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Personal Injury Lawyers' "Bad Faith" Conduct Should Not Eliminate Policyholder Rights

I. HB 837/SB 236's imposition of "good faith" duties on claimants and their attorneys would be DISASTROUS for small businesses and affluent individuals. They grant an immunity to insurers *who act in bad faith*, to the detriment of policyholders.

The whole purpose of liability insurance is to protect the insurance customer from suffering a judgment for more than the policy limits. The policy requires insureds to surrender control over settlement negotiations to the insurance company and cooperate in the defense of any claim. In exchange, the insurance company must handle the claim in good faith. This is how Florida law has worked since 1938, and it has worked supremely well.

HB 837/SB 236 requires injured claimants and their lawyers to act in "good faith" in "furnishing information regarding the claim, in making demands of the insurer, in setting deadlines, and in attempting to settle the claim." But if they fail to act in good faith, that does not protect the policyholder. Rather, the claimant's lack of good faith *only* protects the insurance company without reducing the policyholder's liability. Confused? Consider the following example:

> *Main Street USA's delivery driver negligently causes a wreck, seriously injuring John. Main Street bought $1 million of liability insurance with Gecko Insurance, who refuses to settle John's claim. As a result, the case goes to trial and a jury awards John $5 million.*
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> *Main Street then sues Gecko for bad faith. The jury in the bad faith case finds that Gecko acted in bad faith by failing to settle when it could and should have done so, had it been acting fairly and honestly toward Main Street and with due regard for Main Street's interests. Under current law, that means Gecko must pay Main Street's $5 million liability.*
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> *However, assume Gecko argues John and his lawyers should have been nicer and more cooperative during settlement negotiations, and that Gecko's liability should be reduced by 25% as a result. Under HB 837/SB 236, that would mean Gecko only owes $3.75 million, but Main Street remains liable for the remaining $1.25 million. So, even though the insurance policy required Main Street to surrender all control over claim handling to Gecko and Gecko refused to settle John's claim, Main Street is still forced to declare bankruptcy.*

As the hypothetical demonstrates, HB 837/SB 236 does not protect policyholders from trial lawyers. It only protects insurance companies *from their customers* – the ones the insurance company is paid to protect. In other words, HB 837/SB 236 seeks to punish policyholders for the alleged bad acts of the trial lawyer who is suing them. This makes no sense.

II. HB 837/SB 236 incentivizes the claimant *not to settle* with a policyholder who has significant assets.

Proponents of HB 837/SB 236 may argue the statutory duty of good faith will incentivize trial lawyers to work cooperatively with the insurance company and settle the claim against the policyholder. Maybe that is true when the policyholder is uncollectible. But that is certainly *not* the case when the policyholder is a small business or affluent individual who may have assets to satisfy an excess judgment.

HB 837/SB 236's broad language suggests the injured claimant must do the insurance company's job for it – i.e., gathering up all the medical records and other investigatory materials for the insurance company as a precondition to offering to settle. However, injured claimants frequently do not want to incur those expenses (often $1 per page for thousands of pages of documents), particularly if the policyholder's policy limits are insufficient to cover the losses. If claimants are deemed to act in "bad faith" by refusing to jump through all the insurance company's hoops, they are more likely to simply sue the small business or affluent individual rather than bother with pre-suit settlement negotiations.

The injured claimant is never *required* to offer to settle. The claimant may sue the policyholder and obtain a judgment against them without *ever* offering to settle the liability claim. The claimant does not have to choose between the insurance policy limits and the policyholder's personal assets. Claimants can, and frequently do, go after both.

Any offer to settle within the liability limits is a *gift* to the policyholder, particularly if the claimant's claim is worth significantly more than the policy limits. That is why Florida law requires the insurance company to act "diligently, and with the same haste and precision as if it were in the insured's shoes, work[ing] on the insured's behalf to avoid an excess judgment." *Harvey v. GEICO Gen. Ins. Co.*, 259 So. 3d 1, 7 (Fla. 2018).

Normally, the insurance company must do more than just tender the limits to settle the case against the policyholder. It is quite common for the claimant to condition settlement upon the insurance company gathering additional information, such as affidavits regarding insurance coverage, the policyholder's assets, and whether the negligent party was in the course and scope of their employment at the time of the accident.

The vast majority of the time, when the claimant's attorney imposes such conditions on settlement, he is simply doing his due diligence. In fact, the claimant's lawyer could be sued for malpractice if he settled the case without first confirming whether there are additional insurance policies or other sources of recovery.

However, HB 837/SB 236 will allow an insurance company to argue the claimant's attorney was acting in "bad faith" by making settlement offer with non-monetary conditions or imposing a deadline for acceptance. And if the insurance company is successful in that argument, it will have an immunity from the harm it caused by its bad faith failure to settle. Meanwhile, the policyholder remains on the hook for the entire judgment.

To recap, under current law, if the insurer fails to settle in bad faith, it is responsible for the damages caused by that failure (the excess judgment). Under HB 837/SB 236, the insurer can decrease its liability by blaming the injured claimant for not providing all the investigatory materials or having conditions on a settlement offer – all while leaving the insured customer exposed to any reduction in the insurer's liability. With these additional hurdles, why would the injured claimant even bother making a settlement offer to a small business or affluent individual? It is more trouble than it is worth.

III. Liability insurers must protect their customers from trial lawyers – including the aggressive or tricky ones!

The injured claimant and their lawyer are adversarial with the policyholder in a liability claim. They owe the policyholder no duty at all.

That said, most claimant lawyers work cooperatively with insurance companies when trying to settle a claim. They would much prefer to achieve a quick settlement for their client than incur the time, expense and risk associated with litigation.

Other claimant attorneys are more aggressive. But the policyholder pays premiums for the liability insurers to protect them from lawyers of *all kinds* – not just the nice ones! The policyholder is completely reliant upon the insurance company to protect him from the trial lawyer. In most cases, if the policyholder takes steps to protect himself, he breaches the policy and loses his liability contract. So, liability insurers should be extra careful when dealing with an aggressive or tricky lawyer, to ensure their customer is protected.

Why, then, should the insurance company get to reduce its own liability for bad faith failure to settle simply because the claimant's attorney was aggressive or mean? That is what HB 837/SB 236 allows. The policyholder suffers the consequences simply because the insurance company would rather deal with "sheep" claimant attorneys rather than "wolves." Perhaps the insurance company should just do its job and make a good faith effort to protect the policyholder from sheep and wolves alike.

IV. Florida law already protects insurers from attempted "set ups."

Liability insurers often accuse trial lawyers of attempting to "set up" a bad faith claim – i.e., making a settlement offer which is incapable of being accepted to create a claim for insurance bad faith. However, "an analysis of the relevant case law demonstrates that the courts have properly and consistently defeated attempts to allow 'set-up' bad faith claims which were premised on[:] 1) arbitrary and unrealistic time deadlines for acceptance imposed by claimants, and 2) settlement offers containing unreasonable terms that cannot be complied with (and will not be negotiated)." Rutledge R. Liles, "FLORIDA INSURANCE BAD FAITH LAW: PROTECTING BUSINESSES AND YOU," Florida Bar Journal Vol. 85, No. 3 (Mar. 2011), https://www.floridabar.org/the-florida-bar-journal/florida-insurance-bad-faith-law-protecting-businesses-and-you/.

To prevail in a bad faith claim, the insurance company must be presented with a realistic opportunity to settle the claim. Florida state and federal courts do not hesitate to throw out any attempted "set ups" for that very reason. *See, e.g., DeLaune v. Liberty Mut. Ins. Co.*, 314 So. 2d 601 (Fla. 4th DCA 1975) (noting a policy limits demand with a 10-day deadline was "totally unreasonable under these circumstances" and was a charade designed to "set-up" a bad faith suit); *Johnson v. Geico General Ins. Co.*, 318 Fed. Appx. 847 (11th Cir. 2009) (holding the insurer's offer to settle for policy limits within 33 days of the accident could not be bad faith, as a matter of law, resulting in summary judgment against the claimant on the bad faith claim).

And, even if the claimant's lawyer did attempt to "set up" a bad faith claim, under current law, their conduct is still relevant to the question of whether the insurer had a realistic opportunity to settle the case. *See, e.g., Barry v. GEICO Gen. Ins. Co.*, 938 So. 2d 613, 618 (Fla. 4th DCA 2006) ("The conduct of [the claimant] and her attorney would be relevant to the question of whether there was any realistic possibility of settlement").

As the above cases demonstrate, HB 837/SB 236's imposition of a duty to cooperate on the claimant and claimant's attorney is a solution in search of a problem.