INSURANCE JOURNAL

June 17, 2019

News & Markets

What Florida's 'Omnibus Insurance Bill' Means for the Duty to Defend, Appraisal Process

While most of the news out of the 2019 Florida Legislative Session surrounding insurance has focused on House Bill 7065 and the wide-spread assignment of benefits (AOB) reform it promises, another piece of legislation that makes some big insurance-related changes – HB 301 – awaits the governor's signature (as of press time).

By Michael Packer

HB 301, which some refer to as an omnibus insurance bill, primarily focuses on updating laws related to Florida surplus lines but it also contains two provisions which will have far-reaching effects on Florida's insurance industry.

HB 301 essentially changes the interplay between insurance companies when more than one insurance company owes an insured the duty to defend. Historically, when two or more insurance companies covered a loss and one carrier paid, under Florida law, the paying insurance carrier would be entitled to contribution for that indemnity from other companies providing coverage.

However, there was no right to contribution for the defense costs incurred by the insurer that provided a defense. The courts reasoned that an insurance company has an independent obligation to provide a defense to its insured and when it issued the policy, it did so without contemplation that another insurance company might also be liable to defend the insured should a suit or claim be brought. This has been the long-standing rule of law in Florida.

Now, with the creation of Florida Statute 624.1055, a liability insurer who owes a duty to defend an insured has a right of contribution for defense costs against any other liability insurer who owes a duty to defend the insured against the same claim, suit, or other action. The apportionment of costs will be assessed in accordance with the terms of the liability insurance policies.

This will have a wide impact on the insurance industry, especially in the context of construction defect claims and litigation where, oftentimes, an insured is covered under multiple insurance policies. Prior to the enactment of this law (applies to any claim,

suit, or other action initiated on or after Jan. 1, 2020), the first insurer to pick up the defense was essentially penalized for protecting its insured while the other carrier(s) benefited by not having to contribute to the defense for no other reason than they failed to act in a timely fashion.

In addition, HB 301 makes some minor but important changes to Florida Statute 624.155 (Florida's bad faith statute). The bill precludes a party from filing a Civil Remedy Notice (CRN) for 60 days after appraisal is invoked in a residential insurance dispute. The significance of this change is that it allows a minimum of 120 days for the appraisal process to proceed and for an insurer to pay an appraisal award if appropriate, with no potential liability for extra contractual damages.

While it does not completely eliminate the potential bad faith exposure for participating in appraisal as discussed in the *Cammarata v. State Farm* case, it does provide a more reasonable time basis for a residential carrier to participate in appraisal without the concern of a bad faith claim being perfected.

Lastly, HB 301 removes certain language from Florida Statute 624.155 that is significant. Since the enactment of 624.155, it has been presumed that the Florida Department of Financial Services (DFS) reviews each CRN to ensure it complies with the statute, and either rejects or refuses to accept those CRNs which do not comply. Courts have historically presumed that if a CRN is accepted by DFS, it must be valid. This is simply not true.

DFS does not review each CRN to determine its compliance with 624.155; rather, it accepts every CRN as long as it is uploaded properly. While HB 301 does not go so far as to repudiate this presumption, it does remove the language which suggests that some review process is undertaken by DFS for which non-compliant CRNs are rejected.

The statutory interpretation of this change should lead courts to understand that the mere filing of a CRN and acceptance by DFS does not lead to the presumption that the CRN complies on its face with 624.155. Rather, Florida courts should conduct an independent review, evaluation and analysis of each CRN to determine whether it complies with Florida Statute 624.155 and when it does not, they should be prepared to dismiss a first party lawsuit for extra-contractual damages.

Michael A. Packer is a shareholder and co-chair of the Insurance Coverage/Bad Faith Litigation Practice Group in the Fort Lauderdale, Fla., office of Marshall Dennehey Warner Coleman & Goggin. He may be reached at mapacker@mdwcg.com.