

Civil Justice Subcommittee

Monday, April 4, 2011

2:15 PM

404 HOB

**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

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

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 at 1291.

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:

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 interpleader³⁴ 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.

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

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29 627.311, F.S.; conforming a cross-reference; deleting an
 30 obsolete provision; amending s. 627.727, F.S.; revising
 31 and limiting the damages that are recoverable from an
 32 uninsured motorist carrier in a civil action; providing
 33 for severability; providing an effective date.

34

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

36

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

39 624.155 Civil remedy.—

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

44 (2)-(1) Any person may bring a civil action against an
 45 insurer if ~~when~~ such person is damaged:

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

- 48 1. Section 626.9541(1)(i), (o), or (x);
- 49 2. Section 626.9551;
- 50 3. Section 626.9705;
- 51 4. Section 626.9706;
- 52 5. Section 626.9707; or
- 53 6. Section 627.7283.

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

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

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

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

65 | 3. Except as to liability coverages, failing to promptly
 66 | settle claims, when the obligation to settle a claim has become
 67 | reasonably clear, under one portion of the insurance policy
 68 | coverage in order to influence settlements under other portions
 69 | of the insurance policy coverage.

70 |
 71 | Notwithstanding the ~~provisions of the above to the contrary,~~ a
 72 | person pursuing a remedy under this section need not prove that
 73 | such act was committed or performed with such frequency as to
 74 | indicate a general business practice.

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

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

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

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

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

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

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

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

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

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

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

113 later, the insurer offers to pay the lesser of:

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

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

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

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

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

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

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

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

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

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

168 (8)-(2) Any party may bring a civil action against an

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

171 | (9)(3)(a) Except for an action relating to a third-party
 172 | claim, as a condition precedent to bringing an action under this
 173 | section, the department and the authorized insurer must be have
 174 | ~~been~~ given 60 days' written notice of the violation. If the
 175 | department returns a notice for lack of specificity, the 60-day
 176 | time period does shall not begin until a proper notice is filed.

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

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

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

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

190 | 4. Reference to specific policy language that is relevant
 191 | to the violation, if any. ~~If the person bringing the civil~~
 192 | ~~action is a third party claimant, she or he shall not be~~
 193 | ~~required to reference the specific policy language if the~~
 194 | ~~authorized insurer has not provided a copy of the policy to the~~
 195 | ~~third party claimant pursuant to written request.~~

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

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

199 6. Such other information as the department may require.

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

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

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

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

217 (10) With respect to:

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

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

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

233 (11)(4) Upon adverse adjudication at trial or upon appeal,
 234 the authorized insurer is ~~shall be~~ liable for damages, together
 235 with court costs and reasonable attorney's fees incurred by the
 236 plaintiff. An award of fees and costs may not include any form
 237 of multiplier or enhancement.

238 (12)(5) ~~No~~ Punitive damages may not ~~shall~~ be awarded under
 239 this section unless the acts giving rise to the violation occur
 240 with such frequency as to indicate a general business practice
 241 and these acts are:

- 242 (a) Willful, wanton, and malicious;
- 243 (b) In reckless disregard for the rights of any insured;
- 244 or
- 245 (c) In reckless disregard for the rights of a beneficiary
- 246 under a life insurance contract.

247
 248 Any person who pursues a claim under this subsection must ~~shall~~
 249 post in advance the costs of discovery. Such costs shall be
 250 awarded to the authorized insurer if ~~no~~ punitive damages are not
 251 awarded to the plaintiff.

252 (13)(6) This section does ~~shall~~ not be ~~construed to~~

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

260 ~~(14)(7) In the absence of expressed language to the~~
 261 ~~contrary,~~ This section does ~~shall not be construed to~~ authorize
 262 a civil action or create a cause of action against an authorized
 263 insurer or its employees who, in good faith, release information
 264 about an insured or an insurance policy to a law enforcement
 265 agency in furtherance of an investigation of a criminal or
 266 fraudulent act relating to a motor vehicle theft or a motor
 267 vehicle insurance claim.

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

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

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

287 (16)~~(9)~~ A surety issuing a payment or performance bond on
 288 the construction or maintenance of a building or roadway project
 289 is not an insurer for purposes of subsection (2) ~~(1)~~.

290 Section 2. Paragraph (k) of subsection (3) of section
 291 627.311, Florida Statutes, is amended to read:

292 627.311 Joint underwriters and joint reinsurers; public
 293 records and public meetings exemptions.—

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

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

318 ~~2. Notwithstanding the requirements of s. 624.155(3)(a),~~
 319 ~~as a condition precedent to bringing an action against the plan~~
 320 ~~under s. 624.155, the department and the plan must have been~~
 321 ~~given 90 days' written notice of the violation. If the~~
 322 ~~department returns a notice for lack of specificity, the 90-day~~
 323 ~~time period shall not begin until a proper notice is filed. This~~
 324 ~~notice must comply with the information requirements of s.~~
 325 ~~624.155(3)(b). Effective October 1, 2007, this subparagraph~~
 326 ~~shall expire unless reenacted by the Legislature prior to that~~
 327 ~~date.~~

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

330 627.727 Motor vehicle insurance; uninsured and
 331 underinsured vehicle coverage; insolvent insurer protection.—

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

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

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

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

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 1187 (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

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

3
4 **Amendment (with title amendment)**

5 Remove everything after the enacting clause and insert:

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

8 624.155 Civil remedy.—

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

14 (2)(1) Any person may bring a civil action against an
15 insurer if ~~when~~ such person is damaged:

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

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

19 2. Section 626.9551;

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 1187 (2011)

Amendment No. 1

20 3. Section 626.9705;

21 4. Section 626.9706;

22 5. Section 626.9707; or

23 6. Section 627.7283.

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

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

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

35 3. Except as to liability coverages, failing to promptly
36 settle claims, when the obligation to settle a claim has become
37 reasonably clear, under one portion of the insurance policy
38 coverage in order to influence settlements under other portions
39 of the insurance policy coverage.

40
41 Notwithstanding the ~~provisions of the above to the contrary~~, a
42 person pursuing a remedy under this section need not prove that
43 such act was committed or performed with such frequency as to
44 indicate a general business practice.

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

Amendment No. 1

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

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

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

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

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

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

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

Amendment No. 1

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

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

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

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

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

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

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

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

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 1187 (2011)

Amendment No. 1

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

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

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

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

COMMITTEE/SUBCOMMITTEE AMENDMENT

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

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

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

169 | (8)(2) Any party may bring a civil action against an
170 | unauthorized insurer if such party is damaged by a violation of
171 | s. 624.401 by the unauthorized insurer.

172 | (9)(3)(a) Except for an action relating to a third-party
173 | claim, as a condition precedent to bringing an action under this
174 | section, the department and the authorized insurer must be have
175 | been given 60 days' written notice of the violation. If the
176 | department returns a notice for lack of specificity, the 60-day
177 | time period does shall not begin until a proper notice is filed.

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

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

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

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

191 4. Reference to specific policy language that is relevant
192 to the violation, if any. ~~If the person bringing the civil~~
193 ~~action is a third party claimant, she or he shall not be~~
194 ~~required to reference the specific policy language if the~~
195 ~~authorized insurer has not provided a copy of the policy to the~~
196 ~~third party claimant pursuant to written request.~~

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

200 6. Such other information as the department may require.

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

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

COMMITTEE/SUBCOMMITTEE AMENDMENT

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Amendment No. 1

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

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

218 (10)~~(4)~~ Upon adverse adjudication at trial or upon appeal,
219 the authorized insurer is ~~shall be~~ liable for damages, together
220 with court costs and reasonable attorney's fees incurred by the
221 plaintiff.

222 (11)~~(5)~~ ~~No~~ Punitive damages may not ~~shall~~ be awarded under
223 this section unless the acts giving rise to the violation occur
224 with such frequency as to indicate a general business practice
225 and these acts are:

226 (a) Willful, wanton, and malicious;

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

228 or

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

231

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

236 (12)~~(6)~~ This section does ~~shall~~ not be ~~construed to~~
237 authorize a class action suit against an authorized insurer or a
238 civil action against the commission, the office, or the

COMMITTEE/SUBCOMMITTEE AMENDMENT

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

244 ~~(13)(7) In the absence of expressed language to the~~
245 ~~contrary,~~ This section does ~~shall~~ not be construed to authorize
246 a civil action or create a cause of action against an authorized
247 insurer or its employees who, in good faith, release information
248 about an insured or an insurance policy to a law enforcement
249 agency in furtherance of an investigation of a criminal or
250 fraudulent act relating to a motor vehicle theft or a motor
251 vehicle insurance claim.

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

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

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 1187 (2011)

Amendment No. 1

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

271 | (15)(9) A surety issuing a payment or performance bond on
272 | the construction or maintenance of a building or roadway project
273 | is not an insurer for purposes of subsection (2) (1).

274 | Section 2. Paragraph (k) of subsection (3) of section
275 | 627.311, Florida Statutes, is amended to read:

276 | 627.311 Joint underwriters and joint reinsurers; public
277 | records and public meetings exemptions.—

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

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

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 1187 (2011)

Amendment No. 1

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

302 ~~2. Notwithstanding the requirements of s. 624.155(3)(a),~~
303 ~~as a condition precedent to bringing an action against the plan~~
304 ~~under s. 624.155, the department and the plan must have been~~
305 ~~given 90 days' written notice of the violation. If the~~
306 ~~department returns a notice for lack of specificity, the 90-day~~
307 ~~time period shall not begin until a proper notice is filed. This~~
308 ~~notice must comply with the information requirements of s.~~
309 ~~624.155(3)(b). Effective October 1, 2007, this subparagraph~~
310 ~~shall expire unless reenacted by the Legislature prior to that~~
311 ~~date.~~

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

318 Section 4. This act shall take effect July 1, 2011.
319
320

321 -----
322 **T I T L E A M E N D M E N T**

COMMITTEE/SUBCOMMITTEE AMENDMENT

Bill No. HB 1187 (2011)

Amendment No. 1

323 Remove the entire title and insert:
324 An act relating to civil remedies against insurers; amending s.
325 624.155, F.S.; revising provisions relating to civil actions
326 against insurers; providing a definition; revising the grounds
327 for bringing an action based on the insurer's failure to accept
328 an offer to settle within policy limits; providing who may bring
329 such an action; providing requirements for bringing such an
330 action; providing that the insurer has an affirmative defense if
331 a third-party claimant or the insured fails to cooperate with
332 the insurer; providing that an insurer is not liable for two or
333 more claims that exceed the policy limits if it files an
334 interpleader action or makes the policy limits available under
335 arbitration; specifying responsibility for the payment of liens;
336 providing that an insurer is not liable for amounts in excess of
337 the policy limits if it makes timely payment of the appraisal
338 amount; providing that certain refusals to act by the insurer
339 are not presumptive evidence of bad faith; revising requirements
340 relating to the preaction notice of a civil action sent to the
341 Department of Financial Regulation and the insurer; providing
342 that the provisions of the act replace the common law; amending
343 s. 627.311, F.S.; conforming a cross-reference; deleting an
344 obsolete provision; providing for severability; providing an
345 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	_____	

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

3
 4 **Substitute Amendment for Amendment (1) by Representative**
 5 **Baxley (with title amendment)**

6 Remove everything after the enacting clause and insert:
 7 Section 1. Section 624.155, Florida Statutes, is amended
 8 to read:

9 624.155 Civil remedy.—

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

15 (2)~~(1)~~ Any person may bring a civil action against an
 16 insurer if ~~when~~ such person is damaged:

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

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

Amendment No. 1a

20 2. Section 626.9551;

21 3. Section 626.9705;

22 4. Section 626.9706;

23 5. Section 626.9707; or

24 6. Section 627.7283.

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

27 1. Not attempting in good faith to settle claims when,
28 under all the circumstances, it could and should have done so,
29 had it acted fairly and honestly toward its insured and with due
30 regard for her or his interests;

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

34 3. Except as to liability coverages, failing to promptly
35 settle claims, when the obligation to settle a claim has become
36 reasonably clear, under one portion of the insurance policy
37 coverage in order to influence settlements under other portions
38 of the insurance policy coverage.

39
40 Notwithstanding the ~~provisions of the above to the contrary~~, a
41 person pursuing a remedy under this section need not prove that
42 such act was committed or performed with such frequency as to
43 indicate a general business practice.

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

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

Amendment No. 1a

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

143 (8)-(2) Any party may bring a civil action against an
144 unauthorized insurer if such party is damaged by a violation of
145 s. 624.401 by the unauthorized insurer.

146 (9)-(3)-(a) Except for an action relating to a third-party
147 claim, as a condition precedent to bringing an action under this
148 section, the department and the authorized insurer must have
149 been given 60 days' written notice of the violation. If the
150 department returns a notice for lack of specificity, the 60-day
151 time period shall not begin until a proper notice is filed.

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

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

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159 | 2. The facts and circumstances giving rise to the
160 | violation.

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

162 | 4. Reference to specific policy language that is relevant
163 | to the violation, if any. ~~If the person bringing the civil~~
164 | ~~action is a third party claimant, she or he shall not be~~
165 | ~~required to reference the specific policy language if the~~
166 | ~~authorized insurer has not provided a copy of the policy to the~~
167 | ~~third party claimant pursuant to written request.~~

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

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

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

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

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

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

188 ~~(10)(4)~~ Upon adverse adjudication at trial or upon appeal,
189 the authorized insurer is ~~shall be~~ liable for damages, together
190 with court costs and reasonable attorney's fees incurred by the
191 plaintiff.

192 ~~(11)(5)~~ ~~No~~ Punitive damages may not ~~shall~~ be awarded under
193 this section unless the acts giving rise to the violation occur
194 with such frequency as to indicate a general business practice
195 and these acts are:

196 (a) Willful, wanton, and malicious;

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

198 or

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

201
202 Any person who pursues a claim under this subsection must ~~shall~~
203 post in advance the costs of discovery. Such costs shall be
204 awarded to the authorized insurer if ~~no~~ punitive damages are not
205 awarded to the plaintiff.

206 ~~(12)(6)~~ This section does ~~shall~~ not be ~~construed to~~
207 authorize a class action suit against an authorized insurer or a
208 civil action against the commission, the office, or the
209 department or any of their employees, or ~~to~~ create a cause of
210 action if ~~when~~ an authorized health insurer refuses to pay a
211 claim for reimbursement on the ground that the charge for a
212 service was unreasonably high or that the service provided was
213 not medically necessary.

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214 ~~(13)(7) In the absence of expressed language to the~~
215 ~~contrary,~~ This section does ~~shall~~ not be construed to authorize
216 a civil action or create a cause of action against an authorized
217 insurer or its employees who, in good faith, release information
218 about an insured or an insurance policy to a law enforcement
219 agency in furtherance of an investigation of a criminal or
220 fraudulent act relating to a motor vehicle theft or a motor
221 vehicle insurance claim.

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

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

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241 ~~(15)(9)~~ A surety issuing a payment or performance bond on
242 the construction or maintenance of a building or roadway project
243 is not an insurer for purposes of subsection (2) ~~(1)~~.

244 Section 2. Paragraph (k) of subsection (3) of section
245 627.311, Florida Statutes, is amended to read:

246 627.311 Joint underwriters and joint reinsurers; public
247 records and public meetings exemptions.-

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

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

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

272 ~~2. Notwithstanding the requirements of s. 624.155(3)(a),~~
273 ~~as a condition precedent to bringing an action against the plan~~
274 ~~under s. 624.155, the department and the plan must have been~~
275 ~~given 90 days' written notice of the violation. If the~~
276 ~~department returns a notice for lack of specificity, the 90-day~~
277 ~~time period shall not begin until a proper notice is filed. This~~
278 ~~notice must comply with the information requirements of s.~~
279 ~~624.155(3)(b). Effective October 1, 2007, this subparagraph~~
280 ~~shall expire unless reenacted by the Legislature prior to that~~
281 ~~date.~~

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

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

289

290

291

292

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

293

Remove the entire title and insert:

294

An act relating to civil remedies against insurers; amending s.

295

624.155, F.S.; revising provisions relating to civil actions

296

against insurers; providing a definition; revising the grounds

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