The Florida Justice Reform Institute Supports CS/CS/HB 837 and Third-Party Bad Faith Reform

In Florida, an individual can sue an insurer when he or she believes the insurer acted in "bad faith" in defending or settling a claim. A third-party bad faith claim typically arises when an insurer fails to settle an injured party's claim against the insured within the insurance policy limits, thereby exposing the insured to a judgment for damages in excess of the policy limits. Third-party bad faith has long been part of Florida's common law. *See Auto. Mut. Indem. Co. v. Shaw*, 184 So. 852 (Fla. 1938). Unfortunately, the potential to recover windfall damages in excess of policy limits is a powerful incentive and has led to rampant litigation abuse. There is no duty on the part of a third party to cooperate with an insurance company in settling a claim. Accordingly, attorneys engage in various abusive strategies in order to set up a bad faith claim for their client. These include stalling tactics, intentional misinformation, and unreasonable settlement-related demands.

Further, while an insurer's negligence is relevant to the question of bad faith, ***negligence alone does not amount to bad faith.*** *See Boston Old Colony Ins. Co. v. Gutierrez*, 386 So. 2d 783, 785 (Fla. 1980). Nevertheless, an insurer's negligent conduct is often held to amount to bad faith under the current totality of the circumstances standard provided for in case law.

During the 2023 legislative session, the Legislature should pass CS/CS/HB 837 ("HB 837"), which in Section 3 raises the standard for establishing bad faith and enacts numerous other reforms that will curb abuse of these claims. Specifically, Section 3 of HB 837 would provide as follows:

- Provide a safe harbor from bad faith where an insurer tenders the lesser of the policy limits or the amount demanded by the claimant within 120 days after receiving actual notice of a claim which is accompanied by sufficient evidence to support the amount of the claim. (Lines 291-297.) Further, the failure of an insurer to offer payment pursuant to this section does not constitute bad faith and is inadmissible as evidence of bad faith. (Lines 298-301.) If the insurer failed to tender within the 120-day period, any applicable statute of limitations is extended for an additional 120 days. (Lines 302-304.)

- Confirm that mere negligence alone is insufficient to constitute bad faith. (Lines 308-309.)

- Require the insured, claimant, and any representative of the insured or claimant to act in good faith in furnishing information about the claim, in making demands of the insurer, in setting deadlines, and in attempting to settle a claim—thus discouraging parties from "setting up" third-party bad faith claims. (Lines 310-315.)

- A trier of fact may also consider whether the insured, claimant, or representative of either failed to act in good faith, in which case the trier of fact may reasonably reduce the damages awarded against the insurer. (Lines 316-321.)

- Allow insurers facing multiple claims which in total exceed the available policy limits access to interpleader actions or arbitration in order to resolve the claims and avoid bad faith. (Lines 322-352.)

***Laforet* and the Totality of the Circumstances Standard**

In *State Farm Mutual Automobile Insurance Co. v. Laforet*, 658 So. 2d 55 (Fla. 1995), the Florida Supreme Court clarified that the wholly subjective "totality of the circumstances" standard should be applied in determining whether an insurer acted in bad faith. In *Laforet* the insurer contended that, instead, the "fairly debatable" standard should apply. Under the fairly debatable standard, a claim for bad faith can succeed only if the plaintiff can show the absence of a reasonable basis for the insurer to deny the claim. *Id.* at 62.

The Court rejected the fairly debatable standard. In doing so, the Court looked to section 624.155, Florida Statutes, which was initially enacted to create a first-party bad faith cause of action. Under section 624.155, an insurer has acted in bad faith if it has not attempted in good faith to settle the 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 the insured's interest.

The Court said that section 624.155 applies to both first- and third-party bad faith claims and held that a totality of the circumstances standard similar to the statutory standard should apply to common-law third-party bad faith claims. Under this nebulous, vague standard, a court must consider five factors in evaluating whether an insurer acted in bad faith: (1) whether the insurer was able to obtain a reservation of the right to deny coverage if a defense were provided; (2) efforts or measures taken by the insurer to resolve the coverage dispute promptly or in such a way as to limit any potential prejudice to the insureds; (3) the substance of the coverage dispute or the weight of legal authority on the coverage issue; (4) the insurer's diligence and thoroughness in investigating the facts specifically pertinent to coverage; and (5) the insurer's efforts to settle the liability claim in the face of the coverage dispute. *Id.* at 63.

Thus, despite the Florida Supreme Court's past assurances that an insurer's negligence does not amount to bad faith, now ordinary negligence is often deemed "bad faith" under the totality of the circumstances standard, as illustrated by the following cases following *Laforet*.

In *Berges v. Infinity Insurance Co.*, 896 So. 2d 665 (Fla. 2005), the third-party claimant demanded that the insurer settle the claim for the $20,000 policy limits ***within 25 days*** of the demand letter. Although the insurer verbally accepted the offer within the deadline, the insurer's written acceptance did not make it in time due to a mistyped zip code on the envelope. The claimant revoked his offer and a jury delivered a bad faith verdict of almost $1.9 million. The Court held that a jury could decide the insurer acted in bad faith, emphasizing that under the totality of the circumstances standard, the focus is on the insurer's entire conduct in the handling of the claim. In dissent, Justice Wells expressed his concerns about the lack of a logical, objective standard for bad faith, which had resulted in strategies employed by plaintiffs to manufacture bad faith claims and had ultimately led to "limitless, court-created insurance." *Id.* at 686 (Wells, J., dissenting).

In *United Automobile Insurance Co. v. Levine*, 87 So. 3d 782 (Fla. 3d DCA 2011), the insurer tendered the policy limits to an injured third party's estate prior to receiving any demand or claim, along with a general release in favor of the insured. Acceptance of the policy limits, however, was not conditioned on signing the release. Two months later, without explanation, the estate returned the check. Later the estate complained that the release would preclude the estate from bringing other claims. On appeal, the Third DCA upheld the $5.2 million bad faith damages award against the insurer, stating that until there is a substantial change in Florida's bad faith law, juries would be required to decide bad faith in these circumstances.

In *Goheagan v. American Vehicle Insurance Co.*, 107 So. 3d 433 (Fla. 4th DCA 2011), the injured party was in a coma. The tortfeasor's insurer immediately tried to contact the injured party's next of kin, her mother, and was told the mother had retained an attorney. Despite numerous attempts to reach the mother and/or her attorney, the mother rebuffed the insurer's communications and refused to give the insurer the name of the attorney. The Fourth DCA held, however, that this claim survived summary judgment under the totality of the circumstances standard because a jury could find the insurer failed to proactively settle the case in good faith.

In *Harvey v. GEICO General Insurance Co.*, 259 So. 3d 1 (Fla. 2018), the insurer immediately investigated the claim, quickly advised the insured of the possibility of an excess judgment and the right to retain an attorney, and unconditionally tendered the policy limits within nine days of the accident. But the insurer did not immediately tell the insured that the claimant had requested a statement of financial assets, nor did the insurer immediately provide the statement to the injured party's estate. In upholding the $8.47 million bad faith verdict, the Florida Supreme Court emphasized that the jury was entitled to find that the insurer still acted in bad faith and that nothing "can be read to suggest that an insurer's obligations end by tendering the policy limits." *Id.* at 10. In dissent, Chief Justice Canady said that Florida law does not demand perfection by insurers and reminded the majority that even "negligent claims handling does not equate to bad faith." *Id.* at 13 (Canady, C.J., dissenting). Echoing Justice Wells' dissent in *Berges*, Chief Justice Canady advised that the Court should not merely say bad faith is always a jury question and instead set forth clear, logical, and objective rules for bad faith—otherwise courts will continue to sanction awards of limitless insurance.

As a consequence of *Laforet* and the numerous decisions interpreting that nebulous totality of the circumstances standard, Florida's standard jury instructions on bad faith invite the jury to review all the circumstances and subjectively decide whether the insurer's conduct amounts to bad faith—even if that conduct is only negligent:

> Civil Jury Instruction 404.4 Insurer's Bad Faith: Bad faith on the part of an insurance company is failing to settle a claim when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward [its policyholder] [its insured] [an excess carrier] and with due regard for [his] [her] [its] [their] interests.

CS/HB 837 would address these concerns by confirming that negligent conduct does not rise to the level of bad faith. It would also discourage "set-ups" of bad faith claims by requiring insureds and their representatives to act in good faith in making demands, furnishing information, and setting deadlines, and any such bad faith conduct may be considered in the award of damages.

A Safe Harbor from Bad Faith Liability Is Necessary

A necessary reform for third-party bad faith is the creation of one or more so-called "safe harbors" with which an insurer may comply to avoid bad faith liability, much like the safe harbor that exists in first-party bad faith for insurers. In a first-party bad faith action, no action for bad faith will lie if, within 60 days after the insurer receives notice from the Department of Financial Services of the claimed violation in accordance with the statute, the damages are paid or the circumstances giving rise to the violation are corrected. § 624.155(3)(c), Fla. Stat.

HB 837 would ensure all bad faith claims have such a safe harbor. Specifically, HB 837 would create new subsection (4) in section 624.155, which provides that an action for bad faith shall not lie if the insurer tenders the lesser of the policy limits or the demand amount within 120 days after receiving actual notice of a claim, accompanied by sufficient evidence to support the amount of the claim. (Lines 291-297.) The legislation would also confirm that an insurer's failure to offer payment under this provision is not bad faith and is inadmissible in any action seeking to establish bad faith on the insurer's part. (Lines 298-301.) If the insurer fails to tender in accordance with the statute during the 120-day period, the statute of limitations would correspondingly be extended for an additional 120 days. (Lines 302-304.)

Interpleader and Arbitration

Critically too, HB 837 would allow insurers faced with multiple claimants whose claims in total exceed policy limits to access tools that will enable the insurer to avoid bad faith liability—interpleader and arbitration.

Generally, interpleader is a procedure whereby a party files an action to place into a court registry a sum of money that is subject to multiple claims; such an action protects the party from having to defend several actions by conflicting claimants and requires the claimants to resolve their disputes to the pot of money in one action. While insurance policy proceeds are frequently the subject of interpleader actions, under current law a liability insurer may not file an interpleader action to require multiple claimants to determine their respective rights to the insured's policy limits. However, this action should be available to insurers in such situations. Take an example of a car accident with multiple victims where the insured driver has a low policy limit. Each accident victim has drastically different injuries—one person dies, one person is paralyzed, and one person has only minor injuries. The least injured party may be the first to approach the driver's insurer about the policy limit amount and attempt to take it all or significantly reduce the amount available to the remaining, more severely injured parties. What should the insurer do in such a situation? HB 837 provides an answer.

Section 3 of HB 837 would create new subsection (6) of section 624.155, Florida Statutes, providing an insurer in such a circumstance certain outs. Specifically, 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 claimants if, within 90 days after receiving notice of the competing claims, the insurer either (a) uses interpleader or (b) uses arbitration. (Lines 322-331.)

Under proposed new subsection (6)(a), the insurer may file an interpleader action. If the claimants 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. (Lines 332-338.)

Under proposed new subsection (6)(b), the insurer may use binding arbitration if agreed to by the insurer and the third-party claimants. Under this procedure, the insurer would make the entire amount of the policy limits available for payment to the competing third-party claimants before a qualified arbitrator agreed to by the insurer and the third-party claimants 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 must 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 non-economic damages submitted to the arbitrator for consideration. A third-party claimant whose claim is resolved by the arbitrator must execute and deliver a general release to the insured party whose claims is resolved by the proceeding. (Lines 339-352.)

The Institute Supports HB 837, Which Will Curb Abuse of Third-Party Bad Faith Claims

Section 3 of HB 837 makes numerous critical changes to ensure that third-party bad faith claims are not abused, only true bad faith is subject to extracontractual liability, and insurers are equitably treated. For all these reasons, the Institute supports passage of HB 837.