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Legislative revisions on bad faith law would help small businesses

By Stephen Marino

The insurance industry's latest attack on Florida's insurance laws, Civil Remedies Against Insurers (HB 427), died in the House Civil Justice Committee.

Almost every year, the insurance industry backs a bill designed to reduce or eliminate the duty to protect policyholders. In 2011, it was HB 1187; in 2009, it was HB 1463. These bills typically are proposed by a conservative member of the Legislature, which is odd considering Florida's small businesses need protection the most.

Big businesses often have large self-insured retentions and multiple layers of coverage, as well as sophisticated brokers and lawyers. Florida's small businesses pay premiums for a promise of protection in the event something goes wrong; in exchange for that fiduciary promise, the insurance company demands that it — and only it — can make decisions about investigating and settling claims.

Florida's small businesses put their trust in their insurance companies, in large part because they are required to by their policies.

The insurance industry crafts the policy language and decides what terms it will offer. Florida's small businesses typically don't have a say in the policy terms. And yet every year the industry goes to the Legislature and asks for changes to the law, usually changes that will diminish the effect of the promises it is selling.

The Legislature has generally rejected the industry's requests to change Florida law on an insurance company's good faith duties, codified in Sections 624.155 and 626.9541(1)(i) of Florida Statutes.

Given the industry's persistence and the continued litigation on the issues, perhaps the Legislature should consider some revisions to the statutes. But they should take a different direction.

One revision would be a common-sense way to eliminate some of the litigation on statutory bad faith cases. The term bad faith describes an insurance company's violation of its duties of good faith or fair dealing.

Phrasing it that way is clearly intended to give the impression that some bad intent is required, but it isn't. The standard is whether an insurance company failed to settle a claim when it could and should have done so.

Clarification Deadline

In cases arising under the statute, the claimant must 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, and at that point they often claim they need clarification or more information.

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 should be enough time for an insurance adjuster to read and consider the notice and to write back about 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 the insurance company makes a mistake when handling a claim. Since 1938, Florida courts have stated 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." Boston Old Colony Ins. Co. v. Gutierrez, 386 So.2d 783, 785 (Fla. 1980)

The insurance company insists on making 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 — loses a settlement demand letter, misjudges the amount of liability, fails to recognize the potential damages, etc. — and the result is a judgment against the policyholder, the law assigns culpability to the insurance company, not the small business.

The insurance industry complains this is an unfair result, that if it made an unintentional mistake, it should not have to pay for the resulting judgment.

But who pays if the insurance company isn't held accountable for its own mistakes? The individual or small business must pay. 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.

This suggested clarification does not alter the longstanding premise that the insurance company is responsible only if it could have and should have settled, meaning it had the opportunity and the obligation was clear.

The proposed change would clarify that if the insurance company makes a mistake while performing the duties to investigate and settle — duties it contractually claimed solely for itself, and was paid to perform — then the insurance company, not the small business, will be responsible.

We are barraged with television ads encouraging us to put our faith in insurance companies. If the insurance industry sincerely intends to keep its promise of being on our side and keeping us in good hands, then it should have no objection to these suggested changes.

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