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FLORIDA TORT REFORM FAQ

June 30, 2023

The **Tort Reform Committee** and **Legislative Action Team** stays abreast of legislative reforms of importance to the clients we serve and takes action to support our commitment to fight rampant litigation through legislative efforts.

Our approach is multifaceted. We advocate directly in Tallahassee for reforms by testifying before the legislature on behalf of our firm and on behalf of major associations. We provide regular updates to our clients regarding pending legislative issues and important bill tracking. We also provide balance to the broadcasting campaign of the Plaintiffs' bar by contributing our thoughts on tort reform to the media, appearing in print and film.

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It should be noted that this FAQ does not constitute legal advice. Every claim has its own set of facts and only formal retention for the claim and formal opinion on the claim can be relied upon as legal advice. The FAQ is intended to guide general answers. Sections and portions of the reform will be challenged in the courts. We hope this guide provides you with some assistance. Direct questions can be submitted to our **Tort Reform Committee**. This FAQ will be updated periodically.

Please visit **www.InsuranceDefense.net** to stay on top of the latest information.

TIME LIMIT DEMANDS AND BAD FAITH

QUESTION: What are the bad faith implications for Time Limit Demands served prior to or after March 24, 2023?

It depends on when suit was filed, and arguably on when the policy was issued. If suit was filed on or before March 24, 2023, then the old bad faith case law still arguably applies. See our Time Limit Demand Best Practices Handbook for these situations. We would suggest you follow our Best Practices for any demands made on cases that were filed or in suit prior to March 24, 2023.

If suit was filed after March 24, 2023, then the new rules / statute may apply, but we expect significant litigation over wording of the statute that says the new law will not impair any rights existing under an insurance policy in effect on or before March 24, 2023. Plaintiffs are expected to argue that the new bad faith rules only apply to policies of insurance that were issued after March 24, 2023, and do not apply to policies of insurance in effect prior to or on March 24, 2023, regardless of the filing date of the lawsuit. Insurers and defendants will take the position that the new rule applies to all suits filed after March 24, 2023. It is unclear what courts will decide.

Under the new rule, insurers have a 90-day safe harbor to settle or tender limits following a demand. The demand must be accompanied by "sufficient evidence" to support the claim. The insured and claimant have a duty to act in good faith in furnishing information about the claim to the insurer. This new rule should eliminate the dilemma created by the Powell Doctrine. The strategy will be to document your requests for "sufficient evidence" from opposing counsel. On single combined limits, multiple claimant cases, the insurer has a right to file interpleader if done so within 90 days. This new statute should eliminate the dilemma created by the Farinas Doctrine.

Please note that we expect litigation on this topic. The safest bet is to apply best practices to your time limit demands for policies in existence prior to or on March 24, 2023, but argue the new rule applies to demands that do not settle within 90 days.

QUESTION: What are the bad faith implications for Time Limit Demands involving single limits but multiple claimants?

The insurer can avoid bad faith by filing an interpleader action, in which case the multiple claimants will have to agree on apportionment or try their case before a jury on apportionment. The insurer may have to still defend its insured if the insured is a necessary party due to apportionment between the insured and other claimants. An insurer can also ask the claimants to agree to binding arbitration on apportionment.

QUESTION: Can a plaintiff attorney still make an unreasonable time limit demand after March 24, 2023?

Likely, yes, if suit was filed on or before March 24, 2023; if suit is not yet filed, or filed after March 24, 2023, it depends. We expect significant litigation over wording of the statute that says the new law will not impair any rights existing under an insurance policy in effect on or before March 24, 2023. Plaintiffs are expected to argue that the new bad faith rules only apply to policies of insurance that were issued after March 24, 2023, and do not apply to policies of insurance in effect prior to or on March 24, 2023, regardless of the filing date of the lawsuit. Insurers and defendants will take the position that the new rules apply to all suits filed after March 24, 2023. It is unclear what courts will decide.

It is clear that for policies of insurance that were issued after March 24, 2023, the claimant, attorney and insured have a duty to act in good faith in furnishing information about the claim, making the demand and setting deadlines.

COMPARATIVE NEGLIGENCE

QUESTION: Which claims are now subject to the new modified comparative negligence rule, which bars plaintiffs who were more than 50% at fault from recovery?

Florida Statute section 768.81(6) now provides for mixed comparative fault whereby a "party found to be greater than 50 percent at fault for his or her own harm may not recover any damages." Section 30 of HB 837 states, "[e]xcept as otherwise expressly provided in this act, this act shall apply to causes of action filed after the effective date of this act." Based upon this language, modified comparative negligence would apply to cases filed after March 24, 2023. However, in the initial period following the enactment of the tort reform, it has become abundantly clear that although at first blush, section 30 of HB 837 appears to forestall retroactive application of the reform, several courts have applied the new law to cases that were filed prior to March 24, 2023, finding that the changes are procedural in nature. See, e.g., Donna McIntosh v. North Broward Hospital District d/b/a Broward Health Medical Center (June 12, 2023), finding that sections 768.0427 and 768.81(6) are procedural in nature and also apply to cases filed on or before March 24, 2023); Sharon M. Sapp; Stacy M. Chaney, et al., v. James Brooks; J.B. Coachline, Inc. 17-CA-5664 (May 19, 2023), in which the court found that section 30 of HB 837 did not limit the procedural components of the bill to prospective application); Jacie Hollingsworth v. Debra Muntz, 21-CA-07113 (June 14, 2023), in which the court granted a continuance to permit additional discovery under 768.0427. These early rulings suggest that some courts may apply the new modified comparative negligence rule to cases filed on or before March 24, 2023. We expect constitutional challenges on this timing nuance and will continue to monitor judicial developments on this issue.

ATTORNEY'S FEES

QUESTION: How are attorney's fee exposures impacted by the new law?

Statutory fees for first-party cases has been eliminated for cases filed after March 24, 2023, unless the insurer has completely denied coverage. However, attorney fees exposure subject to the Proposal for Settlement Rule has not changed. Therefore, if a plaintiff serves a valid PFS and obtains a judgment in excess of 25% of the PFS, they will be entitled to attorney's fees. It has become much more difficult for a prevailing plaintiff to obtain a "fee multiplier" under the new statute.

However, we expect arguments that this provision should only apply to insurance contracts issued or renewed after March 24, 2023.

STATUTE OF LIMITATIONS

QUESTION: What claims are now subject to a reduced 2-year Statute of Limitations?

The date of loss is critical to establishing whether you have a four or two-year statute of limitations. The two-year new rule will only apply to losses or accidents that occur *after* March 24, 2023. The new statute applies to *negligence- based* actions, which will include most third-party claims, auto accidents, negligent security, slips and falls, premises liability, product liability, and even motor vehicle claims for property damage. It does not apply to cases arising out of a contract, such as UM/UIM or first-party cases against insurers based on an insurance contract. It does not apply to construction defect claims. Intentional tort and professional negligence claims have and continue to remain under the two-year statute of limitations. You do not need to do anything other than diary according to the date of loss going forward.

MEDICAL BILLS AND SPECIALS

QUESTION: Can the 2-year Statute of Limitations be tolled?

Yes, for civil remedy/bad faith actions against insurers, pursuant to Fla. Stat. §624.155(4)(c), if a demand is made and not accepted within 90 days, then the two-year statute of limitations will be tolled for an additional 90 days.

QUESTION: Which past medical bills will be boardable to the jury?

For suits filed after March 24, 2023, the new rule applies. The new rule now limits plaintiffs to what was actually paid (if paid), and in the case of unpaid bills, allows the jury to hear more evidence regarding the "reasonable value" of medical expenses; this includes amounts third-party payers would have paid if plaintiff had used available insurance, or 120% of Medicare (170% of Medicaid if there is no applicable Medicare rate) in those instances where plaintiff had no insurance.

For cases filed before March 24, 2023, there are some significant developments at the trial court level. Section 30 of HB 837 states, “[e]xcept as otherwise expressly provided in this act, this act shall apply to causes of action filed after the effective date of this act.” Based upon this language, the transparency in damages provisions of the act would apply to cases filed after March 24, 2023. However, in the initial period following the enactment of the tort reform, it has become abundantly clear that although at first blush, section 30 of HB 837 appears to forestall retroactive application of the reform, several courts have applied the new law to cases that were filed prior to March 24, 2023, finding that the changes are procedural in nature. See, e.g., Donna McIntosh v. North Broward Hospital District d/b/a Broward Health Medical Center (June 12, 2023), finding that sections 768.0427 and 768.81(6) are procedural in nature and also apply to cases filed on or before March 24, 2023); Sharon M. Sapp; Stacy M. Chaney, et al., v. James Brooks; J.B. Coachline, Inc. 17-CA-5664 (May 19, 2023), in which the court found that section 30 of HB 837 did not limit the procedural components of the bill to prospective application); Jacie Hollingsworth v. Debra Muntz, 21-CA-07113 (June 14, 2023), in which the court granted a continuance to permit additional discovery under 768.0427. These early rulings suggest that some courts may permit application of 768.0427 in cases filed on or before March 24, 2023. However, a number of other courts have declined to apply the new law to cases filed before March 24, 2023.

QUESTION: What if the plaintiff has Health Insurance?

For suits filed after March 24, 2023, a plaintiff who bypasses available health insurance is subject to admissibility of the amounts the health insurer would have paid, including any deductibles owed by the plaintiff. This will require tricky discovery to determine admissible evidence. It is recommended that discovery be focused on the larger items or expenses, such as surgery dates and surgery centers. The statute does not allow defendants to obtain copies of health insurance contracts with providers so it remains to be seen how this discovery evolves. Some suggestions are to issue written deposition questions regarding precise CPT codes to medical providers so that testimony can be elicited.

For cases filed before March 24, 2023, note that in Jacie Hollingsworth v. Debra Muntz, 21-CA-07113 (June 14, 2023), the the court granted a continuance to permit additional discovery under 768.0427. Some courts may permit application of 768.0427 in cases filed on or before March 24, 2023

QUESTION: What if the plaintiff has Medicare or Medicaid?

For suits filed after March 24, 2023, a plaintiff who was a valid recipient for Medicare and bypasses using Medicare is limited to 120% of the Medicare fee schedule. For plaintiffs that qualify for Medicaid, they are limited to 170% of the Medicaid fee schedule. It is suggested that the Court be asked to take judicial notice of the Medicare and Medicaid reimbursement rates that are codified.

QUESTION: What if the plaintiff's medical bills are under Letter or Protection?

As a condition to making a claim for bills under LOP, the LOP must be produced and provided to the insurer. All billing must have a CPT code, so it can be compared to health insurer and government reimbursement rates. It is discoverable and admissible if a plaintiff attorney refers plaintiff to a provider, and the number of referrals and financial arrangement between the medical provider and plaintiff's attorney is relevant.

QUESTION: What if the plaintiff's medical bills are under Letter or Protection or sold to a third party?

If the bills are sold to a third party, then evidence of the amount of the sale is discoverable and admissible.

QUESTION: How does the new statute affect life care plans or future medical bill claims?

For suits filed after March 24, 2023, the same rules apply as to past medicals. If the plaintiff has health insurance, the reimbursement rates will be admissible as to future life care plans. If the plaintiff has no health insurance or has Medicare or Medicaid, reimbursement at 120% of Medicare (or 170% of Medicaid if there is no applicable Medicare rate) will be admissible. It is suggested that the Court be asked to take judicial notice of the Medicare and Medicaid reimbursement rates that are codified.

CONSTRUCTION DEFECT CLAIMS

QUESTION: How has CD been impacted by the new statute?

CD litigation may be impacted by the newly enacted revisions to Fla. Stat. §768.81. Where a party's allocated fault for their own harm is greater than 50%, that party will not be able to recover any damages from another party. The impact of this amendment arguably relates not only to owners in CD litigation, but those seeking to recover on downstream third-party claims whose liability arises from indemnity and similar theories. Additionally, amendments impacting the lodestar and attorney fee multipliers are impacted by the new statute, as construction defect litigation is often brought on contingency agreements between the owners and their counsel. Additional reform impacting construction defect litigation was addressed in other significant legislation contained within SB 360, which relates to issues involving the statute of limitations and statute of repose under Fla. Stat. §95.11, as well as claims for violation of the Florida Building Code under Fla. Stat. §553.84. This was enacted on April 13, 2023. See our CD tort reform team for further information.

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