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Granting Insurers Special Immunities In Third-Party Claims Puts Small Businesses At Risk Of Financial Ruin

I. Understanding Florida's common law remedy for third-party bad faith.

First, it is critical that people understand what is a THIRD-PARTY case. It is *not* about who brings the insurance bad faith lawsuit. It *is* about the type of coverage from which the claim arises.

Most third-party cases are brought by the insured – not the claimant. But it is still called a third-party bad faith case only because it arises from a third party's claim against the insured. These claims arise only from liability insurance claims.

A FIRST-PARTY bad faith case is one that is purely a dispute between an insurance company and their customer. The customer has a claim that the insurer didn't pay. Examples are fire loss claims, life insurance claims, storm damage claims, and so on. The first-party claim that arises in the personal injury context is an uninsured/underinsured motorists ("UM") claim. The insured is injured by a person who has inadequate insurance and brings a claim against his own UM carrier. If the carrier refuses to pay without justification, that can result in a first-party bad faith claim.

THIRD PARTY claims – where an insurer fails to settle a claim brought by a third party against its insured resulting in an excess judgment – are not statutory. They were created by the Florida Supreme Court in *Auto Mutual Indemnity Co. v. Shaw*, 184 So. 852 (Fla. 1938). Laws made by the courts are called "common law" remedies, and third-party bad faith is "common law bad faith."

The courts have always declined to create common law FIRST-PARTY claims, reasoning that an insured (who is bringing a claim against his insurer for first-party benefits) is always in an adversarial relationship with his insurer. But the Legislature created *statutory* bad faith for first-party claims in 1982, when it passed section 624.155. (Technically the claimant has the *option* of bringing a statutory third-party claim, but there is no reason to mess with that, so virtually nobody does. UM bad faith is statutory, and third-party bad faith is common law, in real life).

II. Although statutory "cure periods" make sense for *first-party* cases, they make no sense for *third-party* cases.

A Civil Remedy Notice of Insurer Violation ("CRN") makes sense in a first-party bad faith setting. A CRN is a condition precedent to a STATUTORY bad faith claim. It can only be served AFTER the insurer has committed bad faith. The insured who thinks the insurer has not treated him fairly has to identify the acts of bad faith, and the people responsible.

The notice is filed on a website maintained by the Department of Financial Services.

Once the CRN is properly served, the carrier has 60 days to "cure" its bad faith. Importantly, *all it has to do* to cure is to pay its policy limits during that 60-day period. No matter what other damages the insured has suffered because of the delay or other bad faith, if the carrier pays its limits, that's the end of it.

And that makes sense for first-party cases. What damages, really, can the insured suffer due to that delay? Some interest? Some attorneys' fees, maybe? Most times it is just de minimis, so if you can get the limits paid just by waiting an additional 60 days, it is worth it. The system works well.

However, granting the insurer some kind of special "get-out-of-jail free" card for THIRD-PARTY cases makes no sense. If an insured kills a kid on a bicycle, his exposure is in the millions, and is certainly not limited by his policy limits. The claimant has the option of ignoring settlement negotiations and can file suit the day after the accident if they want to.

Particularly when the defendant is an affluent individual, or is a business that has significant assets, the claimant may not be particularly interested in limiting their claim to policy limits of $300k, $500k or even $1 million. Why should they? If they get a judgment for $3-4 million, they can collect the insurance limits *and* levy on the insureds assets to collect the balance. So, it is not like they must choose between the two.

Fortunately for many businesses, most (but not all) people who have suffered a bad loss are not really interested in jumping into years of litigation – they much prefer a quick settlement. Also, some lawyers are more interested in a quick settlement for easy cash, instead of having to sweat out years of work, while advancing hundreds of thousands of dollars to pursue full value.

In these cases, *as a matter of grace*, the plaintiff may offer to take policy limits. When that happens, the insured customer who has exposed assets can see light at the end their long, dark tunnel. However, the insured's fate remains utterly and entirely in the hands of his insurer, because under the contract the insured *cannot* get involved in negotiations or settlement of a case, except as controlled and directed by the insurer.

Any offer to settle a claim for a fraction of its value will usually come with conditions, such as affidavits from the insured designed to ensure that the insurance limits are in fact what they have been represented to be, etc. These conditions are essentially the due diligence anyone would expect before taking a fraction of the value of their claim. The liability insurance company who has taken control over the claim has a duty to advise the insured of these conditions and assist in meeting them. Settlement offers also generally have a deadline for payment associated with them, and the courts have held this must be longer than 10 days to be considered reasonable.

If an insurance company has a fair opportunity to settle a claim against their insured, when under all the circumstances they should do so if acting fairly and honestly toward the insured and with due regard for his interests, and the insurer UNJUSTIFIABLY FAILS to do so, that is bad faith.

The claimant *may* decide to forgive the failure, and everyone dodges the bullet. However, for any number of reasons, sometimes including nothing more than a simple change of heart, the plaintiff can decide that their forgiveness account is overdrawn – they file suit, march to verdict and get a crushing judgment against the insured. Once judgment is entered, they can levy on the business or personal assets, costing the insured millions of dollars that could have been avoided

had the insurance company settled the claim in good faith. That is the absolute right of the parent whose child was killed in the accident, and nobody should ever fault them for that decision.

In that situation, the failure of the insurer to settle when it should have constitutes bad faith. Florida law, since 1938, has created a remedy in favor of the customer in such situations, and it has worked extremely well. We have weeded out most of the bad actor insurance companies, while still having an incredibly robust auto and liability coverage market.

The insurance companies have been paid, in advance, to investigate, evaluate, negotiate and settle claims against their insureds if it is possible to do so. Therefore, the insurer owes a duty of good faith to the insured in the exercise of that power over the claim and the insured's financial well-being. If the customer who is saddled with an excess judgment can prove that the insurer "failed to settle a claim against its insured when it could and should have done so had it acted fairly and honestly and with due regard for the insureds interests," the insurer is required to pay the judgment, in order to return the insured to the status where it would have been had the claim been settled.

CS/HB 837 and SB 236 say there can be no bad faith in THIRD-PARTY CLAIMS if the insurance company tenders its policy limits within 90 days after the lawsuit is filed. That means that all the insurance company would have to do is pay its policy limits, belatedly, and it would be immune from bad faith.

HB 837/SB 236 (as originally filed) says there can be no bad faith in THIRD-PARTY CLAIMS unless a CRN is filed and the carrier is given 60 days to "cure" its bad faith. During that time all it will have to do is pay its policy limits, belatedly.

If the insurance company is immune from any pre-suit bad faith failure to settle, then the insurance company will have no incentive to EVER tender the policy limits before a lawsuit. As a result, injured claimants will be forced to hire a lawyer in virtually every case. The lawyer, knowing that the insurance company has no incentive to make their "best offer" before a lawsuit is filed, will file suit immediately instead of trying to resolve the case without litigation.

The whole purpose of liability coverage is to protect the insureds from a lawsuit. These bills do the opposite – **they encourage MORE LAWSUITS to be filed against the policyholders.**

Likewise, advocates of tort reform say it is necessary to reduce litigation. But if these bills pass, there will be *tens of thousands* of additional personal injury lawsuits filed each year.

When the insurance company tenders the policy limits on 89th day after suit is filed, there is NO obligation on the claimant to accept the limits at that point. None. The ONLY person who gets benefit from this get-out-of-jail free card is the insurance company who already committed bad faith.

There is NO obligation on the claimant to accept the limits at that point. None. The ONLY person who gets benefit from this get out of jail free card is the insurance company who committed bad faith.

The carrier will cure by belatedly tendering the policy limits, and the claimant who has had a change of heart can now just say no. Or perhaps the claimant is still conditioning settlement on some reasonable non-monetary condition (i.e., an affidavit verifying the amount of insurance coverage), which the insurance company unreasonably refuses to perform. Either way, the case continues to a crushing excess verdict and judgment, and the insured's assets will be levied on, forcing it to

lose millions of dollars because of the insurance company's earlier bad faith failure to settle. But because of the special immunity, and the company's belated, meaningless tender, the insured has NO remedy for all these losses.

This does NOT HELP ANY BUSINESS IN THE STATE – except, of course, the insurance business.

Also note that under existing common law, the insurer cannot be held responsible if they are only negligent. *DeLaune v. Liberty Mut. Ins. Co.*, 314 So. 2d 601 (Fla. 4th DCA 1975). Insurance is the only business in the state, other than ER doctors, who may be negligent, cause millions of dollars of harm, and get a complete pass from liability. AND THEY AREN'T SATISFIED?!?

HB 837/SB 236 SEEKS TO PROTECT BIG INSURANCE AT THE EXPENSE OF SMALL BUSINESSES. STAND UP FOR POLICYHOLDER RIGHTS!