



Recent Florida Legislative Changes Impact Sureties' Exposure to Attorneys' Fees and Bad Faith Claims

Posted in [Legal Alerts](#) by Matthew G. Davis on Fri Apr 7, 2023

A few days ago, Governor DeSantis signed House Bill 837 into law enacting sweeping tort reforms. This marks the second large scale reform to Florida law governing insurers and sureties in the last six months. In December 2022, Florida eliminated the one-way attorneys' fees provision for property insurance claims. House Bill 837 goes further and eliminates one-way attorneys' fees against insurers entirely. It also makes changes to statutes of limitations, comparative fault, and bad faith. The bill does, however, expressly preserve claimants' rights to recover reasonable attorneys' fees for successful claims against construction payment and performance bond sureties.

House Bill 837 repeals sections 626.9373 and 627.428. Section 627.428 provided for a claimant's recovery of attorneys' fees upon entry of a judgment against an insurer. Section 626.9373 similarly provided for attorneys' fees in suits against surplus lines carriers. The fee provisions in these cases ran only one way: against insurers and in favor of claimants. Florida case law established that a surety "fit within the definition of insurer" in the Florida Insurance Code and that section 627.428 applied to sureties. *See e.g., Snow v. Jim Rathman Chevrolet, Inc.*, 39, 3d 368 (Fla. 5th DCA 2010). This interpretation applied to construction payment and performance bonds (*Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins.*, 945 So. 2d 1216 (Fla. 2006)), motor vehicle dealer bonds (*Jim Rathman Chevrolet*, supra), and guardianship / probate bonds. *Nichols v. Preferred Nat'l Ins. Co.*, 704 So. 2d 1371 (Fla. 1997).

Despite repealing section 627.428, House Bill 837 amended section 627.756 — which applies to claims against construction payment and performance bonds — to maintain a one-way fee provision against construction bond sureties. The statute previously incorporated section 627.428. However, after repealing section 627.428, the Legislature amended section 627.756 to clarify that owners, contractors, subcontractors, laborers and materialmen "shall" recover their reasonable attorneys' fees upon successfully prosecuting their claim against a surety. This section expressly applies to construction bonds and does not appear to apply to other commercial bonds such as motor vehicle dealer bonds, notary bonds or guardianship / probate bonds, for example. Therefore, while Florida construction bond sureties remain exposed to one-way attorneys' fees awards, House Bill 837 arguably eliminated sureties' exposure to one-way attorneys' fees awards for all other types of bonds. Obviously, we expect court to address this issue in the future.

House Bill 837 also made major changes to Florida's bad faith framework. In 2005, the Legislature exempted construction payment and performance bond sureties from bad faith claims (although subsequent cases still allowed indemnitors to assert that the surety acted in bad faith as an affirmative defense to indemnity flowing from construction bond losses). Ch. 2005-218, § 2, Laws of Fla. However, commercial bond sureties remained exposed to statutory bad faith claims. House Bill 837 modifies section 624.155 by clarifying that an insurer's negligence is insufficient to demonstrate bad faith. Previously, Florida law did not define what conduct constituted "bad faith," and it was almost always a jury question. *Berges v. Infinity Ins. Co.*, 896 So. 2d 665 (Fla. 2004). The changes also require the claimant to act in good faith with respect to furnishing information, making demands, setting deadlines and attempting to settle the claim. Thus, House Bill 837 codifies the high bar a claimant must clear to establish statutory bad faith and requires claimants to be forthcoming with information in pursuing their claims.

The Bill made other significant changes to Florida law:

- Reduces the statute of limitations for general negligence from 4 years to 2 years;
- Changes Florida's comparative negligence law so that a plaintiff who is more at fault for his or her own injuries than the defendant generally cannot recover damages from the defendant; and
- Provides that contingency fee multipliers for attorneys' fees awards are appropriate only in "rare and exceptional" circumstances.

House Bill 837 is the second major step in Florida's massive overhaul of tort and insurance law. The bill is wide ranging, and the exact reach of the many changes are sure to be litigated. If you have questions regarding House Bill 837 and its impact on sureties, please reach out to one of our lawyers.