

# *The Elimination Of Section 627.428 Leaves Policyholders In Peril*

**I. Most policyholders will be unable to find representation when they are sued by their own insurance company. This is a recipe for insurer abuse!**

Liability insurers weaponize the civil justice system more than any other industry in America. They have teams of high-priced lawyers at 1,000+ lawyer firms who routinely file questionable or downright frivolous lawsuits *against their own customer* to avoid paying policy benefits or escape bad faith liability.

These lawsuits are called “declaratory judgment actions.” Whenever the amount in dispute is more than \$75,000 and the insurance company is domiciled in another state (as is most often the case), those lawsuits will be filed in federal court. *See* 28 U.S.C § 1332.

Federal court declaratory judgment actions often consume hundreds, if not thousands, of hours of attorney time. No lawyer would agree to handle such a case on a contingency fee because no money is at stake – the case just seeks a “declaration.” That means attorneys will require an hourly fee.

Under section 627.428, if the policyholder wins the declaratory judgment action, their liability insurer must pay the policyholder’s

reasonable attorneys’ fees. *See, e.g., Mercury Ins. Co. of Florida v. Cooper*, 919 So. 2d 491 (Fla. 3d DCA 2005).

That has been the law in Florida since 1893. *See* Ch. 4173, at 101, Laws of Fla. (1893); *Tillis v. Liverpool & London & Globe Ins. Co.*, 35 So. 171 (Fla. 1903).

HB 837/SB 236 seeks a wholesale repeal of section 627.428. Without it, it will be impossible for a policyholder to find competent representation unless they are willing and able to spend \$250,000 in legal fees. This leaves policyholders exposed to insurance company abuses.

There is nothing preventing insurance companies from filing declaratory judgment actions against their policyholder in literally EVERY CASE. Most policyholders, without section 627.428, will be unable to find a lawyer to defend them and will get defaulted. This would enable insurance companies to not only escape bad faith liability, but also avoid paying out the liability coverage. The insurers could collect years of premiums and then file a declaratory judgment action to avoid paying out the coverage as soon as there is a loss.

**Bottom line – Repealing section 627.428 will allow Goliath to trample David.**

## **II. Even if policyholders win the declaratory judgment action, they have no viable procedural mechanism to recover reasonable hourly attorney's fees from the insurer.**

When a civil lawsuit is seeking to recover monetary damages, either side may serve a formal “offer of judgment” or “demand for judgment.” See § 768.79, Fla. Stat. If a plaintiff's demand for judgment is not accepted and the plaintiff wins a judgment of at least 25% greater than the amount of the demand, the plaintiff is entitled to recover reasonable hourly attorneys' fees from the date of the demand. Likewise, if the defendant's offer of judgment is not accepted and the judgment against the defendant is at least 25% less than the amount of the offer, the defendant is entitled to recover reasonable hourly attorneys' fees from the date of the offer.

However, the offer of judgment/demand for judgment statute does not apply to declaratory judgment actions. See *Diamond Aircraft Indus., Inc. v. Horowitch*, 107 So. 3d 362 (Fla. 2013). Thus, there is no procedural mechanism for a prevailing policyholder to force their liability insurer to pay the policyholder's attorney's fees for filing a meritless declaratory judgment action.

## **III. Insurers do not provide the policyholder with a lawyer to defend declaratory judgment actions.**

Every liability policy requires the insurance company to provide a lawyer to defend the policyholder from a lawsuit brought by a third-party that pleads a covered claim.

However, in declaratory judgment actions, it is not an injured third-party suing the policyholder. Rather, it is the insurance company suing its OWN policyholder.

Of course, insurance companies do not provide the policyholder with a lawyer to defend them from the lawsuit filed by the insurance company. That is why section 627.428 exists – to ensure the policyholder can find competent representation if they are sued by a liability insurer.

Without it, there is nothing preventing insurance companies from trampling the rights of their policyholders in every single case.