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OCTOBER 5, 2023 | PUBLICATION

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

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This is the third in a series of four articles analyzing recent changes to Florida law governing bad-faith claims in insurance coverage litigation. The changes were made in Senate Bill 2A and House Bill 837, which became law in December 2022 and March 2023, respectively (the Amendments).

This article will focus on new subsection (6) in Fla. Stat. 624.155. It establishes alternative safe harbors to avoid bad-faith liability for insurers confronted with multiple claimants making competing claims that, in total, exceed policy limits. The new subsection apparently applies only to statutory claims and not those based on common law.[1]

Section 624.155 reads:

> If two or more third-party claimants have competing claims arising out of a single occurrence, which in total may exceed the available policy limits of one or more of the insured parties who may be liable to the third-party claimants, an insurer is not liable beyond the available policy limits for failure to pay all or any portion of the available policy limits to one or more of the third-party claimants if, within 90 days after receiving notice of the competing claims in excess of the available policy limits, the insurer complies with either paragraph (a) or paragraph (b).
>
> > (a) The insurer files an interpleader action under the Florida Rules of Civil Procedure. If the claims of the competing third-party claimants are found to be in excess of the policy limits, the third-party claimants are entitled to a prorated share of the policy limits as determined by the trier of fact. An insurer's interpleader action does not alter or amend the insurer's obligation to defend its insured.[2]
> >
> > (b) Pursuant to binding arbitration that has been agreed to by the insurer and the third-party claimants, the insurer makes the entire amount of the policy limits available for payment to the competing third-party claimants before a qualified arbitrator agreed to by the insurer and such

> third-party claimants at the expense of the insurer. ... A third-party claimant whose claim is resolved by the arbitrator must execute and deliver a general release to the insured party whose claim is resolved by the proceeding.

The subsection overrides prior Florida case law holding that the interpleader is not available to resolve multiple-claimant insurance disputes involving claims that exceed policy limits. *Hernandez v. Travelers Ins. Co.*, 356 So. 2d 1342(Fla. 3d DCA 1978).

The most important distinction between the arbitration and interpleader safe harbors is that the arbitration option requires the insurer to make "the entire amount of the policy limits available for payment to the competing third-party claimants," while the interpleader option does not. This is consistent with Fla. R. Civ. P. 1.240, which allows an interpleader plaintiff to dispute liability "in whole or in part to any or all of the claimants."

The new subsection allows the filing of an interpleader action by the insurer "under the Florida Rules of Civil Procedure" against "the competing third-party claimants" who have claims against "one or more of the insured parties." This seems inconsistent with Fla. R. Civ. P. 1.240, which states in part:

> Persons having claims against the plaintiff may be joined as defendants and required to interplead when their claims are such that the plaintiff is or may be exposed to double or multiple liability. It is not ground for objection to the joinder that ... the plaintiff avers that the plaintiff is not liable in whole or in part to any or all of the claimants. A defendant exposed to similar liability may obtain such interpleader by way of crossclaim or counterclaim.

The statute, therefore, authorizes a different type of interpleader action than the rule. In the interpleader action contemplated by subsection (6) of the statute, the plaintiff is the insurer, but the parties joined are those with claims against the insured. The creation of a new interpleader procedure may raise constitutional "separation of powers" issues.[3]

Both safe harbors, apparently, are available even in situations where the policyholder's liability to the claimant is unclear (one or more of the insured parties ... may be liable to the third-party claimants) and the amount of the total amount of the claims is unknown (which in total may exceed the available policy limits). This raises a fundamental question of which claims are adjudicated in the interpleader action. Are both (i) the underlying claims against the insured and (ii) the insurance coverage claims against the insurer adjudicated in the interpleader, or does the interpleader deal exclusively with insurance coverage issues that remain after resolution of the underlying claims against the insured in other forums? If the latter, is the interpleader action stayed pending the outcome of the underlying claims?

While not directly on point, the United States Supreme Court decision in *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 535 (1967) is instructive. That case involved a collision between a bus and a truck in California that resulted in injuries to dozens of bus passengers from multiple states and Canada. An insurer of a single party filed an interpleader action against all prospective claimants and defendants seeking to require them to litigate all of their claims against each other in the interpleader action. The Court found the scope of the interpleader was too broad:

> State Farm's interest in this case, which is the fulcrum of the interpleader procedure, is confined to its $20,000 fund. That interest receives full vindication when the court restrains claimants from seeking to enforce against the insurance company any judgment obtained

> against its insured, except in the interpleader proceeding itself. To the extent that the District Court sought to control claimants' lawsuits against the insured and other alleged tortfeasors, it exceeded the powers granted to it by the statutory scheme.[4]

While the federal statutory scheme referenced by the Court is different from that in new Fla. Stat. 624.155(6), the same principles would seem to apply to the scope of claims resolved in the interpleader action. The insurer's interests are protected so long as all claimants seeking to enforce against the insurance company any judgment obtained against its insured are required to do so in the interpleader action.

Other issues that will need to be resolved by the courts include:

a. Is the insured a party to the interpleader? To the arbitration?
b. Do third-party claimants without a judgment against the insured "have a claim" against the insurer within the meaning of Fla. R. Civ. P. 1.240?
    a. If not, is the interpleader action stayed pending the outcome of underlying claims?
c. Who decides whether the claims at issue in the interpleader "arise out of the same occurrence"?

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[1] The Amendments create three new subsections of Section 624.155. New subsections (4) and (5) expressly state that they apply to both statutory and common law claims. New subsection (6), however, contains no such statement.

[2] This last sentence of subsection (a) appears to be in deference to *Hernandez* court's observation that:

> One of [the insurer's] liabilities is to defend its insured in the courts. It may not discharge that liability by depositing a sum of money and saying to the courts, "divide it up."

356 So. 2d at 1344.

[3] The Florida Constitution reserves to the Supreme Court the right to regulate procedure in courts, while it reserves to the Legislature the right to create substantive law. Fla. Constitution, Art. V, SECTION 2. The legislature has the power to repeal a rule adopted by the Supreme Court by a two-thirds vote, but it has no constitutional authority to enact any law relating to practice and procedure. *In re Clarification of Florida Rules of Practice and Procedure*, 281 So.2d 204 (Fla. 1973). A statute which purports to create or modify a procedural rule of court or practice is constitutionally infirm. *Milton v. Leapai*, 562 So.2d 804, 807 (Fla. 5th DCA 1990).

[4] *Id.* at 535.