How a Little-Known Senate Bill Could Help Stem the Tide of Bad Faith Litigation in Florida

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On January 14, 2020, Senator Jeff Brandes (R) introduced Florida Senate Bill 1334: Financial Services (SB 1334)[1], which would add two additional requirements to Florida Statute 624.155's civil remedy notice provision:

1. that a civil remedy notice state with specificity "the damages to be paid by the insurer for the claim, available under and pursuant to the express terms and conditions of the policy, less any amount earlier paid by the insurer and any applicable policy deductibles;" and,
2. that the notice "may not demand vague remedial action regarding changes to claims-handling procedures or practices."

If this latest legislative attempt to change Florida's bad faith litigation environment becomes law, it will be a good step towards correcting the financial havoc caused—at least in part—by that environment. This bill could be a major win for insurers and homeowners alike. Here's why.

The Problem: The High Cost of Property and Casualty Insurance in Florida

For years, Floridians have suffered from astronomical homeowners' insurance premiums, which are consistently the highest in the nation. According to the National Association of Insurance Commissioners' 2016 report, released in January 2019, Florida homeowners with a home value of $*200,000*, paid an average of $1,783 in premiums, while homeowners with a home value of *$400,000* in Massachusetts, New York and Pennsylvania paid an average premium of just $1,557, $1,694 and $1,287 respectively. One of the reasons for this price disparity is Florida's bad faith litigation environment. Florida is consistently recognized as one of the most challenging jurisdictions for insurance carriers who face bad faith actions virtually every time there is a dispute over coverage due, in part, to Florida's nebulous "totality of the circumstances" standard. The application of this standard means that a determination of what constitutes "bad faith" is taken out of the hands of a judge and placed into the hands of a jury. Only in rare instances will a trial judge grant summary judgment or a directed verdict for an insurer based on a determination that there is insufficient evidence for a jury to find bad faith; and it is even rarer that judges on the District Court of Appeals or the Supreme Court will agree. As a result, it is not uncommon for insurers to be hit with bad faith verdicts in the millions of dollars, in cases where policy limits are $50,000 or less.

Florida's Bad Faith Statute: §624.155 (1)(b)(1.2.3)

An integral part of Florida's bad faith environment is Florida Statute §624.155, which provides a statutory basis for first- and third-party bad faith lawsuits. Florida Statute §624.155 provides that a claimant may sue an insurer when the insurer fails to attempt "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 and with due regard for her or his interests". Fl. Stat. §624.155(1)(b)1. The statute also permits a bad faith suit against an insurer who fails to provide a statement explaining which payments are being made under which coverage; or (except as to liability coverages) fails to promptly settle claims under one portion of a policy, when the obligation to settle has become reasonably clear, in order to influence settlement under another portion of the policy. Fl. Stat. §624.155(1)(b)1.2.

In addition to providing a standard for determining bad faith and specifying other wrongful conduct that constitutes bad faith, §624.155 requires that a claimant must file what is known as a civil remedy notice or "CRN" prior to filing a lawsuit for statutory bad faith. CRNs are intended to reduce the need for litigation by providing insurers with the opportunity to settle disputes with their insureds by "curing" erroneous decisions or rectifying unlawful or improper conduct.

Under the statute, an insurer has 60 days from the CRN's filing date to cure the alleged violation. For those insureds who genuinely want to reach a reasonable settlement of a disputed claim, this deadline can be the incentive that both the insured and insurer need to reconsider their positions and reach a compromise. Unfortunately, in many instances, insureds and their counsel view CRNs solely as a ticket that needs to be punched in order to bring a bad faith action. Their CRN's often contain conclusory allegations of wrong doing copied verbatim from Florida's Unfair Insurance Trade Practices Act that have nothing to do with their dispute with the insurer – which usually centers on the amount of the covered loss. And many times, by design, the insured's CRN will not include the specific amount of money that the insurer needs to pay in order to "cure" the insurer's alleged bad faith conduct. Why is that you ask, and what's the connection with SB 1334? Read on.

How SB 1334 May Correct Abuse of the Civil Remedy Notice Process

In order to file a bad faith action, the insurer's liability and the amount of damages must be determined. This most often occurs at arbitration or trial; however, it can also occur through an appraisal, including an appraisal performed pursuant to an insurance policy's appraisal option. *See Cammarata v. State Farm Florida Insurance Company*, 152 So.3d 606, 610 (Fla. 4th DCA 2014). The concurring opinion in *Cammarata* points out that allowing such appraisals to serve as the basis for a bad faith lawsuit may have serious consequences, as it allows an insured to sue his or her insurer for bad faith "any time the insurer dares to dispute a claim, but then pays the insured just a penny more than the insurer's initial offer to settle."

When a claimant fails to state a specific monetary demand for damages, or fails to indicate the specific cause of a loss, the insurer is deprived of information needed to make a reasonable offer to the insured consistent with the coverage provided under the terms of the policy. Savvy insureds' attorneys are aware that it is in their client's interest to avoid making a specific monetary demand for damages and to omit details regarding the specific cause of damage, as this practice increases the likelihood that the insurer will make an offer that will ultimately be less than the amount awarded by a fully informed appraisal panel, arbitrator or jury. This provides the insured with ammunition to claim that the insurer deliberately "low-balled" the offer in bad faith.

SB 1334 may be able to correct this abuse, if only in part, by requiring that the civil remedy notice specify the amount of damages sought from the insurer. A specific demand for damages, along with how it is calculated, would provide insurers with a better opportunity to assess the scope of the damages alleged and to "cure" the alleged of violations by paying the exact sum claimed by plaintiffs, thereby precluding a bad faith lawsuit.

SB 1334's prohibition against demands of "vague remedial action regarding changes to claims-handling procedures or practices" is likely an attempt to disrupt the practice of pleading conclusory allegations of poor claim handling that provides no information of any use to correcting a genuine failing or problem. By requiring claimants to detail specific instances of bad conduct, insurers will be in a better position to address the specific conduct that has harmed the insured, and will hopefully facilitate an equitable resolution of the dispute.

SB 1334's proposed changes to Florida's civil remedy notice requirements already are under attack. On February 3, 2020, Senator Perry Thurston, Jr. (D), a committee member on the Senate's Committee on Banking and Insurance, filed a proposed amendment that would delete the changes in their entirety. SB 1334 is scheduled for discussion at the February 4, 2020 meeting of the Committee on Banking and Insurance. Stay tuned.

If you have questions or would like further information, please contact Craig E. Stewart (stewartc@whiteandwilliams.com; 617.748.5216) or Margo Meta (metam@whiteandwilliams.com; 215.864.6219).

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[1] This is just one of three bills introduced by Brandes targeting Florida's current bad faith litigation environment.