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Alert | Litigation

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Tort Reform Overhauls Florida's Litigation Landscape

Florida Governor Ron DeSantis signed a comprehensive tort reform bill, HB 837, into law on March 24, 2023. The Florida Legislature initiated the changes in the law to decrease frivolous lawsuits and prevent predatory practices of billboard attorneys by limiting personal injury cases, insurance litigation, and attorneys' fees.[1] This GT Alert summarizes the new law's key changes, which apply to causes of action filed after March 24, 2023, the new law's effective date, unless otherwise specified. On the eve of HB837's enactment, plaintiffs' lawyers filed more than 280,000 new cases.[2]

NEGLIGENCE LAW

Statute of Limitations for General Negligence* (§95.11(4))**. HB837 amends Fla. Stat. § 95.11 by reducing the statute of limitations period for general negligence actions from four years to two years. Florida joins 44 other states with statutes of limitations for negligence actions of less than four years.[3] The new law applies to causes of action ***accruing after March 24, 2023, the effective date of the new law. As a result of this change, practitioners should pay particular attention to the date of the alleged negligent

[1] *See* Fla. Governor's Office, Governor Ron DeSantis Announces Comprehensive Lawsuit Reforms to Protect Floridians from Predatory Billboard Attorneys, Feb. 14, 2023; *see also* Fla. Governor's Office, Governor Ron DeSantis Signs Comprehensive Legal Reforms into Law, March 24, 2023.
[2] *See* "Comprehensive Tort Reform Spurs Record Filings," The Florida Bar News, April 6, 2023.
[3] *See* Forbes, Personal Injury Statute Of Limitations By State 2023, Dec. 6, 2022.

acts. The statute of limitations for actions based on professional negligence and wrongful death remain at 2 years, and the limitations period for medical malpractice remains at 2 years from discovery.

***Modified Comparative Negligence Standard* (§768.81)**. HB837 amended Fla. Stat. §768.81 (Comparative Fault) and changed Florida's apportionment standard from a "pure" comparative negligence standard to a "modified" comparative negligence standard. Under this new approach, if the plaintiff was more than 50% at fault for his or her harm, then plaintiff shall not recover damages from the defendant. However, personal injury and wrongful death actions arising out of medical negligence are still subject to the pure comparative negligence approach. As a result of this change, Florida now joins the 34 other states who have a modified comparative negligence approach.

INSURANCE LAW

***Bad Faith Actions* (§624.155)**. HB837 amended Fla. Stat. §624.155 (Civil Remedy) and modified Florida's "bad faith" framework by enacting measures that reduce an insurer's liability for bad faith cases, which may indirectly result in lower premiums for certain types of insurance:

- Bad Faith Standard. Prior to March 24, 2023, Florida law did not explicitly define what conduct constituted bad faith. The Florida Supreme Court, in *Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 680 (Fla. 2004), noted that "the question of whether an insurer has acted in bad faith in handling claims against the insured is determined under the 'totality of the circumstances' standard. … Each case is determined on its own facts and ordinarily 'the question of failure to act in good faith with due regard for the interests of the insured is for the jury.'" (citations omitted). The result of the *Berges* decision decreased an insurer's ability to resolve third-party bad faith actions through a motion for summary judgment, as such motions are based on questions of law, while bad faith under *Berges* is a question of fact. By amending Fla. Stat. §624.155, the Florida Legislature clarified that negligence alone is insufficient to prove bad faith by an insurer and essentially codified *DeLaune v. Liberty Mut. Ins. Co.*, 314 So. 2d 601, 603 (Fla. 4th DCA 1975) and other Florida court decisions that have ruled bad faith must be based on more than mere negligence. "In any bad faith action, whether such action is brought under this section or is based on the common-law remedy of bad faith: . . . ***Mere negligence alone is insufficient to constitute bad faith***." §624.155(5), Fla. Stat (2023) (emphasis added).
- Duty of Good Faith By Insureds and Third-Party Claimants. The purpose of Florida's bad faith statute is to help curb abuses and unfair practices by insurers. However, to level the playing field between insured and insurer, HB837 imposes a reciprocal duty of good faith on insureds and third-party claimants in furnishing information regarding a claim to the insurer, in making demands of the insurer, in setting deadlines, and in attempting to settle the claim. The new Fla. Stat. §624.155(5)(b) clarifies that a claimant's or claimant's representative's failure to act in good faith does not create a separate cause of action, but may be considered by the trier of fact in reasonably reducing the amount of damages awarded against an insurer.
- Safe Harbor Period. HB837 gives insurers a 90-day safe harbor period to avoid bad faith liability by tendering the lessor of the policy limits or the amount demanded by the claimant within 90 days after receiving actual notice of the claim. If the insurer fails to tender within 90 days, the applicable statute of limitations is extended for an additional 90 days. Additionally, an insurer's failure to tender within the 90-day period is not bad faith and is inadmissible in a bad faith action.
- Limited Liability Involving Multiple Third-Party Claimants. Finally, if two or more third-party claimants have competing claims arising out of a single occurrence that in total may exceed the available policy limits, the bill allows insurers to limit bad faith liability by paying the total policy limits at the outset if, within 90 days of receiving notice of the competing claims, the insurer either files an

interpleader action or the insurer makes the entire amount of the policy limits available for payment to the competing third-party claimants before a qualified arbitrator selected by the insurer and third-party claimants at the insurer's expense.

These changes apply to insurance contracts issued or renewed after March 24, 2023, and may affect certain insureds and their attorneys by reducing the number of bad faith lawsuits.

***One-Way Attorneys' Fees* (§86.121)**. Prior to March 24, 2023, prevailing insureds were entitled to recover the insured's attorneys' fees against an insurer pursuant to Fla. Stat. §627.428, commonly known as Florida's "one-way attorney fee statute," subject to certain exceptions outline in that statute (e.g., it does not apply to uninsured motorist coverage or residential/commercial property insurance policies). HB837, however, repealed Fla. Stat. §627.428 (and the related statute, Fla. Stat. §626.9373, which applies to actions against surplus lines insurers) and created a new statute, Fla. Stat. §86.121, thereby narrowing the application of one-way prevailing insured attorneys' fees to apply only in actions for declaratory relief to determine insurance coverage after a total coverage denial of a claim. In order words, there are no one-way attorneys' fees for declaratory relief actions based on partial coverage denials. This may create situations that incentivize some insurers to tender *de minimums* coverage payments rather than flat-out denying claims in order to usurp an insured's ability to bring a coverage action with the opportunity to collect prevailing insured attorneys' fees.

Insureds are not completely without recourse. HB837 created a new statute, Fla. Stat. §624.1552, and clarified that Florida's offer of judgment statute, Fla. Stat. §768.79—which provides attorney fee incentives to encourage settlement and thus decrease litigation—applies in ***any*** civil action involving an insurance contract (whether based in damages seeking coverage limits, bad faith liability, declaratory relief, or otherwise). Florida now joins the 6 other states who allow one-way attorney fees in only limited situations. Additionally, prevailing insured attorneys' fees remains available in bad faith actions, pursuant to Fla. Stat. §624.155(7). The bill's restriction of one-way prevailing insured attorney fees reduces the likelihood that an attorney will recover attorneys' fees from an insurer in many coverage cases, which may make it more difficult for insureds to find attorneys willing to take on their cases. However, this change may positively indirectly lower the cost of insurance by lowering the amount of money an insurer is required to pay to prevailing insureds' attorneys. These changes apply to insurance contracts issued or renewed after March 24, 2023.

DAMAGES FOR MEDICAL EXPENSES

***Evidence of Medical Expenses* (§768.0427)**. HB837 creates a new standard as to the admissibility of medical bills to prove damages. A plaintiff must submit proof of the actual amount paid or that will be accepted under plaintiff's health insurance as opposed to what is billed by a healthcare provider. This change effectively requires that damages are limited to those charges a plaintiff, or his/her insurer, has paid or expects to actually pay "to satisfy the charge for the claimant's incurred medical treatment . . . plus the claimant's share of medical expenses under the insurance contract or regulation." §768.0427(2)(b)(1), Fla. Stat. (2023).

Letters of Protection. HB837 provides a definition of a letter of protection. The definition states that a "'Letter of protection' means any arrangement by which a health care provider renders treatment in exchange for a promise of payment for the claimant's medical expenses from any judgment or settlement of a personal injury or wrongful death action." §768.0427(1)(d), Fla. Stat. (2023). Additionally, the bill requires that in order for a plaintiff to recover for any medical expenses incurred under a letter of protection, plaintiff must (i) disclose the agreement; (ii) produce an itemized bill for all medical expenses;

(iii) disclose the identity of any factoring company to which the account receivable was sold; (iv) identify the existence of any healthcare coverage at the time the services were rendered; (v) disclose any referrals under the letter of protection. §768.0427(3), Fla. Stat. (2023). Effectively, HB837 removes any argument that a letter of protection is in some fashion privileged. This section overrules *Worley v. Central Florida Young Men's Christian Ass'n, Inc.*, 228 So. 3d 18 (Fla. 2017), which prohibited discovery into a plaintiff counsel's referral relationship with "treating" doctors.

PREMISES LIABILITY – NEGLIGENT SECURITY

***Allocation of Fault Among All Who Share Responsibility* (§768.0701)**. HB837 requires that in a negligence action relating to premises liability for the criminal acts of third parties, the fact finder must allocate fault as to all persons who contributed to the injury. Presumably, this will require that a portion of the fault be attributed to the criminal third-party who committed the act that caused the damages. How this ultimately affects damages claims in premises liability tort actions remains to be seen, but presumably it will decrease the liability apportioned to property owners.

Multifamily Residential Property Safety and Security* (§768.0706)**. HB837 creates a rebuttable presumption against liability in favor of the owner or principal operator of a multifamily residential property with respect to the criminal actions of third parties. Multifamily residential property is defined as "a residential building, or group of residential buildings, such as apartments, townhouses, or condominiums, consisting of ***at least five dwelling units on a particular parcel." §768.0706(1)(b), Fla. Stat. (2023). In order for the owner to qualify for this rebuttable presumption, certain security measures relating to (i) security cameras; (ii) parking lot lighting; (iii) external and internal lighting; (iv) door locks; (v) access point locks; (vi) gates; and (vii) peepholes must meet certain minimum standards. §768.0706(2), Fla. Stat. Further, by Jan. 1, 2025, obtaining a certification of crime prevention through environmental design assessment every three years will serve as proof to enjoy the benefit of the rebuttable presumption.

CONTINGENCY-BASED ATTORNEYS' FEES

***Fee Multipliers Only Applied in Rare Circumstances* (§57.104)**. HB837 effectively changes the lodestar methodology with respect to multipliers enunciated in *Florida Patient's Compensation Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985) and *Standard Guaranty Insurance Co. v. Quanstrom*, 555 So.2d 828 (Fla. 1990). Under the revisions, multipliers will only be considered "in a rare and exceptional circumstances with evidence that competent counsel could not otherwise be retained." §57.104(2), Fla. Stat. (2023). Accordingly, a trial court's imposition of multipliers should become a rare occurrence that will rarely be applied in any litigation. To overcome this presumption, admissible evidence must be presented as to the unavailability of counsel to handle a particular type of litigation. It would seem that producing such evidence will be exceptionally difficult in the vast majority of civil cases litigated in Florida.

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