Vote No on PCS FOR HB 881 and Undoing the Third-Party Bad Faith Liability Safe Harbor

In Florida, an individual can sue an insurer when he or she believes the insurer acted in "bad faith" in defending or settling a claim. A third-party bad faith claim typically arises when an insurer fails to settle an injured party's claim against the insured within policy limits, thereby exposing the insured to a judgment for damages in excess of those limits. The most common third-party bad faith fact pattern occurs when the insured is in a car accident and injures a third person, and there is a dispute over how the insurer conducts settlement negotiations with the injured third person. A finding that the insurer engaged in "bad faith" in conducting those settlement negotiations means that the injured person can access damages far greater than the insurance policy limits in a subsequent bad faith suit. Unfortunately, the potential to recover windfall damages in excess of policy limits was a powerful incentive and led to rampant litigation abuse. Attorneys engaged in various abusive strategies in order to set up a bad faith claim for their client. These included stalling tactics, intentional misinformation, and unreasonable settlement-related demands.

The Legislature finally addressed many of the abuses of third-party bad faith litigation in 2023 HB 837. In relevant part, HB 837 amended section 624.155, Florida Statutes, to create a sensible safe harbor from third-party bad faith liability: An action for bad faith involving a liability insurance claim 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. § 624.155(4)(a), Fla. Stat.

PCS FOR HB 881 would gut this safe harbor. More specifically, Section 1 of PCS FOR HB 881 would amend section 624.155(4)(a) to state that: (a) a party's submission of "sufficient evidence" for purposes of triggering the 90-day clock of the safe harbor could include any number of things, like a single photograph of an accident scene; and (b) if an insurer does not believe the submitted evidence is sufficient, the insurer must provide a written notice of objection within 10 business days of receipt of the submitted evidence—even though the insurer is unlikely to have the information necessary to know whether to object or not.

The changes proposed by PCS FOR HB 881 are unwarranted and unreasonable, and the Florida Justice Reform Institute asks you to oppose the legislation.

The Problems in Third-Party Bad Faith Litigation That Led to 2023 HB 837

Before turning to the existing safe harbor from third-party bad faith liability and what PCS FOR HB 881 proposes to do, it is important to understand the landscape that led to the passage of HB 837 in 2023 and the creation of subsection (4) in section 624.155.

Prior to the early 1990s, an insurer did not have a duty to tender policy limits before receiving a claimant's demand for those limits. In *Powell v. Prudential Property & Casualty Insurance Co.*, 584 So. 2d 12 (Fla. 3d DCA 1991), the Third District Court of Appeal changed that, holding that "[w]here liability is clear, and injuries so serious that a judgment in excess of the

policy limits is likely, an insurer has an affirmative duty to initiate settlement negotiations." *Id.* at 14. This has meant that where three things are present—(1) clear liability on the part of the insured, (2) low policy limits, and (3) catastrophic damages—the insurer ***must*** tender policy limits before even receiving a demand for them, or else risk damages exposure in far excess of policy limits.

In *Berges v. Infinity Insurance Co.*, 896 So. 2d 665 (Fla. 2005), the Florida Supreme Court held that the question whether an insurer acted reasonably in initiating those settlement discussions will always be a question of fact for a jury to decide. In *Berges*, the third-party claimant demanded that the insurer settle the claim for the $20,000 policy limits within 25 days of receiving the claimant's demand letter. Although the insurer verbally accepted the offer within the deadline, the insurer's written acceptance did not make it in time due to a mistyped zip code on the envelope. The claimant revoked his offer and a jury delivered a bad faith verdict of almost $1.9 million. The Court held that a jury could decide that the insurer acted in bad faith, emphasizing that under the totality of the circumstances standard, the focus is on the insurer's entire conduct in the handling of the claim. In dissent, Justice Wells expressed his concerns about the lack of a logical, objective standard for bad faith, which had resulted in strategies employed by claimants to manufacture bad faith claims and had ultimately led to "limitless, court-created insurance." *Id.* at 686 (Wells, J., dissenting).

Following *Berges*, Justice Wells' concerns came to fruition, with numerous examples where notwithstanding an insurer's timely effort to resolve a third party's claim within policy limits, the insurer was still held liable for an excess judgment entered against their insured. *See, e.g.*, *Harvey v. GEICO*, 259 So. 3d 1 (Fla. 2018) (despite insurer's tender of policy limits to injured party's estate within 9 days of the accident, insurer still held liable in bad faith); *United Auto. Ins. Co. v. Levine*, 87 So. 3d 782 (Fla. 3d DCA 2011) (despite insurer's tender of policy limits to injured party's estate within 1 day of receiving notice of the third party's injury, insurer still held liable in bad faith); *see also, e.g.*, *Bannon v. GEICO Gen. Ins. Co.*, 743 F. App'x 311 (11th Cir. 2018) (affirming jury finding that GEICO acted in bad faith although GEICO tendered policy limits within 20 days of receiving notice of collision).

The Legislature finally took up the call for third-party bad faith reform in 2023, by passing HB 837.

Florida Enacted a Safe Harbor from Third-Party Bad Faith Liability in 2023 HB 837

To create some guardrails on third-party bad faith liability, Florida enacted a reasonable safe harbor from liability where the insurer timely acts to resolve a claim. In relevant part, HB 837 created new subsection (4) of section 624.155, which states as follows:

> (4)(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.
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> (b) If an insurer does not tender the lesser of the policy limits or the amount demanded by the claimant within the 90-day period provided in paragraph (a), the

existence of the 90-day period and that no bad faith action could lie had the insurer tendered the lesser of policy limits or the amount demanded by the claimant pursuant to paragraph (a) is inadmissible in any action seeking to establish bad faith on the part of the insurer.

(c) If the insurer fails to tender pursuant to paragraph (a) within the 90-day period, any applicable statute of limitations is extended for an additional 90 days.

Thus, section 624.155(4)(a) currently provides that in claims involving liability insurance,[1] an insurer has 90 days to tender the lesser of policy limits or the amount demanded by the claimant in order to avoid a later finding of bad faith. To trigger the 90-day clock, the insurer must receive "actual notice of a claim which is accompanied by sufficient evidence to support the amount of the claim." § 624.155(4)(a), Fla. Stat.

"Sufficient evidence" is a common term defined in case law and is "tantamount to competent substantial evidence." *N. Fla. Women's Health & Counseling Servs., Inc. v. State*, 866 So. 2d 612, 627 (Fla. 2003), *receded from on other grounds in Planned Parenthood of Sw. & Cent. Fla. v. State*, 384 So. 3d 67 (Fla. 2024). "Competent substantial evidence" means "such relevant evidence as a reasonable mind would accept as adequate to support a conclusion." *O.H. v. Agency for Pers. with Disab*., 332 So. 3d 27, 33 (Fla. 3d DCA 2021); *see also, e.g*., *Comprehensive Med. Access, Inc. v. Office of Ins. Reg*., 983 So. 2d 45, 46 (Fla. 1st DCA 2008) ("Competent substantial evidence is such evidence that is sufficiently relevant and material that a reasonable mind would accept it as adequate to support the conclusion reached.").

HB 837 took effect on March 24, 2023. Thus, the 90-day safe harbor statute has been in place for only two years.

What PCS FOR HB 881 Proposes to Do

PCS FOR HB 881 appears innocuous enough. But, in effect, it would drastically limit the efficacy of the safe harbor that Governor DeSantis and the Legislature created in 2023.

PCS FOR HB 881 would insert new language into paragraph (4)(a) of section 624.155, defining "sufficient evidence" to mean as follows:

2. For purposes of this paragraph, "sufficient evidence" means written or photographic evidence submitted to the insurer that indicates the claimant has suffered personal injury or property injury. Evidence that may satisfy this requirement includes, but is not limited to:

a. Accident reports.

[1] Liability insurance is specifically defined to mean "[i]nsurance against legal liability for the death, injury, or disability of any human being, or for damage to property, with provision for medical, hospital, and surgical benefits to the injured persons, irrespective of the legal liability of the insured, when issued as a part of a liability insurance contract." § 624.605(1)(b), Fla. Stat.

b. Photographs of an accident scene, physical injuries, or property damage.

c. Medical bills.

d. Repair bills.

e. Other receipts or copies of payments rendered.

3. If an insurer does not believe the submitted evidence is sufficient under sub-paragraph 2., the insurer must provide a written notice of objection within 10 business days of receipt of the submitted evidence; otherwise, any objection to the sufficiency of the evidence for purposes of this paragraph is waived. The submitting party has an additional 10 business days after receipt of any objection to provide clarification or submit further evidence.

Thus, the legislation would broadly define "sufficient evidence" to mean any number of things, including a single photograph of an accident scene, a repair bill, or any "[o]ther receipts or copies of payments rendered." Once a claimant provides any of that "sufficient evidence" to an insurer, the insurer must provide a written notice of objection within 10 business days challenging the sufficiency of the evidence, otherwise such objection is waived.

This is problematic for numerous reasons. First, in the days following an accident, a claimant would likely be submitting such evidence to an insurer's front-line adjuster, not an attorney for the insurer. Under the legislation, the front-line adjuster would be required to examine the purportedly "sufficient evidence" provided by the claimant and prepare a legal-sounding document—a "written notice of objection"—if the adjuster disagrees that the evidence provided is sufficient. It is questionable whether such a front-line adjuster will have the wherewithal to prepare such an objection. But, in any case, the legislation as written invites gamesmanship given the broad definition of "sufficient evidence." A few examples illustrate this problem.

Assume the basic fact pattern that gives rise to most third-party bad faith cases: low policy limits, catastrophic injuries, and clear liability. The insured is clearly at fault for a car accident which results in the deaths of two other persons in a second car; the insured's liability insurance policy limit is only $30,000. Under PCS FOR HB 881, the insured or the claimant simply needs to provide "sufficient evidence" as defined in the bill in order to trigger a requirement that the insurer act within 10 business days to challenge the sufficiency of that evidence. This creates the potential for gamesmanship by claimants' attorneys, as they have every incentive to submit as little information as possible—which still may be deemed "sufficient evidence" under the legislation—in order to later pierce policy limits in a subsequent bad faith action.

Example #1: The Repair Bill. Assume a claimant contacts the insured's insurer and provides the insurer with a copy of a car repair bill 20 days after the accident. The car repair bill indicates that the claimant's car was in an accident and that it will require replacement of the car's headlights, front bumper, airbags, and radiator at a cost of $8,500. The insurer assigns an adjuster to review the claim. The adjuster receives the repair bill. This is "sufficient evidence" under the legislation, which defines the term to specifically include "[r]epair bills." On its face, the car repair bill supports a claim of $8,500. But the adjuster has no idea that the insured is responsible for

significant damages, far beyond the $30,000 policy limit, including the deaths of two people. Yet, under PCS FOR HB 881, the insurer via its adjuster has only a few days to contest the sufficiency of this evidence as presented by the claimant. Based on the evidence that is presented, the adjuster has no real basis to object and consequently the insurer does not object.

Assume that it is not until 91 days after receiving the repair bill that the insurer learns of the full extent of the accident and tenders policy limits. By this point, the insurer has lost the benefit of the safe harbor and the claimant's attorney is unlikely to agree to settle for policy limits. And further, the claimant's attorney has set the stage to come after the insurer later for any excess judgment obtained against the insured.

Example #2: The Accident Photo. Assume the same facts as above, but this time, within 20 days of the accident, instead of providing the repair bill the claimant provides the insurer with a photograph of the accident—which again may constitute "sufficient evidence" under PCS FOR HB 881. The insurer's adjuster receives the photograph and observes that it shows two cars involved in the accident which will require repair. But the photograph does not convey that two people died in the accident as a result of the insured's conduct.

Even though this evidence should not be sufficient to alert the insurer to the insured's full liability, the legislation indicates that this photograph is enough to trigger the requirement for the insurer to act. But absent further information—information the claimant's attorney has no incentive to provide at this point—the insurer's adjuster is in no position to actually object to the evidence. If the insurer does not object within 10 business days, it has waived any argument that the evidence is insufficient, and it is questionable whether the claimant would ever have to turn over information revealing the true extent of damages.

Assume again that the insurer does not learn the full extent of the damages until months later and tenders the policy limits 91 days after receiving a copy of the accident photograph. The claimant rejects the policy limits, and the stage is already set for bad faith liability.

As these examples illustrate, the legislation unfortunately invites the very gamesmanship that 2023 HB 837 was designed to end, again transforming every liability insurance policy into "limitless, court-created insurance." *See Berges*, 896 So. 2d at 686 (Wells, J., dissenting).

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In 2023, Florida instituted a reasonable safe harbor for bad faith liability, giving the insurer 90 days to examine the evidence submitted by a claimant and to decide whether to tender the policy limits or pay the claimant's demand. There is no reason to gut this safe harbor now, as PCS FOR HB 881 proposes to do by broadly defining "sufficient evidence" under the statute and requiring the insurer to act before obtaining all relevant information. For all these reasons, the Florida Justice Reform Institute opposes PCS FOR HB 881.