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Client Alert: Recent Statutory Changes in Florida Insurance Law: Bad Faith - Part One

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In late 2022 and early 2023, Governor DeSantis signed into law two pieces of legislation making changes to Florida law governing bad-faith claims in insurance coverage litigation. The first was Senate Bill 2A (SB-2A), which became law on December 16, 2022, and the second was House Bill 837 (HB 837), which became law on March 24, 2023. (Collectively, the provisions of these bills affecting bad-faith claims will be referred to as "the Amendments.")

The Amendments are found in three new subsections added to Fla. Stat. 624.155 in HB 837 and in an amendment to Fla. Stat. 624.1551 in SB-2A.

This is the first in a series of four articles analyzing the Amendments. This article will focus on new subsection (4) in Section 624.155, which applies to both statutory and common-law liability insurance claims.

The new provision creates a safe harbor for insurers who tender policy limits on liability insurance claims. It states, in relevant part:

> a. An action for bad faith involving a liability insurance claim, including any such action brought under the common law, shall not lie if the insurer tenders the lesser of the policy limits or the amount demanded by the claimant within 90 days after receiving actual notice of a claim, which is accompanied by sufficient evidence to support the amount of the claim.[1]

The new provision overrides well-developed case law holding that the tender of limits alone is not sufficient to avoid bad-faith "failure to settle" liability when the insurer fails to take other steps necessary to protect the insured settlement-related obligations as outlined in *Boston Old Colony Insurance Co. v. Gutierrez*.[2] These duties include:

> [the] duty to advise the insured of settlement opportunities, to advise as to the probable outcome of the litigation, to warn of the possibility of an excess judgment, and to advise the insured of any steps he might take to avoid same.... The insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so.[3]

For instance, in *Berges v. Infinity Insurance Co.,*[4] the insurer promptly accepted the plaintiff's offer to settle for policy limits of $20,000 but was later held liable for $1.8 million after it failed to advise the insured about issues involving the settlement and failed to pay the limits before the deadline set in the plaintiff's offer.

Similarly, in *Harvey v. GEICO General Insurance Company,* [5] the insurer tendered its $100,000 policy limits nine days after the accident, but was found liable for $9.2 million because it failed to promptly advise the insured of plaintiff's demand for financial information. Again, in *Brink v. Direct General Insurance Company,*[6] the insurer tendered its $10,000 policy limits four different times but suffered a bad-faith jury verdict in excess of $19 million because it failed to advise the insured on other issues related to the settlement.[7]

On its face, new subsection 624.155(4) would change the result in all of these cases. It apparently shields the insurer from bad-faith liability so long as it makes a timely tender even if the plaintiff has withdrawn the settlement offer before the tender and even if the insurer has failed to comply with its other duties outlined in *Boston Old Colony*.

The safe harbor seems designed to shield insurers from perceived abuse of time-limited policy limit demands involving a "strategy which consists of setting artificial deadlines for claims payments and the withdrawal of settlement offers when the artificial deadline is not met." [8] By providing a set period of 90 days to offer the policy limits, the legislation moots (for the insurer if not the insured) any deadlines set by a claimant during the 90-day period.[9]

The wording of new subsection (4) leaves open a number of issues that presumably will be decided by the courts, including:

a. What constitutes an effective "tender"? Is a tender effective if it is made before the insurer and insured have complied with their duties to provide the information to the claimant as required by Fla. Stat. 627.4137?
b. Is a tender effective if it is not conditioned on receipt of a release of the insured?
c. Is a tender effective if it is subject to other conditions?
d. Does timely tender of policy limits shield the insurer from bad-faith liability if the failure to settle results from the insurer's failure to comply with its other settlement-related obligations as outlined in *Boston Old Colony Insurance Co. v. Gutierrez*?
e. What effect, if any, does the tender have on the insurer's obligation to defend? Will courts find it significant that new subsection (4) does not contain a provision stating that the insurer's tender does not alter or amend the insurer's obligation to defend its insured, comparable to that in new subsection (6)(a)?
f. Does the safe harbor in subsection (4)(a) apply to multiple claimant situations, or is an insurer facing multiple claimants limited to the safe harbors set forth in new subsection (6) of 624.155?[10]
g. What constitutes "actual notice of a claim" and "sufficient evidence to support the amount of the claim"?
h. If disputed, who decides the date on which the insurer received "actual notice of a claim" and "sufficient evidence to support the amount of the claim"?

[1] If the insurer does not make the tender, new section 624.155 (4)(b) renders inadmissible evidence of the existence of the 90-day safe harbor set forth in subsection (a) in any subsequent bad faith action. New subsection 624.155 (4)(c) extends the statute of limitations by 90 days in the event the insurer does not make the tender.

[2] *Boston Old Colony Insurance Co. v. Gutierrez,* 386 So. 2d 783 (Fla. 1980).

[3] *Boston Old Colony*, 386 So.2d at 785.

[4] *Berges v. Infinity Insurance Co.,*896 So.2d 665, 685 (Fla. 2004)

[5] *Harvey v. GEICO General Insurance Company,* 259 So.3d 1 (2018)

[6] *Brink v. Direct General Insurance Company,* 38 F.4th 917 (11th 2022) (*Brink I*), on remand *Brink v. General Insurance Company,* M.D. Fla. Case No.:19-cv-02844-JSM-AEP (7/14/23 Order) (*Brink II*).

[7] *Brink II* at 1.

[8] *Berges v. Infinity Insurance Co.,* 896 So.2d 665, 685 (Fla. 2004) (Wells, J., dissenting).

[9] The Legislature also provided additional protections to insurers who decline the safe harbor and fail to make the required tender within the 90 day window. These protections, found in new subsection (5) of 624.155, allow juries to consider the conduct of the insured, claimant, and their representatives when assessing damages against an insurer. This subsection is the subject of Part 2 of this series.

[10] New subsection (6) of 624.155 is the subject of Part 3 of this series.