits available for payment to the

competing third-party claimants before a qualified arbitrator selected by the insurer at the expense of the insurer. The third-party claimants are entitled to a prorated share of the policy limits as determined by the arbitrator, who shall consider the comparative fault, if any, of each third-party claimant, and the total likely outcome at trial based upon the total of the economic and noneconomic damages submitted to the arbitrator for consideration. A third-party claimant whose claim is resolved by the arbitrator shall execute and deliver a general release to the insured party whose claim is resolved by the proceeding.

(5) After settlement of a third-party claim, the third-party claimant's attorney is responsible for the satisfaction of any liens from the settlement funds to the extent such settlement funds are sufficient. If the third-party claimant is not represented by counsel, the third-party claimant shall provide the insurer with a written accounting of all outstanding liens.

(6) An insurer is not liable for amounts in excess of the policy limits or of the award, whichever is less, if it makes timely payment of an appraisal award.

(7) The fact that the insurer does not accept a demand to settle or offer policy limits under paragraph (3)(c), pay an appraisal award under subsection (6), or file an interpleader action or make policy limits available for arbitration under subsection (4) during the times specified does not give rise to a presumption that the insurer acted in bad faith.

(8) ~~(2)~~ Any party may bring a civil action against an

unauthorized insurer if such party is damaged by a violation of s. 624.401 by the unauthorized insurer.

(9) ~~(3)(a)~~ Except for an action relating to a third-party claim, as a condition precedent to bringing an action under this section, the department and the authorized insurer must be ~~have been~~ given 60 days' written notice of the violation. If the department returns a notice for lack of specificity, the 60-day time period does ~~shall~~ not begin until a proper notice is filed.

(a) ~~(b)~~ The notice shall be on a form provided by the department, sent by certified mail to the claim handler if known or, if unknown, to the specific office handling the claim, and ~~shall~~ state with specificity the following information~~, and such other information as the department may require~~:

1. The statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated.

2. The facts and circumstances reasonably known to the insurer giving rise to the violation, stated with specificity, and the corrective action that the insurer needs to take to remedy the alleged violation.

3. The name of any individual involved in the violation.

4. 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.~~

5. A statement that the notice is given in order to

perfect the right to pursue the civil remedy authorized by this section.

6. Such other information as the department may require.

(b) ~~(c)~~ Within 20 days after ~~of~~ receipt of the notice, the department may return any notice that does not provide the specific information required by this section~~,~~ and ~~the department shall~~ indicate the specific deficiencies contained in the notice. A determination by the department to return a notice for lack of specificity is ~~shall be~~ exempt from ~~the requirements of~~ chapter 120.

(c) ~~(d)~~ No action shall lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected.

(d) ~~(e)~~ The authorized insurer that is the recipient of the ~~a~~ notice must ~~filed pursuant to this section shall~~ report to the department on the disposition of the alleged violation.

(e) ~~(f)~~ The applicable statute of limitations for an action under this section is ~~shall be~~ tolled for ~~a period of~~ 65 days by the mailing of the notice ~~required by this subsection~~ or the mailing of a subsequent notice ~~required by this subsection~~.

(10) With respect to:

(a) A first-party claim, the insurer does not owe a fiduciary duty to the insured and retains the right to protect materials covered by the work-product privilege found within the claim processing file. The privilege must yield to inspection if an appropriate showing is made under the Florida Rules of Civil Procedure. The attorney-client privilege remains absolute.

(b) A third-party claim, until a claim or action for

payment on a policy of insurance is final, all files of an insurer, including papers, communications, investigatory reports, or other documents in the insurer's files are the insurer's work product and immune from production or discovery. Thereafter, discovery shall be determined in accordance with the Florida Rules of Civil Procedure. Communications between an insurer and its counsel which are protected under s. 90.502 remain protected.

(11) ~~(4)~~ Upon adverse adjudication at trial or upon appeal, the authorized insurer is ~~shall be~~ liable for damages, together with court costs and reasonable attorney's fees incurred by the plaintiff. An award of fees and costs may not include any form of multiplier or enhancement.

(12) ~~(5)~~ ~~No~~ Punitive damages may not ~~shall~~ be awarded under this section unless the acts giving rise to the violation occur with such frequency as to indicate a general business practice and these acts are:

(a) Willful, wanton, and malicious;

(b) In reckless disregard for the rights of any insured; or

(c) In reckless disregard for the rights of a beneficiary under a life insurance contract.

Any person who pursues a claim under this subsection must ~~shall~~ post in advance the costs of discovery. Such costs shall be awarded to the authorized insurer if ~~no~~ punitive damages are not awarded to the plaintiff.

(13) ~~(6)~~ This section does ~~shall~~ not ~~be construed to~~

authorize a class action suit against an authorized insurer or a civil action against the commission, the office, or the department or any of their employees, or ~~to~~ create a cause of action if ~~when~~ an authorized health insurer refuses to pay a claim for reimbursement on the ground that the charge for a service was unreasonably high or that the service provided was not medically necessary.

(14) ~~(7) In the absence of expressed language to the contrary,~~ This section does ~~shall~~ not ~~be construed to~~ authorize a civil action or create a cause of action against an authorized insurer or its employees who, in good faith, release information about an insured or an insurance policy to a law enforcement agency in furtherance of an investigation of a criminal or fraudulent act relating to a motor vehicle theft or a motor vehicle insurance claim.

(15) The civil remedies specified in this section are the sole remedies and causes of action for extracontractual damages for bad-faith failure to settle under an insurance contract. Any related common-law causes of action are replaced and superseded by this section. The provisions of this section apply to all cases brought pursuant to this section unless specifically controlled by s. 766.1185.

~~(8) The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state. Any person may obtain a judgment under either the common-law remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies. This~~

~~section shall not be construed to create a common-law cause of action. The damages recoverable pursuant to this section shall include those damages which are a reasonably foreseeable result of a specified violation of this section by the authorized insurer and may include an award or judgment in an amount that exceeds the policy limits.~~

(16) ~~(9)~~ A surety issuing a payment or performance bond on the construction or maintenance of a building or roadway project is not an insurer for purposes of subsection (2) ~~(1)~~.

Section 2. Paragraph (k) of subsection (3) of section 627.311, Florida Statutes, is amended to read:

627.311 Joint underwriters and joint reinsurers; public records and public meetings exemptions.—

(3) The office may, after consultation with insurers licensed to write automobile insurance in this state, approve a joint underwriting plan for purposes of equitable apportionment or sharing among insurers of automobile liability insurance and other motor vehicle insurance, as an alternate to the plan required in s. 627.351(1). All insurers authorized to write automobile insurance in this state shall subscribe to the plan and participate therein. The plan shall be subject to continuous review by the office which may at any time disapprove the entire plan or any part thereof if it determines that conditions have changed since prior approval and that in view of the purposes of the plan changes are warranted. Any disapproval by the office shall be subject to the provisions of chapter 120. The Florida Automobile Joint Underwriting Association is created under the plan. The plan and the association:

(k)~~1.~~ Shall have no liability, and no cause of action ~~of any nature shall arise~~ against any member insurer or its agents or employees, agents or employees of the association, members of the board of governors of the association, the Chief Financial Officer, or the office or its representatives for any action taken by them in the performance of their duties or responsibilities under this subsection. Such immunity does not apply to actions for or arising out of a breach of any contract or agreement pertaining to insurance, or any willful tort.

~~2. Notwithstanding the requirements of s. 624.155(3)(a), as a condition precedent to bringing an action against the plan under s. 624.155, the department and the plan must have been given 90 days' written notice of the violation. If the department returns a notice for lack of specificity, the 90-day time period shall not begin until a proper notice is filed. This notice must comply with the information requirements of s. 624.155(3)(b). Effective October 1, 2007, this subparagraph shall expire unless reenacted by the Legislature prior to that date.~~

Section 3. Subsection (10) of section 627.727, Florida Statutes, is amended to read:

627.727 Motor vehicle insurance; uninsured and underinsured vehicle coverage; insolvent insurer protection.—

(10) The damages recoverable from an uninsured motorist carrier in an action brought under s. 624.155 ~~shall~~ include the total amount of the claimant's damages, including the amount in excess of the policy limits but not exceeding two times the policy limits, any interest on unpaid benefits, and reasonable



CODING: Words ~~stricken~~ are deletions; words underlined are additions.

attorney's fees and costs~~, and any damages caused by a violation of a law of this state~~. The total amount of the claimant's damages is recoverable whether caused by an insurer or by a third-party tortfeasor.

Section 4. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Section 5. This act shall take effect July 1, 2011.

Amendment No. 1

COMMITTEE/SUBCOMMITTEE ACTION

| | | |
|---|---|---|
| ADOPTED | ____ | (Y/N) |
| ADOPTED AS AMENDED | ____ | (Y/N) |
| ADOPTED W/O OBJECTION | ____ | (Y/N) |
| FAILED TO ADOPT | ____ | (Y/N) |
| WITHDRAWN | ____ | (Y/N) |
| OTHER | | |

Committee/Subcommittee hearing bill: Civil Justice Subcommittee
Representative(s) Baxley offered the following:

**Amendment (with title amendment)**

Remove everything after the enacting clause and insert:

Section 1. Section 624.155, Florida Statutes, is amended to read:

624.155 Civil remedy.—

(1) As used in this section, the term "third-party claim" means a claim against an insured, by one other than the insured, on account of harm or damage allegedly caused by an insured and covered by a policy of liability insurance. The term "third-party claimant" is one making a third-party claim.

(2) ~~(1)~~ Any person may bring a civil action against an insurer if ~~when~~ such person is damaged:

(a) By the insurer's ~~a~~ violation of ~~any of~~ the following ~~provisions by the insurer~~:

1. Section 626.9541(1)(i), (o), or (x);

2. Section 626.9551;

3. Section 626.9705;

4. Section 626.9706;

5. Section 626.9707; or

6. Section 627.7283.

(b) By the insurer's commission of any of the following acts ~~by the insurer~~:

1. Acting arbitrarily and contrary to the insured's interests in failing ~~Not attempting in good faith~~ to settle claims within the policy limits if ~~when~~, under all the circumstances existing at the relevant time, it could and should have done so, had it acted fairly and honestly toward its insured ~~and with due regard for her or his interests~~;

2. Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or

3. Except as to liability coverages, failing to promptly settle claims, when the obligation to settle a 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.

Notwithstanding the ~~provisions of the~~ above ~~to the contrary~~, a person pursuing a remedy under this section need not prove that such act was committed or performed with such frequency as to indicate a general business practice.

(3) If a civil action is brought against an insurer pursuant to subparagraph (2)(b)1.:

Amendment No. 1

(a) Only an insured or the insured's assignee may bring such an action. However, a third-party claimant that failed or refused to present a demand to settle under paragraph (3)(b) may not recover under this subsection even with an assignment of the insured's claim.

(b) With respect to a third-party claim, an insurer does not violate the duty set forth in subparagraph (2)(b)1. if the insurer does not receive a notice from the insured pursuant to paragraph (3)(d) and the third-party claimant does not provide a demand to settle which:

1. Is in writing, signed by the third-party claimant or the claimant's authorized representative, and delivered to the insurer and the insured;

2. States a specified amount within the insured's policy limits for which the third-party claimant offers to settle its claim in full and to release the insured from liability;

3. Is limited to one claimant and one line of coverage or, if not so limited, separately designates a demand for each claimant and each line of coverage, each of which may be accepted independently;

4. Is submitted by a person having the legal authority to accept payment and to execute the release, or, when court approval of the settlement is necessary, by a person having authority to settle contingent on court approval;

5. Does not contain any conditions for acceptance other than payment of the specific amount demanded and compliance with the disclosure requirements of s. 627.4137; and

6. Includes a detailed explanation of the coverage and liability issues and the facts giving rise to the claim, including an explanation of injuries and damages claimed; the names of known witnesses; and a listing and copy, if available, of relevant documents, including medical records, which are available to the third-party claimant or authorized representative at the time of the demand to settle. The third-party claimant and his or her representatives have a continuing duty to supplement this information as it becomes available.

(c) With respect to a third-party claim, an insurer does not violate the duty set forth in subparagraph (2)(b)1. if, within 60 days after the insurer's receipt of the third-party claimant's written demand to settle, or within 90 days after the insurer's receipt of the notice of the claim, whichever is later, the insurer offers to pay the lesser of:

1. The amount requested in the third-party claimant's written demand to settle; or

2. The insured's policy limits, in exchange for a release of liability.

(d) If a third-party claimant fails or refuses to provide a demand to settle pursuant to paragraph (3)(b), but the insured wishes that its insurer make a policy-limits offer, the insured may, no sooner than thirty days after the incident giving rise to the claim, notify the insurer in writing that the insured has made a good-faith effort to seek a written demand from the third-party claimant and to obtain all materials referenced in subsection 3(b), that the third-party claimant has failed or refused to comply, and that the insured requests that the

insurer nonetheless offer policy limits. The insured must simultaneously provide all information in its possession or control referenced in paragraph (3)(b) and has a continuing duty to supplement with additional information as it becomes available. If, no later than ninety days after receipt of the insured's written request pursuant to this subsection, the insurer offers to settle for policy limits, the insurer does not violate the duty under subparagraph (2)(b)1. If during this period the third-party claimant submits a written demand, the insurer has no less than sixty days from receipt of that written demand to agree to settle for the lesser of the demanded amount or policy limits without violating the duty under subparagraph (2)(b)1. Nothing in this section prohibits or limits the ability of the insurer to negotiate with a third-party claimant or others to make offers or to settle claims before, during, or after these time periods.

(e) An insurer has an affirmative defense to any such action if the third-party claimant, the insured, or their representatives fail to fully cooperate in providing all relevant information and in presenting the claim.

(4) Notwithstanding the above, if two or more third-party claimants make competing claims arising out of a single occurrence, which in total exceed the available policy limits of one or more of the insured parties who may be liable to the third-party claimants, an insurer is not liable beyond the available policy limits for failure to pay all or any portion of the available policy limits to one or more of the third-party claimants if, within 90 days after receiving notice of the

competing claims in excess of the available policy limits, the insurer:

(a) Files an interpleader action under the Florida Rules of Civil Procedure. If the claims of the competing third-party claimants are found to be in excess of the policy limits, the third-party claimants are entitled to a prorated share of the policy limits as determined by the trier of fact. An insurer's interpleader action does not alter or amend the insurer's obligation to defend its insured; or

(b) Pursuant to binding arbitration, makes the entire amount of the policy limits available for payment to the competing third-party claimants before a qualified arbitrator selected by the insurer at the expense of the insurer. The third-party claimants are entitled to a prorated share of the policy limits as determined by the arbitrator, who shall consider the comparative fault, if any, of each third-party claimant, and the total likely outcome at trial based upon the total of the economic and noneconomic damages submitted to the arbitrator for consideration. A third-party claimant whose claim is resolved by the arbitrator shall execute and deliver a general release to the insured party whose claim is resolved by the proceeding.

(5) After settlement of a third-party claim, the third-party claimant's attorney is responsible for the satisfaction of any liens from the settlement funds to the extent such settlement funds are sufficient. If the third-party claimant is not represented by counsel, the third-party claimant shall

provide the insurer with a written accounting of all outstanding liens.

(6) An insurer is not liable for amounts in excess of the policy limits or of the award, whichever is less, if it makes timely payment of an appraisal award.

(7) The fact that the insurer does not accept a demand to settle or offer policy limits under paragraph (3)(c) or (3)(d), pay an appraisal award under subsection (6), or file an interpleader action or make policy limits available for arbitration under subsection (4), during the times specified, does not give rise to a presumption that the insurer acted in bad faith.

(8) ~~(2)~~ Any party may bring a civil action against an unauthorized insurer if such party is damaged by a violation of s. 624.401 by the unauthorized insurer.

(9) ~~(3)(a)~~ Except for an action relating to a third-party claim, as a condition precedent to bringing an action under this section, the department and the authorized insurer must be ~~have been~~ given 60 days' written notice of the violation. If the department returns a notice for lack of specificity, the 60-day time period does ~~shall~~ not begin until a proper notice is filed.

(a) ~~(b)~~ The notice shall be on a form provided by the department, sent by certified mail to the claim handler if known or, if unknown, to the specific office handling the claim, and ~~shall~~ state with specificity the following information~~, and such other information as the department may require~~:

Amendment No. 1

1. The statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated.

2. The facts and circumstances reasonably known to the insurer giving rise to the violation, stated with specificity, and the corrective action that the insurer needs to take to remedy the alleged violation.

3. The name of any individual involved in the violation.

4. 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.~~

5. A statement that the notice is given in order to perfect the right to pursue the civil remedy authorized by this section.

6. Such other information as the department may require.

(b) ~~(c)~~ Within 20 days after ~~of~~ receipt of the notice, the department may return any notice that does not provide the specific information required by this section~~,~~ and ~~the department shall~~ indicate the specific deficiencies contained in the notice. A determination by the department to return a notice for lack of specificity is ~~shall be~~ exempt from ~~the requirements of~~ chapter 120.

(c) ~~(d)~~ No action shall lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected.

(d) ~~(e)~~ The authorized insurer that is the recipient of the ~~a~~ notice must ~~filed pursuant to this section shall~~ report to the department on the disposition of the alleged violation.

(e) ~~(f)~~ The applicable statute of limitations for an action under this section is ~~shall be~~ tolled for ~~a period of~~ 65 days by the mailing of the notice ~~required by this subsection~~ or the mailing of a subsequent notice ~~required by this subsection~~.

(10) ~~(4)~~ Upon adverse adjudication at trial or upon appeal, the authorized insurer is ~~shall be~~ liable for damages, together with court costs and reasonable attorney's fees incurred by the plaintiff.

(11) ~~(5)~~ ~~No~~ Punitive damages may not ~~shall~~ be awarded under this section unless the acts giving rise to the violation occur with such frequency as to indicate a general business practice and these acts are:

(a) Willful, wanton, and malicious;

(b) In reckless disregard for the rights of any insured; or

(c) In reckless disregard for the rights of a beneficiary under a life insurance contract.

Any person who pursues a claim under this subsection must ~~shall~~ post in advance the costs of discovery. Such costs shall be awarded to the authorized insurer if ~~no~~ punitive damages are not awarded to the plaintiff.

(12) ~~(6)~~ This section does ~~shall~~ not ~~be construed to~~ authorize a class action suit against an authorized insurer or a civil action against the commission, the office, or the

department or any of their employees, or ~~to~~ create a cause of action if ~~when~~ an authorized health insurer refuses to pay a claim for reimbursement on the ground that the charge for a service was unreasonably high or that the service provided was not medically necessary.

(13) ~~(7) In the absence of expressed language to the contrary,~~ This section does ~~shall~~ not ~~be construed to~~ authorize a civil action or create a cause of action against an authorized insurer or its employees who, in good faith, release information about an insured or an insurance policy to a law enforcement agency in furtherance of an investigation of a criminal or fraudulent act relating to a motor vehicle theft or a motor vehicle insurance claim.

(14) The civil remedies specified in this section are the sole remedies and causes of action for extracontractual damages for bad-faith failure to settle under an insurance contract. Any related common-law causes of action are replaced and superseded by this section. The provisions of this section apply to all cases brought pursuant to this section unless specifically controlled by s. 766.1185.

~~(8) The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state. Any person may obtain a judgment under either the common-law remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies. This section shall not be construed to create a common-law cause of action. The damages recoverable pursuant to this section shall~~

~~include those damages which are a reasonably foreseeable result of a specified violation of this section by the authorized insurer and may include an award or judgment in an amount that exceeds the policy limits.~~

(15) ~~(9)~~ A surety issuing a payment or performance bond on the construction or maintenance of a building or roadway project is not an insurer for purposes of subsection (2) ~~(1)~~.

Section 2. Paragraph (k) of subsection (3) of section 627.311, Florida Statutes, is amended to read:

627.311 Joint underwriters and joint reinsurers; public records and public meetings exemptions.—

(3) The office may, after consultation with insurers licensed to write automobile insurance in this state, approve a joint underwriting plan for purposes of equitable apportionment or sharing among insurers of automobile liability insurance and other motor vehicle insurance, as an alternate to the plan required in s. 627.351(1). All insurers authorized to write automobile insurance in this state shall subscribe to the plan and participate therein. The plan shall be subject to continuous review by the office which may at any time disapprove the entire plan or any part thereof if it determines that conditions have changed since prior approval and that in view of the purposes of the plan changes are warranted. Any disapproval by the office shall be subject to the provisions of chapter 120. The Florida Automobile Joint Underwriting Association is created under the plan. The plan and the association:

(k) ~~1.~~ Shall have no liability, and no cause of action ~~of any nature shall arise~~ against any member insurer or its agents

or employees, agents or employees of the association, members of the board of governors of the association, the Chief Financial Officer, or the office or its representatives for any action taken by them in the performance of their duties or responsibilities under this subsection. Such immunity does not apply to actions for or arising out of a breach of any contract or agreement pertaining to insurance, or any willful tort.

~~2. Notwithstanding the requirements of s. 624.155(3)(a), as a condition precedent to bringing an action against the plan under s. 624.155, the department and the plan must have been given 90 days' written notice of the violation. If the department returns a notice for lack of specificity, the 90-day time period shall not begin until a proper notice is filed. This notice must comply with the information requirements of s. 624.155(3)(b). Effective October 1, 2007, this subparagraph shall expire unless reenacted by the Legislature prior to that date.~~

Section 3. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Section 4. This act shall take effect July 1, 2011.

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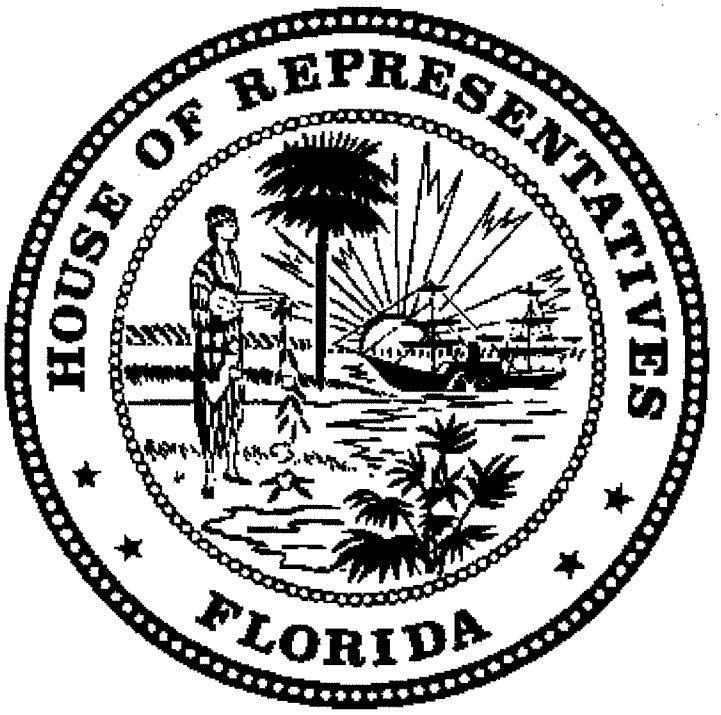
**T I T L E A M E N D M E N T**

Amendment No. 1

Remove the entire title and insert:

An act relating to civil remedies against insurers; amending s. 624.155, F.S.; revising provisions relating to civil actions against insurers; providing a definition; revising the grounds for bringing an action based on the insurer's failure to accept an offer to settle within policy limits; providing who may bring such an action; providing requirements for bringing such an action; providing that the insurer has an affirmative defense if a third-party claimant or the insured fails to cooperate with the insurer; providing that an insurer is not liable for two or more claims that exceed the policy limits if it files an interpleader action or makes the policy limits available under arbitration; specifying responsibility for the payment of liens; providing that an insurer is not liable for amounts in excess of the policy limits if it makes timely payment of the appraisal amount; providing that certain refusals to act by the insurer are not presumptive evidence of bad faith; revising requirements relating to the preaction notice of a civil action sent to the Department of Financial Regulation and the insurer; providing that the provisions of the act replace the common law; amending s. 627.311, F.S.; conforming a cross-reference; deleting an obsolete provision; providing for severability; providing an effective date.




# Civil Justice Subcommittee

## Monday, April 4, 2011

## 2:15 PM

## 404 HOB

### Addendum A

Dean Cannon
Speaker

Eric Eisnaugle
Chair

Amendment No. 1a

| COMMITTEE/SUBCOMMITTEE ACTION | |
|---|---|
| ADOPTED | __ (Y/N) |
| ADOPTED AS AMENDED | __ (Y/N) |
| ADOPTED W/O OBJECTION | __ (Y/N) |
| FAILED TO ADOPT | __ (Y/N) |
| WITHDRAWN | __ (Y/N) |
| OTHER | _____ |

Committee/Subcommittee hearing bill: Civil Justice Subcommittee
Representative(s) Gaetz offered the following:

**Substitute Amendment for Amendment (1) by Representative Baxley (with title amendment)**

Remove everything after the enacting clause and insert:

Section 1. Section 624.155, Florida Statutes, is amended to read:

624.155 Civil remedy.—

(1) As used in this section, the term "third-party claim" means a claim against an insured, by one other than the insured, on account of harm or damage allegedly caused by an insured and covered by a policy of liability insurance. The term "third-party claimant" is one making a third-party claim.

(2) ~~(1)~~ Any person may bring a civil action against an insurer if ~~when~~ such person is damaged:

(a) By the insurer's ~~a~~ violation of ~~any of~~ the following ~~provisions by the insurer~~:

1. Section 626.9541(1)(i), (o), or (x);

2. Section 626.9551;

3. Section 626.9705;

4. Section 626.9706;

5. Section 626.9707; or

6. Section 627.7283.

(b) By the insurer's commission of any of the following acts ~~by the insurer~~:

1. 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 and with due regard for her or his interests;

2. Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or

3. Except as to liability coverages, failing to promptly settle claims, when the obligation to settle a 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.

Notwithstanding the ~~provisions of the~~ above ~~to the contrary~~, a person pursuing a remedy under this section need not prove that such act was committed or performed with such frequency as to indicate a general business practice.

(3) If a civil action is brought against an insurer pursuant to subparagraph (2)(b)1.:

(a) Only an insured or the insured's assignee may bring such an action.

(b) With respect to a third-party claim, a third-party claimant wishing to settle within policy limits shall provide a demand to settle which:

1. Is in writing, signed by the third-party claimant or the claimant's authorized representative, and delivered to the insurer and the insured;

2. States a specified amount within the insured's policy limits for which the third-party claimant offers to settle its claim in full and to release the insured from liability;

3. Is limited to one claimant and one line of coverage or, if not so limited, separately designates a demand for each claimant and each line of coverage, each of which may be accepted independently;

4. Is submitted by a person having the legal authority to accept payment and to execute the release, or, when court approval of the settlement is necessary, by a person having authority to settle contingent on court approval;

5. Does not contain any conditions for acceptance other than payment of the specific amount demanded and compliance with the disclosure requirements of s. 627.4137; and

6. Includes a detailed explanation of the coverage and liability issues and the facts giving rise to the claim, including an explanation of injuries and damages claimed; the names of known witnesses; and a listing and copy, if available, of relevant documents, including medical records, which are available to the third-party claimant or authorized representative at the time of the demand to settle. The third-

party claimant and his or her representatives have a continuing duty to supplement this information as it becomes available.

(c) With respect to a third-party claim, an insurer does not violate the duty set forth in subparagraph (2)(b)1. if, within 60 days after the insurer's receipt of the third-party claimant's written demand to settle, or within 90 days after the insurer's receipt of the notice of the claim, whichever is sooner, the insurer offers to pay the lesser of:

1. the amount request in the third-party claimant's written demand to settle; or

2. the insured's policy limits, in exchange for a release of liability.

(d) If a third-party claimant fails or refuses to provide a demand to settle pursuant to subsection (3)(b), but the insured wishes that its insurer made a policy-limits offer, the insured shall request in writing that the insurer nonetheless offer policy limits.

(e) An insurer has an affirmative defense to any such action if the third-party claimant, the insured, or their representatives fail to fully cooperate in providing all relevant information and in presenting the claim.

(4) Notwithstanding the above, if, two or more third-party claimants make competing claims arising our of a single occurrence, which in total exceed the available policy limits of one or more of the insured parties who may be liable to the third-party claimants, an insurer is not liable beyond the available policy limits for failure to pay all or any portion of the available policy limits to one or more of the third-party

claimants if, within 90 days after receiving notice of the competing claims in excess of the available policy limits, the insurer:

(a) Files an interpleader action under the Florida Rules of Civil Procedure. If the claims of the competing third-party claimants are found to be in excess of the policy limits, the third-party claimants are entitled to a prorated share of the policy limits as determined by the trier of fact. An insurer's interpleader action does not alter or amend the insurer's obligation to defend its insured; or

(b) Pursuant to binding arbitration, makes the entire amount of the policy limits available for payment to the competing third-party claimants before a qualified arbitrator selected by the insurer as the expense of the insurer. The third-party claimants are entitled to a prorated share of the policy limits as determined by the arbitrator, who shall consider the comparative fault, if any, of each third-party claimant, and the total likely outcome at trial based upon the total of the economic and noneconomic damages submitted to the arbitrator for consideration. A third-party claimant whose claim is resolved by the arbitrator shall execute and deliver a general release to the insured party whose claim is resolved by the proceeding.

(5) After settlement of a third-party claim, the third-party claimant's attorney is responsible for the satisfaction of any liens from the settlement funds to the extent such settlement funds are sufficient. If the third-party claimant is not represented by counsel, the third-party claimant shall

provide the insurer with a written accounting of all outstanding liens.

(6) an insurer is not liable for amounts in excess of the policy limits or of the award, whichever is less, if it makes timely payment of an appraisal award.

(7) The fact that the insurer does not accept a demand to settle or offer policy limits under paragraph (3)(c) or (3)(d), pay an appraisal award under subsection (6), or file an interpleader action or make policy limits available for arbitration under subsection (4) during the times specified does not give rise to a presumption that the insurer acted in bad faith.

(8) ~~(2)~~ Any party may bring a civil action against an unauthorized insurer if such party is damaged by a violation of s. 624.401 by the unauthorized insurer.

(9) ~~(3)(a)~~ Except for an action relating to a third-party claim, as a condition precedent to bringing an action under this section, the department and the authorized insurer must have been given 60 days' written notice of the violation. If the department returns a notice for lack of specificity, the 60-day time period shall not begin until a proper notice is filed.

(a) ~~(b)~~ The notice shall be on a form provided by the department and shall state with specificity the following information, and such other information as the department may require:

1. The statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated.

2. The facts and circumstances giving rise to the violation.

3. The name of any individual involved in the violation.

4. 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.~~

5. A statement that the notice is given in order to perfect the right to pursue the civil remedy authorized by this section.

(b) ~~(c)~~ Within 20 days of receipt of the notice, the department may return any notice that does not provide the specific information required by this section, and the department shall indicate the specific deficiencies contained in the notice. A determination by the department to return a notice for lack of specificity shall be exempt from the requirements of chapter 120.

(c) ~~(d)~~ No action shall lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected.

(d) ~~(e)~~ The authorized insurer that is the recipient of a notice filed pursuant to this section shall report to the department on the disposition of the alleged violation.

(e) ~~(f)~~ The applicable statute of limitations for an action under this section shall be tolled for a period of 65 days by

the mailing of the notice required by this subsection or the mailing of a subsequent notice required by this subsection.

(10) ~~(4)~~ Upon adverse adjudication at trial or upon appeal, the authorized insurer is ~~shall be~~ liable for damages, together with court costs and reasonable attorney's fees incurred by the plaintiff.

(11) ~~(5)~~ ~~No~~ Punitive damages may not ~~shall~~ be awarded under this section unless the acts giving rise to the violation occur with such frequency as to indicate a general business practice and these acts are:

(a) Willful, wanton, and malicious;

(b) In reckless disregard for the rights of any insured; or

(c) In reckless disregard for the rights of a beneficiary under a life insurance contract.

Any person who pursues a claim under this subsection must ~~shall~~ post in advance the costs of discovery. Such costs shall be awarded to the authorized insurer if ~~no~~ punitive damages are not awarded to the plaintiff.

(12) ~~(6)~~ This section does ~~shall~~ not ~~be construed to~~ authorize a class action suit against an authorized insurer or a civil action against the commission, the office, or the department or any of their employees, or ~~to~~ create a cause of action if ~~when~~ an authorized health insurer refuses to pay a claim for reimbursement on the ground that the charge for a service was unreasonably high or that the service provided was not medically necessary.

(13) ~~(7) In the absence of expressed language to the contrary,~~ This section does ~~shall~~ not ~~be construed to~~ authorize a civil action or create a cause of action against an authorized insurer or its employees who, in good faith, release information about an insured or an insurance policy to a law enforcement agency in furtherance of an investigation of a criminal or fraudulent act relating to a motor vehicle theft or a motor vehicle insurance claim.

(14) The civil remedies specified in this section are the sole remedies and causes of action for extracontractual damages for bad-faith failure to settle under an insurance contract. Any related common-law causes of action are replaced and superseded by this section. The provisions of this section apply to all cases brought pursuant to this section unless specifically controlled by s. 766.1185.

~~(8) The civil remedy specified in this section does not preempt any other remedy or cause of action provided for pursuant to any other statute or pursuant to the common law of this state. Any person may obtain a judgment under either the common-law remedy of bad faith or this statutory remedy, but shall not be entitled to a judgment under both remedies. This section shall not be construed to create a common-law cause of action. The damages recoverable pursuant to this section shall include those damages which are a reasonably foreseeable result of a specified violation of this section by the authorized insurer and may include an award or judgment in an amount that exceeds the policy limits.~~

(15)~~(9)~~ A surety issuing a payment or performance bond on the construction or maintenance of a building or roadway project is not an insurer for purposes of subsection (2) ~~(1)~~.

Section 2. Paragraph (k) of subsection (3) of section 627.311, Florida Statutes, is amended to read:

627.311 Joint underwriters and joint reinsurers; public records and public meetings exemptions.—

(3) The office may, after consultation with insurers licensed to write automobile insurance in this state, approve a joint underwriting plan for purposes of equitable apportionment or sharing among insurers of automobile liability insurance and other motor vehicle insurance, as an alternate to the plan required in s. 627.351(1). All insurers authorized to write automobile insurance in this state shall subscribe to the plan and participate therein. The plan shall be subject to continuous review by the office which may at any time disapprove the entire plan or any part thereof if it determines that conditions have changed since prior approval and that in view of the purposes of the plan changes are warranted. Any disapproval by the office shall be subject to the provisions of chapter 120. The Florida Automobile Joint Underwriting Association is created under the plan. The plan and the association:

(k)~~1.~~ Shall have no liability, and no cause of action ~~of any nature shall arise~~ against any member insurer or its agents or employees, agents or employees of the association, members of the board of governors of the association, the Chief Financial Officer, or the office or its representatives for any action taken by them in the performance of their duties or

responsibilities under this subsection. Such immunity does not apply to actions for or arising out of a breach of any contract or agreement pertaining to insurance, or any willful tort.

~~2. Notwithstanding the requirements of s. 624.155(3)(a), as a condition precedent to bringing an action against the plan under s. 624.155, the department and the plan must have been given 90 days' written notice of the violation. If the department returns a notice for lack of specificity, the 90-day time period shall not begin until a proper notice is filed. This notice must comply with the information requirements of s. 624.155(3)(b). Effective October 1, 2007, this subparagraph shall expire unless reenacted by the Legislature prior to that date.~~

Section 3. If any provision of this act or its application to any person or circumstance is held invalid, the invalidity does not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and to this end the provisions of this act are severable.

Section 4. This act shall take effect July 1, 2011.

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**T I T L E A M E N D M E N T**

Remove the entire title and insert:

An act relating to civil remedies against insurers; amending s. 624.155, F.S.; revising provisions relating to civil actions against insurers; providing a definition; revising the grounds

for bringing an action based on the insurer's failure to accept an offer to settle within policy limits; providing who may bring such an action; providing requirements for bringing such an action; providing that the insurer has an affirmative defense if a third-party claimant or the insured fails to cooperate with the insurer; providing that an insurer is not liable for two or more claims that exceed the policy limits if it files an interpleader action or makes the policy limits available under arbitration; specifying responsibility for the payment of liens; providing that an insurer is not liable for amounts in excess of the policy limits if it makes timely payment of the appraisal amount; providing that certain refusals to act by the insurer are not presumptive evidence of bad faith; revising requirements relating to the preaction notice of a civil action sent to the Department of Financial Regulation and the insurer; providing that the provisions of the act replace the common law; amending s. 627.311, F.S.; conforming a cross-reference; deleting an obsolete provision; providing for severability; providing an effective date.