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Meaningful Tort Reform on Florida Horizon

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Florida citizens and visitors alike have been inundated with increasingly sophisticated television ad campaigns and endless and often crass billboards on our roadways touting the sweepstakes that has characterized personal injury litigation in Florida. Indeed, it is hard to travel very far between highway exits without being confronted by what one might reasonably confuse as a lottery jackpot, but which in reality is a recent verdict or settlement obtained by a personal injury firm. Florida has long been recognized as one of the most lucrative jurisdictions for bodily injury litigation, with its draconian penalties on insurance carriers and absence of any meaningful controls on economic and non-economic damages. However, sweeping changes seem afoot as a recent wave of legislative impatience with the plaintiffs' bar, starting in the first-party property sector, is poised to reach the personal injury sector.

On February 14, 2023, Governor Ron DeSantis issued a press release titled "Governor Ron DeSantis Announces Comprehensive Lawsuit Reforms to Protect Floridians from Predatory Billboard Attorneys". The following day, House Bill 837 was introduced, proposing sweeping reform to Florida's tort law landscape. If passed in its current form, the bill is massive in its implications, but this article focuses on two of the more significant reforms: changes to bad faith laws and admissibility of medical bills performed under a Letter of Protection.

Changes to Statutory Bad Faith Actions Under Fla. Stat. 624.155

House Bill 837 seeks to rein in bad faith lawsuits by:

1. Requiring more than mere negligence to constitute actional bad faith;
2. Imposing a duty upon insureds and claimants to act in good faith; and
3. Creating a mechanism for fair distribution of insurance proceeds when two or more third-party claims exceed policy limits.

The significance of these proposed statutory provisions cannot be overstated.

First, the bill seeks to create a standard for common law and statutory bad faith actions by explicitly stating "mere negligence alone is insufficient to constitute bad faith." Current Florida Supreme Court precedent holds that bad faith shall be adjudicated under a totality of the circumstances standard, which has made it increasingly difficult for insurance carriers to obtain summary judgment on these claims. While it is uncertain how courts will apply this section if passed, it likely creates an avenue for dismissing bad faith lawsuits that simply allege mere negligence. While Florida courts have consistently incorporated this standard into precedent, the codification of this principle will provide carriers with a much-needed statutory protection.

Second, the bill imposes upon insureds and claimants "a duty to act in good faith in furnishing information regarding the claim, in making demands of the insurer, in setting deadlines, and in attempting to settle the claim." Currently, insurers receive time-sensitive demand letters seeking policy limits without enough supporting documents. This practice blindfolds insurers and forces them to evaluate a claim under a ticking clock without an entire understanding of the claim. If passed, this bill would significantly protect an insurer from

being duped into a bad faith claim. The imposition of "good faith" obligations on the insured directly contradicts the trend that had been unfolding in Florida cases, which expressly stated that a bad faith analysis is not to consider the actions by the insured(s). If passed, the proposed bill would specifically permit the trier of fact to consider if the insured or claimant did not act in good faith "in which case, the trier of fact may reasonably reduce the amount of damages awarded against the insurer."

Third, the bill creates a safe harbor distribution of proceeds where two or more third-party claimants make competing claims from a single occurrence for amounts exceeding the available policy limits of the insured parties. When faced with this scenario, the insurer can:

4. File an interpleader action; or
5. Enter binding arbitration to prevent extra contractual damages.

If the insurer chooses the interpleader action and the claims of third-party claimants are found in excess of the policy limits, then the claimants are entitled to a "prorated share of the policy limits as determined by the trier of fact." Likewise, if the insurer chooses binding arbitration, then the third-party claimants become entitled to a prorated share of the policy limits. Importantly, "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."

If the reforms in this bill are passed and adopted, they will provide long-needed statutory guidance to carriers which are too frequently targeted with predatory "bad faith setup" tactics by savvy plaintiffs' counsel. However, the bill does not stop at bad-faith reform; it also attempts to seriously restrict the practice of doctors billing outlandish and disproportionate sums for medical services rendered in exchange for the promise of being compensated out of the proceeds of the claim.

Changes to Florida Law on Letters of Protection

The practice of providing medical services under a Letter of Protection (LOP) to bodily injury claimants has gone without substantive regulation or scrutiny for many years. These medical groups do not charge patients who self-pay for these services, and they implicitly acknowledge that they will never recoup the amounts in such bills. However, until recently, there was no substantial way to prevent a plaintiff from arguing that these inflated bills reasonably reflected the value for the services received and arguing that their non-economic damages (i.e., "pain and suffering") should be some multiplier of these bogus charges.

House Bill 837 seeks to create stricter requirements regarding disclosures when a claimant attempts to recover medical expenses by way of an LOP. It does so in the following ways:

6. Setting requirements on what evidence must be presented to satisfy unpaid damages when a claimant uses an LOP; and
7. Setting disclosure requirements regarding LOPs.

Taken together, these two mechanisms may help curb the seemingly inflated damages verdicts often seen.

First, the proposed statute places requirements on what evidence must be presented to prove the amount of damages to satisfy unpaid damages under an LOP. If a claimant takes the LOP route and has health coverage, then the claimant *must present evidence of the amount the coverage would have paid the health provider*, along with the claimant's share of medical expenses if the claimant had obtained medical services pursuant to their health care coverage.

If the claimant obtains medical treatment or services under an LOP and the health care provider transfers the right to receive payment for the services to a medical lien-purchasing company, then the claimant must present

evidence of the amount the third party agreed to pay the health care provider in exchange for the rights to the LOP.

Second, the proposed statute adds requirements as a condition precedent to bringing a personal injury claim or wrongful death action for medical expenses rendered under an LOP. Important requirements include:

8. A copy of the LOP;
9. An itemized list of all medical expenses, coded, to the extent applicable, to the American Medical Association's Current Procedural Terminology, or the Healthcare Common Procedure;
10. If the rights to the LOP were sold to a medical lien-purchasing company, the name of the company and the purchase price;
11. If the claimant had medical coverage, the identity of such coverage; and
12. If the claimant was referred to use an LOP, the identity of the referral source - including whether the claimant's attorney made the referral.

Conclusion

Florida still has a long way to go before meaningful tort reform becomes a reality, or until these reforms reduce insurance premiums. However, the initiative and bill proposed by Governor DeSantis are an important first step. Moreover, what is being proposed in the bill is not an elimination of claimants' rights, and it is far from placing hard caps on damages. Rather, it is a meaningful attempt at introducing reasonableness standards on practices far too common in the personal injury sector that have not only given Florida a bad reputation but have also made operating business in Florida an expensive and risky proposition. If you have any questions on this topic, please reach out to one of the authors or the Baker Donelson attorney with whom you regularly work.