porterwright

INSURANCE
LAW ALERT

May 10, 2023

LAWRENCE INGRAM
813.568.4026
lingram@porterwright.com

JESSICA ALLEY
813.568.4023
jalley@porterwright.com

Insurance intermediaries' guide to the Florida Tort Reform Act

Florida House Bill 837 or the "Act," effective March 24, 2023, has received considerable press focusing on two changes to Florida law: The Act shortened Florida's statute of limitations for negligence actions from four years to two years, and the Act eliminated an insurance policyholder's "one way" statutory attorneys' fee entitlement in coverage cases. These two changes, while historic, are only the beginning of the far-reaching changes to Florida law that will directly impact insurance intermediaries.

The numbers of newly filed cases alone will change the Florida legal landscape for years. Specifically, in anticipation over the expected changes, the plaintiff's bar filed an unprecedented number of circuit court cases. The Florida E-Filing Portal reported 90,593 new circuit civil cases were filed in Florida in the five days between March 17 and March 22. To put this number in perspective, only 27,586 cases had been filed statewide in the nearly three months prior. Defense lawyers are calling for an emergency declaration to protect against the onslaught of deadlines and trials. Florida's already overwhelmed defense lawyers, insurance adjusters and third-party administrators cannot reasonably be prepared or equipped to handle this flood of litigation. It will take years for the underfunded courts to work through this mass of new cases.

This legislation was expressly intended to make Florida more business and insurer friendly. Insurance industry proponents of the Act celebrated on March 24 because the Act is expected to limit litigation, reduce attorneys' fee awards and reshape Florida's challenging bad faith laws. The Act accordingly provides a number of valuable benefits to insurers.

This white paper will focus on the Act's impact on Florida's retail insurance agents and other insurance intermediaries (such as wholesale agents) and insurance managing entities (such as third-party administrators).

Some changes are helpful, some changes are neutral and some changes may in the long run be detrimental to Florida's insurance intermediaries. Our analysis is based solely on the Tampa practice group's decades of representing the full spectrum of insurance intermediaries. We will not discuss every aspect of the Act, only those we consider to have a substantial impact on this industry.

What's different under the act?

TIMING & EFFECTIVE DATE

With limited exceptions (e.g. the changes to section 95.11 – Florida's statute of limitations) the Act became effective on March 24, 2023, and applies to any case filed thereafter. Any existing rights under an insurance contract are not affected, but the Act applies to any contract issued or renewed after the effective date.

STATUTE OF LIMITATIONS

Section 95.11, Florida Statutes, now requires all negligence claims accruing after March 24, 2023, to be filed within two years—not four. Importantly, this change does not affect any claims accrued prior to March 24, 2023.

Anticipated ramifications for insurance intermediaries

Shortening the time to bring claims should ultimately reduce the number of suits filed. Despite this initial benefit, an increase in litigation in the near term seems inevitable over issues such as when claims accrue and whether delayed discovery doctrine will toll the expiration of the statute of limitations. We expect an increase in legal malpractice claims against attorneys who fail to timely file cases within the new limitations period. Generally, retail agents and wholesale brokers should benefit from the shortened statute as most E&O claims arise under negligence theories.

CONTRIBUTORY FAULT

Under the new provisions of section 768.81, Florida Statutes, a plaintiff found to be more than 50% at fault for their own harm may not recover any damages. The only exception provided relates to injury or death arising out of medical negligence.

Anticipated ramifications for insurance intermediaries

Negligence is the basis for the vast majority of actions against insurance intermediaries. Comparative negligence defenses, including the failure to read the policy or proposal, the failure to disclose material information about the risk, and the failure to pay policy premiums, provide essential tools for the defense of insurance agents and brokers.

ATTORNEYS' FEES IN INSURANCE DISPUTES

The Act repeals sections 627.428 and 626.9373 Florida Statutes, which previously authorized a one-way award of attorney's fees to an insured who prevailed against an insurer. The Act reverses over 100 years of Florida

law by eliminating the nearly automatic recovery of attorneys' fees for a policyholder when that policyholder prevails in a coverage dispute with its insurer. This has often been referred to as the "one-way fee provision" because prevailing insurers could not recover fees under the statute.

Anticipated ramifications for insurance intermediaries

The Act substitutes a limited entitlement to fees in third party liability cases but only when the insurer has "made a total coverage denial of a claim." Section 86.121, Fla. Stat. Under the new provisions, reasonable attorneys' fees may be awarded to a select group (only insureds and named beneficiaries—no assignments permitted … a major issue in residential property claims), when an insured prevails on a declaratory action establishing coverage. Critically this new provision does not permit a fee recovery against an insurer absent a complete denial and specifically excludes situations where an insurer defends under a reservation of rights. Declaratory actions addressing claims for residential or commercial property policies are also excluded from this limited fee authorization.

Additionally, the Act creates a new section 624.1552, which specifically provides that the fee shifting provisions of Florida's existing offer of judgment rule now apply to any civil action involving an insurance contract. In practice, this modification creates the previously unprecedented opportunity for an insurer to recover fees from its insured upon rejection of a settlement offer later proven to have been reasonable.

ATTORNEYS' FEE MULTIPLIERS

The Act also amends Section 57.104, Florida Statutes, to provide that in any case where attorney's fees are to be awarded there is a strong presumption that a lodestar fee is sufficient. The presumption can only be overcome in "rare and exceptional" circumstances with evidence that competent counsel could not otherwise be maintained.

Anticipated ramifications for insurance intermediaries

We anticipate considerable litigation directed to the potential retroactive nature of the statutory changes to fee recovery because of the Act's failure to expressly provide for retroactive operation.

INSURER BAD FAITH

The Act makes profound changes to Florida's insurer bad faith framework. Historically, the term "bad faith" was a misnomer. The law required an insurer to act with the utmost good faith, the failure of which would subject the insurer to adverse statutory and common law ramifications. The Act now embraces the term and specifically uses the phrase "bad faith."

Under the Act there can be no insurer bad faith involving a liability claim if the insurer tenders the lesser of the policy limits or the amount demanded by the claimant within 90 days of receiving actual notice of a claim, which is accompanied by sufficient evidence to the support the amount of the claim. Even if the insurer fails to tender its limits, that fact is inadmissible

in any subsequent bad faith action. The Act also plainly provides that mere negligence is insufficient to establish insurer bad faith and imposes a new duty upon the policyholders and claimants—their own duty of good faith in furnishing information, making demands, settling deadlines and in attempting to settle. Under the new protocols, the policyholder or claimants' failure to act in good faith will be issues for the trier of fact to consider in the bad faith action against the insurer and may justify a reduction of any award against an insurer.

The Act also directly addresses a common problem for auto and general liability insurers and their counsel by specifically proscribing safe harbor actions when faced with excess claims from two or more third-party claimants on the same insurance limits. The Act permits an insurer to take steps to limit its exposure to the policy limits by timely filing an interpleader or participating in binding arbitration where agreed to by the claimants.

Anticipated ramifications for insurance intermediaries

We anticipate the Act will result in far fewer bad faith actions.

EVIDENCE OF MEDICAL EXPENSES

The Act provides that evidence of health care insurance coverage, other than Medicare or Medicaid, may be admissible in determining the damages to be awarded for past or future medical expenses. Otherwise, in case of no insurance, only evidence of 120% of the Medicare reimbursement rate, or if no Medicare reimbursement rate, then 170% of the Medicaid reimbursement rate, is admissible. Claimants must also disclose letters of protection and when a letter of protection in involved, the amount the assignee paid or agreed to pay is admissible. Also, there must be disclosures of providers who sell accounts to factoring companies or other third-parties who purchase accounts. The person referring under a letter of protection must be disclosed. The amounts recoverable for medical treatment or services in a personal injury or wrongful death suit may not include amounts in excess of the reasonable and necessary cost or value of the medical care admitted pursuant to the Act's restrictions. All these new rules combined will help to reduce the value of bodily injury and wrongful death claims.

Anticipated ramifications for insurance intermediaries

These provisions of the Act are probably of most interest to TPA's handling bodily injury and wrongful death claims.

PROTECTIONS FOR OWNERS & OPERATORS OF MULTIFAMILY RESIDENTIAL PROPERTY

The Act requires the owners or principal operators of multifamily residential property to have in place by January 1, 2025, certain crime prevention protocols detailed in the Act. When in compliance with the crime prevention protocols there is a presumption against liability in connection

with criminal acts that occur on the premises committed by third parties who are not employees or agents of the owner or operator.

Anticipated ramifications for insurance intermediaries

Premises liability arising from criminal activity has been a source of high demands, settlements, and jury awards. The Act provides substantial benefit to owners and operators of multifamily residential property who are and remain in compliance. Going forward we would expect insurers and risk managers to take full advantage of the Act and thus limit exposure but also reduce insurance costs.