SB 230 Is Necessary to End Exploitation of Insurance Litigation Reforms

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.

For decades, Florida's one-way attorney fee statutes, sections 627.428 and 626.9373, Florida Statutes, essentially made insurance policy breach litigation 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 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 2022 through SB 2A and SB 2D.

Notwithstanding these efforts, the plaintiffs' bar has crafted new ways in which to recover attorney fees in insurance disputes—largely by exploiting other recent reforms that were intended to provide insurers with proper notice of claims so that these disputes might be resolved before turning into litigation. To ensure that the Legislature's insurance litigation reforms have the chance to work, the Legislature should pass SB 230 and end the exploitation of these prior reforms.

Background on Notification Requirements in Property Insurance Policy Breach Lawsuits and Bad Faith Lawsuits

Before turning to how these reforms are being exploited, it is necessary to discuss two "notice" procedures in Florida law designed to create opportunities for insurers and insureds to resolve disputes ***before*** resorting to litigation.

Section 627.70152, Florida Statutes, provides for certain notice requirements before a claimant may bring suit under a property insurance policy. More specifically, as a condition precedent to filing such a suit, a claimant must provide the Department of Financial Services with written notice of intent to initiate litigation ("NOI") based on a form provided by the Department that is then forwarded to the insurer. The NOI is required to provide detailed information concerning the claim.

Upon receipt of an NOI, the insurer must respond in writing within 10 business days. § 627.70152(4), Fla. Stat. If an insurer is responding to an NOI following denial of coverage, the insurer must respond by accepting coverage, continuing to deny coverage, or asserting the right to reinspect the damaged property. *Id.* § 627.70152(4)(a). If an insurer is responding to an NOI that alleges an act or omission by the insurer other than a denial of coverage, the insurer must respond

by making a settlement offer or requiring the claimant to participate in appraisal or another method of alternative dispute resolution. *Id.* § 627.70152(4)(b). These requirements, first passed in 2021 SB 76, were designed to encourage early resolution of disputes before proceeding to litigation.

Section 624.155, Florida Statutes, provides a statutory bad faith remedy against insurers. This statute provides that a party may bring a bad faith civil action for extracontractual damages against an insurer for violating certain statutory provisions (under section 624.155(1)(a))[1] or if the insurer has committed one of the following acts (under section 624.155(1)(b)):

- 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.

§ 624.155(1), Fla. Stat.

In order to bring a bad faith claim under this statute, a claimant must first give the insurer 60 days' written notice of the alleged violation via a civil remedy notice ("CRN"). *Id.* § 624.155(3). Pursuant to section 624.155(3)(c), "[n]o action shall lie" if, within 60 days of receiving the CRN, an insurer pays the damages on which the claimed violation is based. This "sixty-day window is designed to be a cure period that will encourage payment of the underlying claim, and avoid unnecessary bad faith litigation." *Talat Enters., Inc. v. Aetna Cas. & Sur. Co*., 753 So. 2d 1278, 1282 (Fla. 2000). Under the CRN statute, every monetary demand made in the CRN must be satisfied in order for the CRN to be "cured."

There are three conditions precedent to filing a bad faith suit: (1) liability for coverage must be established; (2) the amount of damages must be established; and (3) a CRN must be filed. *Cammarata v. State Farm Fla. Ins. Co.*, 152 So. 3d 606, 612 (Fla. 4th DCA 2014). Critically, the *Cammarata* court determined that the first two elements are satisfied by a settlement, including via an appraisal process. *Id.* And courts have further clarified that ***any*** payment of money following an insurer's receipt of a CRN constitutes a confession of judgment, establishing that element necessary to a bad faith action. *See Stiwich v. Progressive Am. Ins. Co.*, 370 So. 3d 687, 689-92 (Fla. 2d DCA 2023).

[1] These are section 626.9541(1)(i), (o), or (x) (relating to unfair claim settlement practices, illegal dealings in premiums and excess or reduced charges for insurance, and refusal to insure), section 626.9551 (relating to certain coercion tactics), section 626.9705 (relating to illegal dealings in life or disability insurance), sections 626.9706 and 626.9707 (relating to discrimination in life and disability insurance), and section 627.7283 (relating to cancellation of motor vehicle insurance).

Section 624.1551, Florida Statutes, was added in 2022, and separately provides that

> [n]otwithstanding any provision of s. 624.155 to the contrary, in any claim for extracontractual damages ***under s. 624.155(1)(b)***, no action shall lie until a named or omnibus insured or a named beneficiary has established through an adverse adjudication by a court of law that the property insurer breached the insurance contract and a final judgment or decree has been rendered against the insurer. Acceptance of an offer of judgment under s. 768.79 or the payment of an appraisal award does not constitute an adverse adjudication under this section. The difference between an insurer's appraiser's final estimate and the appraisal award may be evidence of bad faith under s. 624.155(1)(b), but is not deemed an adverse adjudication under this section and does not, on its own, give rise to a cause of action.

§ 624.1551, Fla. Stat. (emphasis added). Thus, for bad faith actions based on allegations that the insurer committed one of the acts outlined in section 624.155(1)(b), section 624.1551 clarifies that no statutory bad faith action will lie absent an actual adverse adjudication by a court that the insurer breached the contract; acceptance of an offer of judgment or payment of an appraisal award does not count.

Notably, although the one-way attorney fee statutes are repealed, a prevailing insured in a bad faith action brought under section 624.155 is permitted to recover his or her attorney fees—incurred in both the bad faith action ***and*** the underlying breach of contract action. *See* § 624.155(7), Fla. Stat.; *Imhof v. Nationwide Mut. Ins. Co.*, 643 So. 2d 617, 619 (Fla. 1994).

The Plaintiffs' Bar Is Exploiting the NOI, CRN, and Proposal for Settlement Processes

The NOI and CRN processes are designed to give insureds and their insurers an opportunity to resolve insurance disputes before resorting to litigation. But plaintiffs' attorneys are employing a variety of gamesmanship tactics to set up bad faith claims and corresponding attorney fee claims.

<u>Exploitation 1: Allowing a vague CRN to expire before filing an NOI.</u>

Claimants are using the CRN and NOI processes to essentially set up insurers for bad faith claims and a corresponding right to recover attorney fees. A common occurrence is the following: before filing an NOI to signal that the insured intends to file a complaint for breach of an insurance policy, the insured instead files a vague CRN (often claiming violations under section 624.155(1)(a) and (1)(b) in order to avoid application of section 624.1551) which is impossible to cure. The claimant ghosts the insurer after filing the CRN, foreclosing the insurer from curing the CRN.

After the 60-day cure period expires, the claimant files an NOI. If the insurer wants to reverse a prior denial and issue payment, invoke appraisal, or make a settlement offer in response to the NOI, any of those actions will "perfect" the insured's bad faith claim under section 624.155. That is because, under Florida law, if an insurer issues any payment after the 60-day cure period ends, the insured has established the elements for bad faith. Furthermore, despite the Legislature's efforts to end one-way legal fees, the insured will be able to recover them under section 624.155.

Two real-life examples illustrate this exact fact pattern:

Barvoets v. Kin Interinsurance Network (Exhibit A)

- On February 14, 2024, the claimants filed a CRN, alleging violations under paragraph (1)(a) and (1)(b) of section 624.155. The claimants alleged that Kin made a claims determination partially denying coverage, issuing payment in the amount of $7,524.75. The claimants alleged they have obtained an estimate for repairs in the amount of $122,477.89, which they assert is the full amount necessary to restore their home to its pre-loss condition.

- The cure request is not only to tender payment to the claimants in the amount of $122,477.89, but to also "[c]reate, adopt and implement adequate standards and/or guidelines for the proper investigation and adjustment of claims" and "[p]rovide sufficient training and supervision of employees and agents to avoid further violations . . . ."

- A little more than 60 days after filing this vague CRN, the claimants filed an NOI on April 17, 2024, seeking $129,978 in a presuit settlement demand based on damages of $122,478. The NOI statute mandates that the insurer respond, but if the insurer pays any portion of this amount, the claimants' bad faith claim will be perfected.

Johnson v. Kin Interinsurance Network (Exhibit B)

- On January 16, 2024, the claimant filed a CRN alleging violations of section 624.155(1)(a) and (1)(b), and asserting that the insurer should accept full coverage and pay the insured's estimate of damages, $38,244.72 and $13,000 for an air conditioning repair company's invoice, less the applicable deductible and prior payments.

- A little more than 60 days after filing the vague CRN, on March 28, 2024, the claimant filed an NOI, with a presuit settlement demand of $149,091 based on damages of $139,091. If the insurer pays any portion of this amount, the claimants' bad faith claim will be perfected, even though the NOI statute is intended to offer insurers an opportunity to avoid further litigation by resolving the claim prior to litigation.

<u>Exploitation 2: Allowing a vague CRN to expire before invoking appraisal.</u>

A variation on the above is a scenario in which the claimant files a vague CRN asserting violations under both section 624.155(1)(a) and (1)(b). Once the 60-day cure period expires, the claimant then invokes appraisal under the insurance policy. Appraisal often results in a split of the difference between the claimant's demand and the insurer's offer. But, if the appraisal panel finds even $1 in the claimant's favor, the claimant will have perfected a statutory bad faith claim and the right to collect attorney fees.

<u>Exploitation 3: Allowing a vague CRN to expire before filing a low proposal for settlement.</u>

Yet one more variation on the above scenario allows claimants and their attorneys to set up bad faith claims and obtain one-way legal fees. In this scenario, the claimant files a CRN right before or after filing a lawsuit against the insurer for breach of the insurance policy. Then, once the 60-day cure period expires, the claimant files a proposal for settlement under Florida Rule of

Civil Procedure 1.442 and section 768.79, Florida Statutes, that is significantly lower than the demand made in the claimant's NOI.

This forces the insurer to either accept the proposal for settlement (which "perfects" a statutory bad faith claim under section 624.155) or go to trial while risking that the claimant will beat the lowball proposal for settlement and in doing so be able to collect attorneys' fees under section 768.79, Florida Statutes,[2] all in addition to fees in a future bad faith action.

Three real-life examples illustrate this fact pattern:

Zimmerman v. Kin Interinsurance Network (Exhibit C)

- This is a Hurricane Ian-related claim, where the claimants and insurer disputed the amount paid and the scope of coverage.

- On November 6, 2023, the claimants filed an NOI, asserting damages of $118,625 and making a settlement demand of $123,625.

- On December 26, 2023, the claimants filed a lawsuit, generally alleging damages in excess of $50,000.

- On May 13, 2024, the claimants filed a CRN, which includes allegations under 624.155(1)(a) and (1)(b) (thereby avoiding application of section 624.1551); the claimants also allege that the amount necessary to reasonably compensate the insureds and put their property back to its pre-loss condition is $148,000. The 60-day cure period expired without the insurer making any payment.

- On August 7, 2024, the claimants served a much lower proposal for settlement on the insurer for $50,000.

- If the insurer accepts the proposal for settlement, the insurer will then pay the $50,000 to the claimants (which makes the claimants the prevailing party) and the claimants will be able to file a bad faith lawsuit as the prevailing party that received payment on their claim after expiration of the CRN's 60-day cure period.

- If the insurer does not accept the proposal for settlement and loses at trial, the insurer still faces the prospect of paying the claimants' attorney fees under both the proposal for settlement and section 624.155.

[2] Under the proposal for settlement statute and rule, if a defendant declines a plaintiff's proposal for settlement, the defendant may be liable for the plaintiff's reasonable attorney fees if the plaintiff obtains a judgment that is at least 25% greater than their offer to the defendant. § 768.79(7)(b), Fla. Stat.; *see also* Fla. R. Civ. P. 1.442.

Patino v. Florida Peninsula Insurance Co. (Exhibit D)

- This is a claim related to slab damage purportedly caused by broken supply lines; the claimant and insurer dispute the amount paid and the scope of coverage.

- On September 16, 2024, the insured filed a CRN, alleging damages in the amount of $151,266.89, under a policy that otherwise carries a limit of $10,000.

- On September 27, 2024, the insured filed an NOI with a presuit settlement demand of $161,767.00.

- On October 15, 2024, the insured filed suit against the insurer, generally alleging damages in excess of $50,000 in order to obtain circuit court jurisdiction.

- On February 4, 2025, after the CRN's 60-day cure period had expired without the insurer taking action, the insured gave notice of serving a proposal for settlement on the insurer.

- The amount of the proposal for settlement is unknown. But this situation likely puts the insurer in the difficult position of deciding between the following choices: (a) pay the amount demanded in the proposal for settlement but still face a subsequent bad faith action as the insured will have "prevailed," perfecting a bad faith claim; or (b) risk a trial in which the claimant may be able to "beat" a lowball proposal for settlement (and recover their attorney fees) and the insurer still might face a subsequent bad faith action.

Fotis v. Kin Interinsurance Network (Exhibit E)

- This is a Hurricane Ian-related claim, where the claimants and insurer disputed the amount paid by the insurer and the scope of coverage.

- On November 21, 2023, the claimants filed an NOI alleging $136,345.00 in damages and making a presuit settlement demand of $141,345.00.

- The claimants later filed suit on December 20, 2023, claiming more generally that their damages exceed $50,000.

- A few months later, on March 26, 2024, the claimants filed a CRN, this time alleging that the amount necessary to reasonably compensate the claimants and return their property to its pre-loss condition is $191,630.35. The CRN includes allegations under both paragraph (1)(a) and (1)(b) under section 624.155, meaning that section 624.1551 cannot apply. The 60-day cure period expired without the insurer issuing any payment.

- Then, on August 16, 2024, the claimants served a proposal for settlement on the insurer in the amount of $60,000—much lower than their presuit demand.

- This again puts the insurer in a difficult position. It can accept the proposal for settlement and pay $60,000, but payment still opens the door to a bad faith suit under section 624.155,

as section 624.1551 does not apply. Under section 624.155, the claimants will be able to recover their attorney fees.

- Alternatively, the insurer can choose to go to trial in the breach of contract action, but if it does not "beat" the proposal for settlement, it is still on the hook for the claimants' attorney fees under section 768.79 as well as in any bad faith action that later arises.

Exploitation 4: CRNs are easily drafted to avoid section 624.1551

As all of the above examples illustrate, the reforms promised in section 624.1551 are easily avoided by simply alleging in the CRN violations under both paragraphs (1)(a) and (1)(b) of section 624.155. A review of the CRNs filed against first-party insurers reflects that virtually all of them include allegations under both paragraphs (1)(a) and (1)(b).

Thus, the well-meaning aim of section 624.1551—to confirm that bad faith may not lie absent entry of an actual adverse adjudication by a court determining that the insurer has actually breached the insurance policy—is thwarted, as the statute can be avoided with the stroke of a pen in the CRN.

The Legislature Should Enact SB 230

The Legislature has spent years remedying the problems that have plagued insurance litigation. All of that good work is being undone by enterprising plaintiffs' attorneys. The Legislature must ensure its reforms have a chance of success by closing the loopholes described above and by passing SB 230.

More specifically, section 1 of SB 230 will ensure that any claim for bad faith under section 624.155 is subject to the requirements of section 624.1551—which requires the insured to obtain an actual court judgment finding that the insurer has breached the insurance policy before the insured may pursue any bad faith claim. The legislation also confirms that acceptance of an offer of judgment or demand for judgment under section 768.79, or corrective action or payment by the insurer pursuant to a valid NOI, does not constitute an adverse adjudication that would perfect the conditions precedent of a bad faith claim.

Further, the legislation would confirm that vague CRNs are not enough—the insured in a CRN must specify the statutory provisions violated and enumerate the specific facts and circumstances giving rise to each violation; in addition, the claimant must plainly state in the notice the exact amount of damages needed to cure the violation. Such damages sought must also be available under and pursuant to the express terms and conditions of the insurance policy, and cannot include attorney fees. The CRN must also not include any nonmonetary provisions, demands, or requirements.

The legislation also provides that in addition to the notice and tolling requirements contained in section 624.155, the 60-day cure period and statute of limitations must be tolled for a period of 10 days after receipt of a request from the insurer for additional information related to the claim.

The Legislature must act to protect the good work it has done over the last several years to reduce frivolous and unnecessary insurance litigation. For all these reasons, the Institute supports SB 230.