2023 Florida Fee Shifting

SDV has actively monitored the evolution of this legislation, including substantial commentary from the legal and insurance communities that followed its enactment. In this multi-part series, we will explore the critical developments impacting policyholders and what to expect moving forward.

The insurance-related headlines overwhelmingly concentrate on one key area: the elimination of one-way attorney fee recovery for property insurance policyholders. This development represents a key change in longstanding Florida insurance law and is worthy of attention – but it doesn't tell the whole story.

Perhaps just as important, this new legislation created Florida Statute § 86.121 which expressly entitles policyholders to recover attorney's fees from any insurance carrier other than a commercial or residential property insurer when the insurer "totally" denies coverage. Liability insurers who wrongfully refuse a duty to defend, for example, remain responsible for the policyholder's cost to litigate if coverage is owed. The significance of this development cannot be overstated: for certain insurance disputes, fee shifting remains alive and well.

How Did We Get Here?

For decades, Florida Statute § 627.428 granted policyholders the right to recover all reasonable attorney's fees and costs against an insurer when the policyholder prevails in coverage litigation, including by settlement. In other words, regardless of the type of insurance policy that was the subject of dispute, and regardless whether the insured or insurer filed the action, the court was required to

award to the prevailing policyholder all reasonable attorney's fees and costs.

In 2021, the Florida legislature began chipping away at the one-way fee shifting by creating Florida Statute § 627.70152, which added a notice and pre-suit settlement offer requirement as a pre-condition and developed a tiered structure that tied the ability to recover fees to the success of the litigation. A claimant could recover its full amount of reasonable attorneys' fees and costs only if the difference between the claimant's recovery and any "presuit settlement offer" was at least 50% of the "disputed amount", i.e. the difference between the claimant's presuit settlement demand and the insurer's presuit settlement offer. See Holly Rice, Shifting Focus: Examining Changes to Florida's Insurance Fee Shifting Statute, Adverse Witness, Vol. 205, January 2022, at 12.

Then, in December 2022, Florida's legislature went a step further and sought to repeal the automatic entitlement to attorney's fees and costs under Florida Statute § 627.428 by changing the statute to read, "[i]n a suit arising under a residential or commercial property insurance policy, there is no right to attorney's fees under this section." The legislature similarly amended Florida Statute § 627.70152 to eliminate tiered recovery of fees based on percentage of recovery.

Now, HB 837 completely repeals Florida Statute § 627.428, leaving policyholders to wonder if and when they can recover their fees for suing an insurance carrier that wrongfully denies coverage. Simply stated, an insured who sues an insurer pursuant to a commercial or residential property insurance policy, such as a homeowner's policy or commercial property policy, is no longer automatically entitled to recover any of its attorney's fees and costs incurred in prosecuting such suits, but, all hope is not lost.

The New Fee Shifting Model

First, HB 837 created Florida Statute § 624.1552. The new statute specifically states that Florida Statute § 768.79 (governing formal settlement proposals) applies to any civil action involving an insurance contract – including property insurance claims. In short, an insured who makes an "offer of judgment," i.e. a formal settlement proposal, may recover a portion of its attorneys' fees and costs if the offer is not accepted by the insurer and the policyholder is ultimately successful.

Two strategic considerations for policyholders will be: 1) how soon to serve an offer of judgment; and 2) when to incur litigation costs, since fees are calculated from the date the offer is served (keeping in mind that offers of judgment may be served on a defendant not less than 90 days after service of process or on a plaintiff not less than 90 days after the action is commenced). On the other hand, if the insured intends to pursue a claim for bad faith, the insured must act in good faith when making offers and attempting to negotiate settlement of the suit.

Second, HB 837 also created Florida Statute § 86.121, which states that if an insurer (other than commercial or residential property insurers) totally denies coverage for a claim, and the insured successfully pursues a declaratory judgment action to enforce its rights, then the court shall award to the insured all reasonable attorneys' fees and costs incurred in the action for declaratory relief to determine coverage. Notably, the situation where an insurer provides a defense subject to a reservation of rights is not a "total" denial.

Some key elements of Florida Statute § 86.121 include:

- Applies only to actions for declaratory relief;
- Applies to actions brought in either state or federal

court;
- Applies only after the insurer has made a "total coverage denial;"
- The term "total coverage denial," while undefined, expressly excludes a defense offered by an insurer pursuant to a reservation of rights;
- Applies to both named insureds, additional insureds, and named beneficiaries;
- The rights are non-transferrable;
- The statute does not apply to actions arising under residential or commercial property policies; and
- Provides for a summary procedure as set forth in § 51.011.

Thus, the Florida legislature intentionally preserved an insured's right to recover attorneys' fees under certain circumstances. In the construction industry, for example, a general contractor who seeks to transfer risk downstream by tendering defense and indemnity as an Additional Insured to a subcontractor's commercial general liability carrier can still recover its attorneys' fees and costs if the carrier denies its duty to defend and indemnify. Likewise, professional insurance, directors & officers insurance, and cyber insurance – among many others – continue to have fee shifting available, to ensure the cost of unnecessary coverage litigation is borne by the appropriate party.

Potential Effects of HB 837

The new law will have a significant impact on policyholder litigation, but the full extent of the impact will not be known until case law develops on interpretation of the new statutes. For example, if an insurer settles an action for declaratory relief, can the insured recover fees? Arguably, yes. Under the old fee shifting regime, the Florida Supreme Court specifically held

that if an insurance carrier issues payment of a previously denied claim after being sued and before final judgment is rendered, the carrier has functionally entered a "confession of judgment." Johnson v. Omega Ins. Co., 200 So. 3d 1207, 1215 (Fla. 2016). Nothing in the new statute suggests that Johnson would not apply here. Indeed, the relevant portions of the statutes use the same language. Therefore, settling declaratory judgment actions likely still entitle policyholders to recover their fees pursuant to Florida Statute § 86.121.

Other questions must likewise be explored: What is the full scope and meaning of "total coverage denial?" Could an insurer's lack of response qualify? Could an insurer's response that neither accepts nor denies a duty to defend be interpreted as a total coverage denial? Likewise, will fee recovery be apportioned in circumstances where policyholders file multiple count complaints? As lawsuits are filed and cases litigated, these are questions that courts may have to answer.

Until then, policyholders should appreciate that while HB 837 erodes certain entitlement to fees, there are still many opportunities to recover fees and costs of litigation under the appropriate circumstances. And against this evolving landscape, a nuanced understanding of the statute and thoughtful approach to insurance recovery efforts will be essential to fully maximizing policyholders' rights under the law.
Look for future articles discussing and analyzing the changes brought by House Bill 837 and the impacts of those changes on the claims process, from presentation of claims through litigation.
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