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FLORIDA LEGISLATIVE SESSION UPDATE

Dear Ladies and Gentlemen:

This month we would like to share with you a recent bill that was considered by the Legislature of the State of Florida.

CS/SB 1592

Senate bill 1592, concerning civil remedies against insurers, was under consideration but **DID NOT PASS**. The proposed bill (a copy of which is attached for your convenience) sought to, *inter alia*: (1) revise provisions relating to civil actions against insurers; (2) revise the grounds for bringing an action based on the insurer's failure to accept an offer to settle within policy limits; (3) provide that the insurer has an affirmative defense when a third-party claimant or the insured fails to cooperate with the insurer; (4) provide that certain refusals to act by the insurer are not presumptive evidence of bad faith; and (5) provide for the relationship of the act to the common law and prior judicial decisions.

Although supported by the U.S. and Florida Chambers of Commerce, it is our understanding that this bill ran into substantial opposition by small business owners. Our contacts have advised that before the next legislative session, the changes sought in this bill will be modified to a form that is less extreme. Once we receive notice that a modified bill is being considered, we will provide a copy of that bill to you.

A good article regarding proposed bills considered in this legislative session can be found at:

<http://apps.lobbytools.com/go.cfm?22924224>

Should you have any questions with respect to the foregoing, please feel free to contact us.

Very truly yours,



JOHN BOND ATKINSON
ELLIE A. BERNSTEIN

By the Committee on Judiciary; and Senator Thrasher

590-02847A-11

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1 A bill to be entitled

2 An act relating to civil remedies against insurers;
3 amending s. 624.155, F.S.; revising provisions
4 relating to civil actions against insurers; revising
5 the grounds for bringing an action based on the
6 insurer's failure to accept an offer to settle within
7 policy limits; providing who may bring such an action;
8 providing requirements for bringing such an action;
9 providing for the release of an insured if the insurer
10 offers to settle a third-party claim within a
11 specified time under certain circumstances; providing
12 that the insurer has an affirmative defense if a
13 third-party claimant or the insured fails to cooperate
14 with the insurer; providing that an insurer is not
15 liable for two or more claims that exceed the policy
16 limits if it files an interpleader action or makes the
17 policy limits available under arbitration; specifying
18 responsibility for the payment of liens; providing
19 that an insurer is not liable for amounts in excess of
20 the policy limits if it makes timely payment of the
21 appraisal amount; providing that certain refusals to
22 act by the insurer are not presumptive evidence of bad
23 faith; revising requirements relating to the preaction
24 notice of a civil action sent to the Department of
25 Financial Regulation and the insurer; providing for
26 the relationship of the act to the common law and
27 prior judicial decisions; providing a definition for
28 "third-party claim"; amending s. 627.311, F.S.;
29 conforming a cross-reference; deleting an obsolete

590-02847A-11

20111592c1

30 provision; providing for severability; providing an
31 effective date.

32
33 Be It Enacted by the Legislature of the State of Florida:

34
35 Section 1. Section 624.155, Florida Statutes, is amended to
36 read:

37 624.155 Civil remedy.—

38 (1) Any person may bring a civil action against an insurer
39 if ~~when~~ such person is damaged:

40 (a) By the insurer's a violation of ~~any of~~ the following
41 ~~provisions by the insurer:~~

- 42 1. Section 626.9541(1)(i), (o), or (x);
- 43 2. Section 626.9551;
- 44 3. Section 626.9705;
- 45 4. Section 626.9706;
- 46 5. Section 626.9707; or
- 47 6. Section 627.7283.

48 (b) By the insurer's commission of any of the following
49 ~~acts by the insurer:~~

50 1. Acting arbitrarily and contrary to the insured's
51 interests in failing ~~Not attempting in good faith~~ to settle
52 claims within the policy limits if ~~when~~, under all the
53 circumstances existing at the relevant time, it could and should
54 have done so, had it acted fairly and honestly toward its
55 insured ~~and with due regard for her or his interests;~~

56 2. Making claims payments to insureds or beneficiaries not
57 accompanied by a statement setting forth the coverage under
58 which payments are being made; or

590-02847A-11

20111592c1

59 3. Except as to liability coverages, failing to promptly
60 settle claims, when the obligation to settle a claim has become
61 reasonably clear, under one portion of the insurance policy
62 coverage in order to influence settlements under other portions
63 of the insurance policy coverage.

64
65 Notwithstanding the ~~provisions of the above to the contrary~~, a
66 person pursuing a remedy under this section need not prove that
67 such act was committed or performed with such frequency as to
68 indicate a general business practice.

69 (2) If a civil action is brought against an insurer
70 pursuant to subparagraph (1)(b)1., or based on a common law
71 claim for a bad faith failure to settle:

72 (a) Only an insured or the insured's assignee may bring
73 such action.

74 (b) With respect to a third-party claim, an insurer does
75 not violate the duty to attempt in good faith to settle on
76 behalf of its insured if the third-party claimant does not
77 provide a demand to settle which:

78 1. Is in writing, signed by the third-party claimant or the
79 claimant's authorized representative, and delivered to the
80 insurer and the insured;

81 2. States a specified amount within the insured's policy
82 limits for which the third-party claimant offers to settle its
83 claim in full and to release the insured from liability;

84 3. Is limited to one claimant and one line of coverage or,
85 if not so limited, separately designates a demand for each
86 claimant and each line of coverage, each of which may be
87 accepted independently;

590-02847A-11

20111592c1

88 4. Is submitted by a person having the legal authority to
89 accept payment and to execute the release;

90 5. Does not contain any conditions for acceptance other
91 than payment of the specific amount demanded and compliance with
92 the disclosure requirements of s. 627.4137; and

93 6. Includes a detailed explanation of the coverage and
94 liability issues and the facts giving rise to the claim,
95 including an explanation of injuries and damages claimed; the
96 names of known witnesses; and a listing and copy, if available,
97 of relevant documents, including medical records, which are
98 available to the third-party claimant or authorized
99 representative at the time of the demand to settle. The third-
100 party claimant and his or her representatives have a continuing
101 duty to supplement this information as it becomes available.

102 (c) With respect to a third-party claim, an insurer does
103 not violate the duty to attempt in good faith to settle on
104 behalf of its insured if, within 60 days after the notice of
105 claim, 60 days after the insurer's receipt of the third-party
106 claimant's written demand to settle, or 30 days after the
107 accident or incident giving rise to the claim, whichever is
108 later, the insurer offers to pay the lesser of:

109 1. The amount requested in the third-party claimant's
110 written demand to settle; or

111 2. The insured's policy limits, in exchange for a release
112 of liability.

113 (d) An insurer has an affirmative defense to any such
114 action if the third-party claimant, the insured, or their
115 representatives fail to fully cooperate in providing all
116 relevant information and in presenting the claim.

590-02847A-11

20111592c1

117 (3) Notwithstanding statutory or common law requirements,
118 if two or more third-party claimants make competing claims
119 arising out of a single occurrence, which in total exceed the
120 available policy limits of one or more of the insured parties
121 who may be liable to the third-party claimants, an insurer is
122 not liable beyond the available policy limits for failure to pay
123 all or any portion of the available policy limits to one or more
124 of the third-party claimants if, within 90 days after receiving
125 notice of the competing claims in excess of the available policy
126 limits, the insurer:

127 (a) Files an interpleader action under the Florida Rules of
128 Civil Procedure. If the claims of the competing third-party
129 claimants are found to be in excess of the policy limits, the
130 third-party claimants are entitled to a prorated share of the
131 policy limits as determined by the trier of fact. An insurer's
132 interpleader action does not alter or amend the insurer's
133 obligation to defend its insured; or

134 (b) Pursuant to binding arbitration agreed to by all
135 parties, makes the entire amount of the policy limits available
136 for payment to the competing third-party claimants before a
137 qualified arbitrator selected by the insurer at the expense of
138 the insurer. The third-party claimants are entitled to a
139 prorated share of the policy limits as determined by the
140 arbitrator, who shall consider the comparative fault, if any, of
141 each third-party claimant, and the total likely outcome at trial
142 based upon the total of the economic and noneconomic damages
143 submitted to the arbitrator for consideration. A third-party
144 claimant whose claim is resolved by the arbitrator shall execute
145 and deliver a general release to the insured party whose claim

590-02847A-11

20111592c1

146 is resolved by the proceeding.

147 (4) After settlement of a third-party claim, the third-
148 party claimant's attorney is responsible for the satisfaction of
149 any liens from the settlement funds to the extent such
150 settlement funds are sufficient. If the third-party claimant is
151 not represented by counsel, the third-party claimant shall
152 provide the insurer with a written accounting of all outstanding
153 liens.

154 (5) An insurer is not liable for amounts in excess of the
155 policy limits or of the award, whichever is less, if it makes
156 timely payment of an appraisal award.

157 (6) The fact that the insurer does not accept a demand to
158 settle or offer policy limits under paragraph (2)(c), pay an
159 appraisal award under subsection (5), or file an interpleader
160 action or make policy limits available for arbitration under
161 subsection (3) during the times specified does not give rise to
162 a presumption that the insurer acted in bad faith.

163 (7)(2) Any party may bring a civil action against an
164 unauthorized insurer if such party is damaged by a violation of
165 s. 624.401 by the unauthorized insurer.

166 (8)(3)(a) Except for an action relating to a third-party
167 claim, as a condition precedent to bringing an action under this
168 section, the department and the authorized insurer must be ~~have~~
169 ~~been~~ given 60 days' written notice of the violation. If the
170 department returns a notice for lack of specificity, the 60-day
171 time period does ~~shall~~ not begin until a proper notice is filed.

172 (a)(b) The notice shall be on a form provided by the
173 department, sent by certified mail to the claim handler if known
174 or, if unknown, to the specific office handling the claim, and

590-02847A-11

20111592c1

175 ~~shall~~ state with specificity the following information, ~~and such~~
176 ~~other information as the department may require:~~

177 1. The statutory provision, including the specific language
178 of the statute, which the authorized insurer allegedly violated.

179 2. The facts and circumstances reasonably known to the
180 insurer giving rise to the violation, stated with specificity,
181 and the corrective action that the insurer needs to take to
182 remedy the alleged violation.

183 3. The name of any individual involved in the violation.

184 4. Reference to specific policy language that is relevant
185 to the violation, if any. ~~If the person bringing the civil~~
186 ~~action is a third party claimant, she or he shall not be~~
187 ~~required to reference the specific policy language if the~~
188 ~~authorized insurer has not provided a copy of the policy to the~~
189 ~~third party claimant pursuant to written request.~~

190 5. A statement that the notice is given in order to perfect
191 the right to pursue the civil remedy authorized by this section.

192 6. Such other information as the department may require.

193 (b)-(e) Within 20 days after ~~of~~ receipt of the notice, the
194 department may return any notice that does not provide the
195 specific information required by this section, ~~and the~~
196 ~~department shall~~ indicate the specific deficiencies contained in
197 the notice. A determination by the department to return a notice
198 for lack of specificity is ~~shall be~~ exempt from ~~the requirements~~
199 ~~of~~ chapter 120.

200 (c)-(d) No action shall lie if, within 60 days after filing
201 notice, the damages are paid or the circumstances giving rise to
202 the violation are corrected.

203 (d)-(e) The authorized insurer that is the recipient of the

590-02847A-11

20111592c1

204 a notice must ~~filed pursuant to this section shall~~ report to the
205 department on the disposition of the alleged violation.

206 (e)~~(f)~~ The applicable statute of limitations for an action
207 under this section is ~~shall be~~ tolled for a ~~period of~~ 65 days by
208 the mailing of the notice ~~required by this subsection~~ or the
209 mailing of a subsequent notice ~~required by this subsection~~.

210 (9)~~(4)~~ Upon adverse adjudication at trial or upon appeal,
211 the authorized insurer is ~~shall be~~ liable for damages, together
212 with court costs and reasonable attorney's fees incurred by the
213 plaintiff.

214 (10)~~(5)~~ ~~No~~ Punitive damages may not ~~shall~~ be awarded under
215 this section unless the acts giving rise to the violation occur
216 with such frequency as to indicate a general business practice
217 and these acts are:

- 218 (a) Willful, wanton, and malicious;
- 219 (b) In reckless disregard for the rights of any insured; or
- 220 (c) In reckless disregard for the rights of a beneficiary
221 under a life insurance contract.

222

223 Any person who pursues a claim under this subsection must ~~shall~~
224 post in advance the costs of discovery. Such costs shall be
225 awarded to the authorized insurer if ~~no~~ punitive damages are not
226 awarded to the plaintiff.

227 (11)~~(6)~~ This section does ~~shall~~ not be construed to
228 authorize a class action suit against an authorized insurer or a
229 civil action against the commission, the office, or the
230 department or any of their employees, or ~~to~~ create a cause of
231 action if ~~when~~ an authorized health insurer refuses to pay a
232 claim for reimbursement on the ground that the charge for a

590-02847A-11

20111592c1

233 service was unreasonably high or that the service provided was
234 not medically necessary.

235 ~~(12)(7) In the absence of expressed language to the~~
236 ~~contrary,~~ This section does ~~shall~~ not be construed to authorize
237 a civil action or create a cause of action against an authorized
238 insurer or its employees who, in good faith, release information
239 about an insured or an insurance policy to a law enforcement
240 agency in furtherance of an investigation of a criminal or
241 fraudulent act relating to a motor vehicle theft or a motor
242 vehicle insurance claim.

243 ~~(13)(8)~~ The civil remedy specified in this section does not
244 preempt any other remedy or cause of action provided for
245 pursuant to any other statute or pursuant to the common law of
246 this state. The legal standard established in subparagraph
247 (1)(b)1. and the provisions of subsections (2)-(6) apply equally
248 and without limitation or exception to all common law remedies
249 and causes of action for bad faith failure to settle, regardless
250 of legal theory, and to actions brought pursuant to this
251 section. To prevent circumvention of this section by resort to
252 common-law causes of action, all prior judicial decisions
253 inconsistent with the provisions of this section are
254 disapproved. These include, but are expressly not limited to,
255 Macola v. Gov't Employees Ins. Co., 953 So.2d 451 (Fla. 2006),
256 Berges v. Infinity Ins. Co., 896 So.2d 665 (Fla. 2004), and
257 Powell v. Prudential Property & Cas. Ins. Co., 584 So.2d 12
258 (Fla. 3rd DCA 1991). Any person may obtain a judgment under
259 ~~either~~ the common-law remedy for ~~of~~ bad faith or this statutory
260 remedy, but is ~~shall~~ not be entitled to a judgment under both
261 remedies. This section does ~~shall~~ not be construed to create a

590-02847A-11

20111592c1

262 common-law cause of action. The damages recoverable pursuant to
263 this section ~~shall~~ include those damages that ~~which~~ are a
264 reasonably foreseeable result of a specified violation of this
265 section by the authorized insurer and may include an award or
266 judgment in an amount that exceeds the policy limits.

267 (14)~~(9)~~ A surety issuing a payment or performance bond on
268 the construction or maintenance of a building or roadway project
269 is not an insurer for purposes of subsection (1).

270 (15) As used in the section, the term "third-party claim"
271 means a claim against an insured, by one other than the insured,
272 on account of harm or damage allegedly caused by an insured and
273 covered by a policy of liability insurance.

274 Section 2. Paragraph (k) of subsection (3) of section
275 627.311, Florida Statutes, is amended to read:

276 627.311 Joint underwriters and joint reinsurers; public
277 records and public meetings exemptions.—

278 (3) The office may, after consultation with insurers
279 licensed to write automobile insurance in this state, approve a
280 joint underwriting plan for purposes of equitable apportionment
281 or sharing among insurers of automobile liability insurance and
282 other motor vehicle insurance, as an alternate to the plan
283 required in s. 627.351(1). All insurers authorized to write
284 automobile insurance in this state shall subscribe to the plan
285 and participate therein. The plan shall be subject to continuous
286 review by the office, which may at any time disapprove the
287 entire plan or any part thereof if it determines that conditions
288 have changed since prior approval and that in view of the
289 purposes of the plan changes are warranted. Any disapproval by
290 the office shall be subject to the provisions of chapter 120.

590-02847A-11

20111592c1

291 The Florida Automobile Joint Underwriting Association is created
292 under the plan. The plan and the association:

293 (k)~~1~~. Shall have no liability, and no cause of action ~~of~~
294 ~~any nature shall arise~~ against any member insurer or its agents
295 or employees, agents or employees of the association, members of
296 the board of governors of the association, the Chief Financial
297 Officer, or the office or its representatives for any action
298 taken by them in the performance of their duties or
299 responsibilities under this subsection. Such immunity does not
300 apply to actions for or arising out of a breach of any contract
301 or agreement pertaining to insurance, or any willful tort.

302 ~~2. Notwithstanding the requirements of s. 624.155(3)(a), as~~
303 ~~a condition precedent to bringing an action against the plan~~
304 ~~under s. 624.155, the department and the plan must have been~~
305 ~~given 90 days' written notice of the violation. If the~~
306 ~~department returns a notice for lack of specificity, the 90-day~~
307 ~~time period shall not begin until a proper notice is filed. This~~
308 ~~notice must comply with the information requirements of s.~~
309 ~~624.155(3)(b). Effective October 1, 2007, this subparagraph~~
310 ~~shall expire unless reenacted by the Legislature prior to that~~
311 ~~date.~~

312 Section 3. If any provision of this act or its application
313 to any person or circumstance is held invalid, the invalidity
314 does not affect other provisions or applications of the act
315 which can be given effect without the invalid provision or
316 application, and to this end the provisions of this act are
317 severable.

318 Section 4. This act shall take effect July 1, 2011.