The Florida Justice Reform Institute Opposes SB 426 and Reinstating Regular Attorney Fee Awards in Insurance Litigation

Florida has enacted significant reforms over the past few years designed to reduce meritless 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. SB 426 appears designed to undercut those reforms before the results of those reforms are realized.

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ended the abuse of the one-way attorney fee statutes in property insurance cases in late 2022, and then finally repealed these statutes in their entirety in 2023 through HB 837.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, SB 426 threatens to create new incentives to litigate over insurance disputes given the promise of attorney fees. More specifically, the legislation would create a new mechanism for award of "reasonable" attorney fees in insurance litigation to the "prevailing party," as defined by the legislation.

Now is not the time to create a new mechanism for attorney fees in insurance litigation. The repeal of one-way attorney fees is still relatively new, and we need to gather further data to understand the repeal's impacts, including whether it has reduced frivolous litigation and resulted in earlier resolution of insurance disputes. Further, there are other existing mechanisms, like section 768.79, Florida Statutes, and section 57.105, Florida Statutes, that allow prevailing parties to recover their attorney fees in some circumstances. For all these reasons, the Institute opposes SB 426.

Background on Florida's Repeal of Prior Statutes Authorizing Recovery of Attorney Fees in Insurance Litigation

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

[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).

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]

Regardless of the 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*,[4] 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."[5] 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***."[6] 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."[7]

The Legislature ended the abuse of the one-way attorney fee statutes in property insurance cases in 2022 through SB 2A. SB 2A provided that the one-way attorney fee statutes were not applicable in a suit arising under a residential or commercial property insurance policy. Though SB 2A eliminated one-way attorney fees, it also reinstated application of the offer-of-judgment statute, section 768.79, Florida Statutes, to civil actions arising under a residential or commercial property insurance policy. Finally, in 2023, the Legislature enacted HB 837, which repealed the one-way attorney fee statutes and ended their applicability to all other insurance coverages.

SB 2A became effective on December 16, 2022, and HB 837 became effective on March 27, 2023. The statute of limitations for a claim that an insurer breached an insurance policy is five years from the date of loss.[8] That means that many cases may not be subject to the repeal of the one-way attorney fee statutes as of yet. Thus, gathering the data necessary to evaluate the impact

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[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]942 So. 2d 969 (Fla. 2d DCA 2006).
[5]*Id.* at 973.
[6]*Id.* at 973-74 (emphasis added).
[7]*Id.* at 974.
[8]*See* § 95.11(2)(e), Fla. Stat.

of the repeal of one-way attorney fee statutes will take several years. Until that data and information is available, it is impossible to know whether these repeals appreciably reduced frivolous insurance litigation.

Now Is Not the Time to Create a New Statutory Scheme for Attorney Fees in Insurance Litigation

The Legislature has spent years remedying the problems that have plagued insurance litigation, including the problem of runaway attorney fees authorized by the one-way attorney fee statutes. But SB 426 proposes to undo a lot of that good work by establishing a system wherein prevailing parties may be awarded their fees in insurance litigation, based on a "reasonable" standard that will once again open the door to exorbitant fee awards rendered by trial court judges subject to election and pressures by their local bar.

The Legislature must give its prior reforms a chance at success and reject SB 426. Parties are not left without recourse for recovering attorney fees, as either an insured or insurer could potentially recover their attorneys' fees under the offer of judgment statute, section 768.79, Florida Statutes, and corresponding Florida Rule of Civil Procedure 1.442, or even under section 57.105, Florida Statutes, if a claim or defense is unsupported. For all these reasons, the Institute opposes SB 426.