The Florida Justice Reform Institute Opposes HB 451 and Undoing Recent Insurance Litigation Reforms

"You're afraid of making mistakes. Don't be. Mistakes can be profited by."
Ray Bradbury, FAHRENHEIT 451.

Florida has enacted significant reforms over the past few years designed to reduce frivolous and unnecessary insurance litigation—litigation that was largely driven by the promise of statutory, "one-way" attorney fees recoverable only by insureds and their assigns—and to make Florida's insurance market more attractive to insurers. HB 451 appears designed to undo those reforms.

For decades, Florida's one-way attorney fee statutes essentially made litigation against insurers risk-free for plaintiffs. Because these fee-shifting statutes were one-way—as only prevailing plaintiffs could recover their attorney fees, not prevailing insurers—they incentivized plaintiffs to bring suit, even over low-dollar and non-meritorious disputes. This resulted in a perpetration of low severity damage claims driving recovery of high plaintiffs' attorney fees, costing insurers and Florida taxpayers billions of dollars per year. The Legislature ended the abuse of the one-way attorney fee statutes in property insurance cases in late 2022, and then finally repealed these statutes in their entirety in 2023 through HB 837.

Notwithstanding these significant strides forward, HB 451 threatens to undo those efforts and create new incentives to litigate over any and all insurance disputes given the promise of attorney fees. More specifically, Section 6 of the legislation would amend section 627.70152, Florida Statutes, to create a mechanism by which one-way attorney fees may be recovered in property insurance disputes once more. The prevailing party in a dispute would be awarded up to 100 percent of their attorney fees dependent upon the degree of success achieved in the suit as compared to the claimant's presuit settlement demand. However, it appears there would be full recovery by the prevailing party of their attorney fees where (a) the insurer fails to comply with statutory timelines for responding to claims or engaging in mediation, (b) the claimant's demand "is deemed reasonable by the court, regardless of judgment outcome," or (c) the court finds evidence of bad faith or abuse of the litigation process. In addition, numerous sections of the legislation would further undermine the state's efforts to make Florida's insurance market stronger and more predictable for insurers. Because HB 451 would undo all of the Legislature's good work to address the property insurance litigation crisis, the Florida Justice Reform Institute opposes this legislation.

The Original Purpose of the One-Way Attorney Fee Statutes Was to Level the Playing Field Between Insureds and Insurers—But They Instead Led to Litigation Driven by the Promise of Attorney Fees

Under the well-established common law rule, neither prevailing plaintiffs nor prevailing defendants are entitled to recover attorney's fees unless authorized by contract or statute.[1] Section 627.428, Florida Statutes, and its counterpart for surplus lines insurers in section 626.9373, were exceptions to that common law rule. Called herein the one-way attorney fee statutes, these laws authorized an award of attorney fees to certain prevailing parties in disputes with insurers.[2] Under section 627.428(1), for example, "any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer" was entitled to an award of attorney fees if he or she prevailed in a dispute with an insurer, subject to some exceptions.[3]

A number of purposes have been ascribed to such laws. Traditionally, one-way attorney fee statutes operate to "compensate the prevailing plaintiff, promote public interest litigation, punish or deter the losing party for misconduct, or prevent abuse of the judicial system."[4] Attorney fee statutes that categorically shift fees to only one type of losing party are intended to avoid "grave injustices" that arise with "strict adherence to the [common law] rule [that each party bears its own attorney's fees], indiscriminate to the equities of particular cases."[5] For example, statutory exceptions to the common law rule have been established for certain defendants perceived to have greater economic power, like railroads, and, in this case, insurance companies.[6]

In *Feller v. Equitable Life Assurance Society of the United States*,[7] the Florida Supreme Court described the purposes of the one-way attorney fee statute in section 627.428 as follows: "to discourage the contesting of policies . . . and to reimburse successful plaintiffs reasonably for their outlays for attorney's fees when a suit is brought against them, or they are compelled to sue, in Florida Courts to enforce their contracts."[8] According to the Court, reimbursing individual insureds and beneficiaries is necessary because "[i]t is an undue hardship upon beneficiaries of policies to be compelled to reduce the amount of their insurance by paying attorney's fees when

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[1]*See Rivera v. Deauville Hotel, Emps. Serv. Corp.*, 277 So. 2d 265, 266 (Fla. 1973); *Stone v. Jeffres*, 208 So. 2d 827, 828-29 (Fla. 1968).
[2]*See Stone*, 208 So. 2d at 828-29; *see also* § 627.428, Fla. Stat. (2022).
[3]§ 627.428(1), Fla. Stat. (2022); *see also, e.g.*, *Danis Indus. Corp. v. Ground Imp. Techniques, Inc.*, 645 So. 2d 420, 421 (Fla. 1994) (Section 627.428 "is a one-way street offering the potential for attorney's fees only to the insured or beneficiary.").
[4]John F. Vargo, *The American Rule on Attorney Fee Allocation: The Injured Person's Access to Justice*, 42 Am. U. L. Rev. 1567, 1588 (1993).
[5]Lawrence J. Hollander & Michael H. Cramer, *Attorney's Fees—Should They Be Taxed as Costs?*, 8 Miami L.Q. 573 (Summer 1954).
[6]*Id.* at 573 (citing § 356.04, Fla. Stat. (1953) (railroads); § 625.08, Fla. Stat. (1953) (insurance companies)); *see also, e.g.*, John Leubsdorf, *Toward a History of the American Rule on Attorney Fee Recovery*, 47 Law & Contemp. Probs. 9, 25 (1984) (with the creation of one-way attorney fee statutes, legislatures "were beginning to look at realistic attorney fee awards less as bounties for greedy lawyers and more as aids to needy plaintiffs or sanctions against corporate defendants").
[7]57 So. 2d 581 (Fla. 1952).
[8]*Id.* at 586; *accord State Farm Fire & Cas. Co. v. Palma*, 629 So. 2d 830, 831 (Fla. 1993); *Ins. Co. of N. Am. v. Lexow*, 602 So. 2d 528, 531 (Fla. 1992).

suits are necessary in order to collect that to which they are entitled."[9] Large insurance companies do not incur the same hardship. Thus, the one-way attorney fee statutes "level[ed] the playing field so that the economic power of insurance companies is not so overwhelming that injustice may be encouraged because people will not have the necessary means to seek redress in the courts."[10]

Regardless of the positive intent behind the one-way attorney fee statutes, they became the driving force of insurance litigation and the cause of several crises in Florida's insurance market. Plaintiffs had little reason ***not*** to pursue litigation—no matter the value or merit of the claim at issue—because they were shielded from having to pay the insurer's attorney fees if they lost, and got the added benefit of coverage for their own attorney fees if they won.

In a 2006 decision, *Allstate Insurance Co. v. Regar*,[11] the Second District Court of Appeal held that an assignee was entitled to attorney fees under the one-way attorney fee statute. However, the court was "not unsympathetic" to the defendant insurer's plight given the "exponential[] increas[e]" in the number of extracontractual damages cases filed without any apparent link to the conduct of insurers. "Instead, plaintiff's attorneys are filing bad faith actions over issues that it seems could be simply resolved, like the wording of the release in this case."[12] The court observed that "[t]hese attorneys are perhaps motivated by the promise of fees under Section 627.428 upon prevailing in this action. Certainly this case has mushroomed into ***over $200,000 in attorney's fees***"—an amount that pales in comparison to the amounts awarded today—"plus as as-yet-undetermined amount of appellate attorney's fees from an initial offer of settlement for meager policy limits of ***$25,000***."[13] While expressing concern that it was "not certain that outcomes like today's were contemplated at the time of the statute's enactment," the Florida court acknowledged "that issue is for resolution by the legislature."[14]

The Legislature answered that call by finally repealing the one-way attorney fee statutes in 2023.

The Legislature Should Not Reopen the Door to Insurance Litigation Motivated by Attorney Fees, Nor Should It Make Florida's Insurance Market Even More Inhospitable to Insurers

HB 451 proposes to unravel much of the good work done by the Legislature in the past few years to reduce unnecessary insurance litigation. The goals of those prior reforms were to make the insurance market more predictable and attractive for property insurers to move into Florida. HB 451 threatens to end those reforms before they have the chance to achieve real and long-lasting success.

<u>The Legislation Would Reinstate One-Way Attorney Fees and Incentivize Litigation</u>

First, Section 6 of the legislation would recreate a scheme by which claimants may recover their attorney fees in most insurance disputes. New subsection (8) of section 627.70152 would

[9]*Feller*, 57 So. 2d at 586.
[10]*Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 684 (Fla. 2000).
[11]942 So. 2d 969 (Fla. 2d DCA 2006).
[12]*Id.* at 973.
[13]*Id.* at 973-74 (emphasis added).
[14]*Id.* at 974.

state that "[i]n cases arising from a property insurance dispute, the court ***shall*** determine attorney fees as provided in this subsection."

The legislation then outlines the manner in which those attorney fees would be calculated. In the first three paragraphs ((a), (b), and (c)), recovery would be dependent upon the degree of success achieved in the suit:

- If the judgment entered is greater than 80 percent of the claimant's presuit settlement demand, the prevailing party's attorney—which, in these circumstances, would be the claimant's attorney—"must" be awarded ***100 percent*** of their reasonably incurred attorney fees. Proposed § 627.70152(8)(a) (emphasis added).

- If the judgment entered "is between 20 percent and 80 percent, inclusive, of the claimant's presuit settlement demand," the prevailing party's attorney—which again, in these circumstances, would be the claimant's attorney—"must be awarded the percentage of reasonably incurred attorney fees which is proportional to the percentage of the judgment relative to the presuit demand." Proposed § 627.70152(8)(b).

- If the judgment is less than 20 percent of the claimant's presuit settlement demand, the prevailing party's attorney may not be awarded any attorney fees. Proposed § 627.70152(8)(c). In other words, there is no set of facts under which the insurer would recover their attorney fees, largely making the attorney fees proposed under the statute one-way and risk-free for claimants.

Although the legislation in some ways resembles the prior attorney fee scheme in 627.70152, it differs in that the threshold determination for fees is the ***claimant's*** presuit settlement demand only, when previously section 627.70152 considered the ***insurer's*** presuit settlement offer in conjunction with the presuit settlement demand.[15] This places the conditions for fees entirely in the claimant's control.[16]

In short, the attorney fee scheme that the legislation proposes is untenable. Under paragraph (8)(a), for example, a claimant would be incentivized to make a low-dollar presuit settlement demand because they would be all but assured of recovery of their full attorney fees if they prevail at trial. To take a simple example, in a case in which the insurer denies coverage assume a claimant makes a presuit settlement demand of $5,000 that the insurer rejects. When the case proceeds to

[15] § 627.70152(2)(c), (e) & (8)(a), Fla. Stat. (2021) (in determining fee award, court was to consider "the difference between the amount obtained by the claimant and the ***presuit settlement offer***," defined to mean "the offer made by the insurer in its written response to the notice" of intent to litigate, and the "disputed amount," defined to mean "the difference between the claimant's presuit settlement demand, not including attorney fees and costs listed in the demand, and the insurer's presuit settlement offer, not including attorney fees and costs, if part of the offer" (emphasis added)).

[16] Another concern is that the prior fee calculation of 627.70152 was based on the claimant's ultimate recovery, exclusive of fees and costs, compared to the disputed amount. This time, there is no mention of whether the amount of fees and costs can be included in the "judgment entered" for purposes of determining whether the conditions in paragraphs (8)(a), (b), or (c) are met. Consider a $5,000 dispute where $20,000 in costs is incurred during trial—a common scenario. The claimant could argue the costs must be included in the judgment pursuant to section 57.041, Florida Statutes.

trial, the claimant seeks an even greater amount of damages—say, $20,000. Under paragraph (8)(a) as proposed in the legislation, if the claimant recovers $4,001 or more—i.e., more than 80 percent of the claimant's presuit settlement demand—the claimant recovers 100 percent of their attorney fees, notwithstanding what those fees are and even if they are disproportionate to the amounts at stake.

Under paragraph (8)(b), if the judgment entered is between 20 percent and 80 percent of the claimant's presuit settlement demand, the claimant's attorney will recover an amount of fees proportional to the percentage of the judgment relative to the presuit demand. Using the example above, a claimant would need to recover only ***$1,000*** in the judgment—i.e., 20 percent of the claimant's presuit settlement demand—in order to recover at least 20 percent of the attorney fees incurred. This particular provision will likely be used in cases involving "covered claims" (i.e., the insurer recognizes the loss is covered but there is a dispute over the amount due), where the claimant makes an offer that is unlikely to be accepted, but that does not represent all of the damages at issue. For example, in a hurricane claim, the presuit settlement demand could contemplate a roof replacement at a moderate price, but the ensuing lawsuit could seek to recover for a high cost roof replacement, plus windows, doors, resulting interior damage, and so on. So long as the claimant recovers at least 20% of that more moderately priced presuit settlement demand, they can recover a corresponding proportion of their attorney fees.

Putting paragraphs (8)(a), (b), and (c) aside, the legislation next proposes a trump card: the above provisions requiring a certain degree of success in the suit in order to obtain attorney fees do not apply at all, and attorney fees are presumably fully recoverable, if one of three things occurs:

- "The insurer fails to comply with statutory timelines for responding to claims or engaging in mediation." Proposed § 627.70152(8)(d)1.

- "The claimant's demand is deemed reasonable by the court, regardless of judgment outcome." Proposed § 627.70152(8)(d)2.

- "The court finds evidence of bad faith or abuse of the litigation process by either party." Proposed § 627.70152(8)(d)3.

These exceptions will largely swallow the rule. Under the proposed legislation, an insurer's one-day delay in responding to a claim would presumably require the insurer to pay ***any and all*** of the claimant's attorney fees in ensuing litigation—even if the claimant did not prevail, as the legislation does not specify that paragraph (8)(d) applies only to attorney fees sought by a prevailing party, or even if the one-day delay was irrelevant to the dispute.

The second exception in paragraph (8)(d) is incredibly broad, with no definition given for what is deemed "reasonable"—allowing attorneys that are seeking to recover their fees to place judges in the uncomfortable position of finding a demand "unreasonable" in order to avoid having to award fees. The legislation also indicates that a claimant may recover their attorney fees for bringing a lawsuit ***even if they do not prevail*** simply because the court deems the demand "reasonable." Thus, the legislation would allow the trial court to override the effect of a jury's determination that would otherwise result in the claimant not recovering anything or only a nominal amount on the claim.

The third exception does not define either "bad faith" or "abuse of the litigation process," but creates a scenario in which both sides in litigation will be prompted to point the finger at the other in the hopes of triggering a right to fees. This exception also appears to invite "bad faith" considerations into a lawsuit for breach of contract. Under existing law, those two types of lawsuits are entirely separate. In fact, courts have stated that considerations of bad faith "have no place" in a breach of contract lawsuit[17] and that conflating the two actions would severely prejudice the insurer.[18] Bad faith claims are subject to their own actions under section 624.155, Florida Statutes, and the common law, and follow a finding that the insurer has breached the insurance contract. But HB 451 invites the court to consider bad faith in the breach of contract action, and thus would needlessly expand the scope of discovery in breach of contract actions to now include discovery concerning "bad faith."

The Legislature spent several painstaking years addressing attorney fee claims in insurance disputes and creating mechanisms that encourage the timely resolution of insurance disputes without resort to litigation, like the notice of intent to litigate requirements in section 627.70152. HB 451 proposes to undo those efforts and to give claimants' attorneys numerous new incentives to litigate all in the hope of obtaining attorney fees. The Legislature should reject this effort to go back to one-way attorney fees in insurance litigation.

The Legislation Would Prejudice Insurers in Litigation

What is more, the legislation threatens to make Florida's insurance market even less hospitable for insurers. Sections 4 and 6 appear designed to create circumstances which will make insurers look worse to juries in the courtroom. Section 4 proposes to make various changes to the loss estimates that insurers must disclose. One requirement would be to send out a "written" estimate instead of the electronic estimates permitted now, increasing costs. Further, any changes to the estimate must be maintained and kept for a period of seven years. These onerous changes appear designed to generate complicated loss estimates that can be presented to a jury as evidence of the purported ways in which the insurer did not want to pay the insured.

Section 6 also changes the way an insurer can respond to a notice of intent to initiate litigation when the claim has been denied under section 627.70152, Florida Statutes. Previously, the insurer could respond to a notice of intent to initiate litigation regarding a claim that was denied by (1) accepting coverage, (2) continuing to deny coverage, or (3) reinspecting the property. HB 451 proposes to change this statute to require that the insurer: (1) accept the presuit settlement demand, (2) provide a counteroffer, or (3) state the insurer is "declining to respond." This drastically changes and limits the responses available to an insurer when responding to a notice of intent to initiate litigation. In particular, it would remove the insurer's ability to re-inspect, which is significant, especially if the dispute is over something that the insurer is alleged to have overlooked. Moreover, this section confusingly proposes to amend section 627.70152 to provide

[17] *Citizens Prop. Ins. Corp. v. Mendoza*, 250 So. 3d 716, 719 (Fla. 4th DCA 2018) ("While such considerations may be appropriate in a bad faith case, they have no place in a simple breach of contract action.").

[18] *Maryland Cas. Co. v. Alicia Diagnostic, Inc*., 961 So. 2d 1091, 1092 (Fla. 5th DCA 2007) ("an insurer would be prejudiced by having to litigate either a bad faith claim or an unfair settlement practices claim in tandem with a coverage claim, because the evidence used to prove either bad faith or unfair settlement practices could jaundice the jury's view on the coverage issue").

that OIR may impose any penalty under the Florida Insurance Code on a person who violates this section, which seems out of place in this statute regarding notices of intent to initiate litigation.

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Increasing the Statutory Judgment Interest Rate Is Unnecessary

Finally, Section 1 of the legislation needlessly increases the statutory judgment interest rate. The general rule is that the person to whom a debt is due—including a court judgment—is entitled to interest at the legal rate from the date the debt was due to compensate the person for his or her losses.[19] Where no contractual provision specifies the rate of interest to be assessed on a judgment, the rate of interest is determined by section 55.03, Florida Statutes, which provides for an adjustable interest rate to account for the value of the judgment in current market conditions. More specifically, section 55.03 provides that the Chief Financial Officer sets the applicable interest rates for judgments each calendar quarter by averaging the discount rate of the Federal Reserve Bank of New York for the preceding 12 months, and then adding 400 basis points (4%) to the averaged federal discount rate. § 55.03, Fla. Stat. The law already reflects the reality that a party holding a judgment is losing the time-value of their judgment for however long that judgment is not paid, and thus fairly and reasonably requires an increased amount to be paid on that judgment based on federally-determined rates plus an additional 4 percent. Thus, if rates increase, the judgment to be paid also increases based on those rates plus some. There is no compelling reason, however, to double that calculation by increasing the basis points to 800 basis points or 8 percent as Section 1 of the legislation proposes to do.

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The Legislature must act to protect the good work it has done over the last several years to reduce frivolous and unnecessary insurance litigation and to make Florida's property insurance market more attractive and predictable for insurers. For all these reasons, the Institute opposes HB 451.

[19] *See Langsetmo v. Metza*, 335 So. 3d 708, 711 (Fla. 4th DCA 2022).