troutman pepper locke

Articles + Publications | June 5, 2023

Recent Tort Reforms Expected to Have Major Impact on Insurance Litigation in Florida

WRITTEN BY

Jennifer Mathis | Carrie E. Paulsen

A wide range of tort reform laws (HB 837) were recently approved by the Florida House and went into effect on March 24. HB 837 is intended to help protect businesses and insurers from excessive litigation in Florida and is expected to make it more difficult for claimants to pursue "bad faith" lawsuits. The new laws include the following:

Changes to Florida Bad Faith Law

HB 837 makes several changes to Florida's civil remedy statute (Fla. St. § 624.155), which permits a claimant to bring a civil action against an insurer for various unfair insurance practices. Section 624.155(5)(a) now specifies that "mere negligence alone is insufficient to constitute bad faith." The revised statute also provides that in any bad faith action brought under the statute, the insured, the claimant, and their representatives have a duty to act in good faith in furnishing information regarding the claim, making demands of the insurer, setting deadlines, and attempting to settle the claim. Fla. St. § 624.155(5)(b)(1). A breach of these obligations by the insured, the claimant, or their representatives does not create a separate cause of action on the part of the insurer, but the trier of fact may consider such conduct and reasonably reduce the amount of damages awarded against the insurer as a result of it. Fla. St. § 624.155(5)(b)(1), (2).

Section 624.155 now also includes a safe harbor for insurers by providing that a bad faith action cannot be brought against an insurer under either statutory or common law if the insurer tenders the lesser of (1) the policy limits or (2) the amount demanded by the claimant within 90 days after receiving actual notice of a claim that is accompanied by sufficient evidence to support the amount of the claim. Fla. St. § 624.155(4)(a). If the insurer fails to tender this amount, the applicable statute of limitations is extended by 90 days. Fla. St. § 624.155(4)(c). An insurer's failure to tender this amount within the 90-day period is inadmissible in a subsequent action seeking to establish the insurer's bad faith. Fla. St. § 624.155(4)(b).

The revised Section 624.155 also provides a safe harbor procedure for insurers when multiple parties have competing claims arising out of a single occurrence, and their claims may exceed the available policy limits. An insurer is insulated from liability above its policy limits if, within 90 days of receiving notice of the competing claims exceeding the policy limits, the insurer either files an interpleader or makes its entire policy limits available to the claimants pursuant to binding arbitration that is paid by the insurer. Fla. St. § 624.155(6)(a), (b).

Limitation on Award of Attorneys' Fees Against an Insurer

HB 837 repeals Florida statutes (Fla. St. §§ 627.428 and 626.9373), which permit an insured to recover its

attorney fees in a lawsuit against an insurer when the insured is the prevailing party. These laws are replaced by a much more limited statute (Fla. St. § 86.121), which only permits an insured to recover its reasonable attorneys' fees incurred in litigating a declaratory judgment action to determine coverage after an insurer has made a total denial of coverage, and there is a verdict in favor of the insured. This new law also clarifies that a defense offered by an insurer pursuant to a reservation of rights does not constitute a denial of coverage. Fla. St. § 86.121(1)(b). The right to recover reasonable attorney fees may not be transferred, assigned, or acquired by anyone other than a named or omnibus insured or a named beneficiary. *Id*. This statute does not apply to residential or commercial property insurance. Fla. St. § 86.121(2).

Section 57.104 of the Florida statutes is also amended to provide that, in any action in which attorney fees are awarded by a court, there is a strong presumption that a lodestar fee is sufficient and reasonable. This presumption may be overcome only in a rare and exceptional circumstance with evidence that competent counsel could not otherwise be retained. Fla. St. § 57.104(2).

Restrictions on Admissibility of Medical Bills

HB 837 creates a new statute (Fla. St. § 768.0427) regarding the admissibility of evidence regarding medical expenses in personal injury and wrongful death actions. It aims to eliminate awards of inflated medical costs by limiting admissible evidence and recoveries for medical costs to amounts that were actually paid. Previously, Florida law permitted a plaintiff to introduce evidence of the gross amount of its medical bills irrespective of the amount actually paid by the health insurer. *Nationwide Mutual Fire Insurance Co. v. Harrell*, 53 So.3d 1084 (Fla. Ct. App. 1st Dist. 2010). Under the new statute, evidence to prove the amount of damages for past medical treatment or services is limited to the amount actually paid, regardless of the source of payment. Fla. St. § 768.0427(2)(a). Evidence regarding unpaid past medical bills and future medical costs is also limited depending on the type of medical insurance held by the claimant. Fla. St. § 768.0427(2)(b), (c).

Section 768.0427 also impacts the use of "letters of protection" (agreements between an attorney and doctor for the doctor to provide treatment in lieu of receiving payment until proceeds from a settlement or judgment are obtained). First, it requires the claimant to make certain disclosures as a condition precedent to asserting a claim for medical expenses for treatment rendered under a letter of protection. These disclosures include a copy of the letter, billings made by the provider, diagnosis codes used, and information on the relationship between the claimant's counsel and the medical provider, including whether the claimant's attorney referred the claimant to such treatment, the financial relationship between the attorney and medical provider, the financial benefit obtained, and the number and frequency of such referrals. This new disclosure requirement overturns prior Florida law, holding that information regarding the financial relationship between a plaintiff attorney and treating physician was not discoverable, and the question of whether the attorney referred its client to a particular physician was protected by the attorney-client privilege. *Worley v. Central Florida*, 228 So.3d 18 (Fla. 2017).

Section 768.0427(4) limits the damages recoverable for medical treatment or services to: (1) the amounts actually paid by or on behalf of the claimant to the health care provider; (2) amounts necessary to satisfy charges for medical treatment that are due and owing at the time of trial; and (3) amounts necessary to provide for any reasonable and necessary medical treatment or services the claimant will receive in the future.

Protections for Property Owners Against Premises Liability Lawsuits

HB 837 also provides new protections to property owners regarding premises liability claims. It creates a new statute (Fla. St. § 768.0701), which provides that in an action against an owner, lessor, or manager for premises liability for criminal acts of third parties, the trier of fact must consider the fault of all persons who contributed to the injury.

Another new statute (Fla. St. § 768.0706) provides that an owner or principal operator of multifamily residential property who substantially implements specified security measures on the property has a presumption against liability for criminal acts that occur on the premises that are committed by third parties who are not agents or employees of the owner or operator.

Offer of Judgment

HB 837 creates a new statute (Fla. St. § 624.1552), which provides that the Florida statute regarding offers of judgment (Fla. St. § 768.79) applies to any civil action involving an insurance contract. Section 768.79 provides that a defendant is entitled to recover its reasonable costs and attorneys' fees if it makes an offer of judgment that is not accepted by the plaintiff within 30 days and there is a finding of no liability or the judgment obtained by the plaintiff is at least 25% less than the offer.

Revision of Comparative Negligence Law

Florida has been a comparative negligence state, allowing damages to be awarded based on each defendant's percentage of fault. HB 837 amends Florida's comparative fault law (Fla. St. § 768.81) to provide that any party found to be greater than 50% at fault for his or her own harm may not recover any damages. Fla. St. § 768.81(6). This section does not apply to medical negligence claims. *Id*.

Reduction in the Statute of Limitations

HB 837 amends Florida's statute of limitations law (Fla. St. § 95.11) to reduce the statute of limitations for actions based on negligence from four years to two years. Fla. St. § 95.11(4)(a).

HB 837 applies to causes of action filed after March 24. It does not affect cases filed prior to this date. The above summary is only intended to provide highlights of the changes to Florida law and does not purport to be a complete statement of the law. Please refer to the entire text of HB 837 and the relevant statutes.

RELATED INDUSTRIES + PRACTICES

- Insurance + Reinsurance