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SOUTH FLORIDA LEGAL GUIDE

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Defending Florida's Insurance Code from Industry Attacks

In nearly every session of the Florida Legislature, the insurance industry pushes a bill that's intended to limit or eliminate insurance companies' duty to protect their policyholders. In 2009, it was HB 1463. In 2011, it was HB 1187. In the latest session, it was HB 427, "Civil Remedies Against Insurers," which – fortunately for policyholders – died in the Civil Justice Committee of Florida's House of Representatives on January 31, 2012.

These attacks on the Florida Insurance Code are typically sponsored by a conservative member of the Legislature, which is odd since it's Florida's small businesses that need protection the most. Big corporations generally have large self-insured retentions, multiple layers of coverage, and sophisticated brokers and lawyers. Florida's small businesses, on the other hand, must put their trust in their insurance companies. The small businesses pay their premiums for liability insurance in return for a promise of protection in case something goes wrong.

As part of the deal, the insurance company demands that it, and only it, can make decisions about investigating, defending and settling claims. The insurance industry unilaterally crafts the policy language. Small businesses, like individuals, typically don't have a say in the policy terms. The Florida Insurance Code is one of the few checks on this imbalanced relationship.

Every year, however, the insurance industry asks the Legislature to change the law in ways that would weaken coverage. The Legislature has generally rejected the insurance industry's attempts to change Florida law on an insurance company's good faith duties to its insureds, codified in Sections 624.155 and 626.9541(1)(i) of the Florida Statutes. Given the insurance industry's persistence, and the continued litigation on the issues, the Legislature should consider some revisions to the statutes, but in another direction.

One potential revision would be a common-sense way to eliminate some of the litigation on statutory bad faith. The term "bad faith" is used to describe an insurance company's violation of its duties of good faith or fair dealing. Phrasing it that way may give the impression that some bad intent is required, but it is not. The standard under Florida law is whether an insurance company failed to settle a claim when it could and should have done so. In cases arising under the statute, the claimant is required to file a notice with Florida regulators, giving the insurance company 60 days to investigate and correct the circumstances. Insurance companies often wait until the last day or two to respond to the notice, and at that point they often claim they need clarification or more information from the claimant. The Legislature should consider amending the notice provision to require the insurance company to ask for clarification or additional information within 21 days of receiving the notice. Three weeks is enough time for an insurance adjuster to review the notice and to write back with any concerns. The point of the 60-day cure

period is to reduce litigation. Requiring the insurance company to express its concerns in a timely manner is consistent with that intent.

Lawmakers also should consider clarifying what happens if an insurance company makes a mistake when handling a claim. Since 1938, Florida courts have operated on the premise that an insurer must act in good faith toward the insured. The reason is simple: a liability insurer demands complete control over the defense and settlement of claims, and must therefore use "the same degree of diligence as a person of ordinary care and prudence should exercise in the management of his own business." The insurance company insists that it make the decisions, so Florida law requires that it do so while acting in the best interest of its policyholder.

If the insurance company is negligent, if it makes a mistake (for example, the insurance company loses a demand letter, misjudges the extent of liability, fails to appreciate the potential damages) and the result is a judgment against the policyholder, the law places the responsibility for the judgment on the insurance company, not the small business.

The insurance industry complains that it should not have to pay for the resulting judgment if it made an unintentional mistake. But who would pay if the insurance company weren't held accountable for its own mistakes? The policyholder. If the small business can't afford the judgment, it can be shut down or pushed into bankruptcy. And it doesn't get back the premiums it paid to the insurance company that was supposed to protect it but failed to do so.

The suggested clarification would not change the long-standing premise that the insurance company is responsible only if it had the opportunity to settle ("could have") and the obligation to settle was clear ("should have"). The proposed change would make clear that if the insurance company makes a mistake while performing the duties to investigate and settle – duties it contractually demanded that it keep solely for itself and which it was paid to perform – then the insurance company, not the small business, is responsible.

If the insurance industry really is on our side and actually keeps us in good hands, as its advertising suggests, then it should have no objection to these suggested changes.

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