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Senate Bill 2-A: The Laws It Changed and Its Impact on Past, Present, and Future Claims

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SENATE BILL 2-A: THE LAWS IT CHANGED AND ITS IMPACT ON PAST, PRESENT, AND FUTURE CLAIMS

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I. INTRODUCTION

Florida was admitted as the 27th state on March 3, 1845.[1] For the majority of its existence as a state, consumer protections have been a cornerstone of Florida insurance law. In 1893, as the state grew, the Florida legislature enacted the first statute which authorized the recovery of reasonable attorney fees against life and fire insurance companies.[2] In 1982, recognizing the need for further consumer protections, Florida created the Civil Remedy statute[3] authorizing a first-party civil action against insurers due to bad faith conduct; however, despite such consumer protections remaining necessary to "level the playing field"[4] between corporations and consumers, Florida, from the governor's office down, has recently crusaded to remove such safeguards.[5] Through a legislature

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[1] *See* Florida Department of State, *A Brief History*, FLA. DEP'T. OF STATE, https://dos.myflorida.com/florida-facts/florida-history/a-brief-history/ (last visited Jan. 9, 2024).

[2] *See* FLA. STAT. § 625.08 (1893).

[3] *See* FLA. STAT. § 624.155 (1982).

[4] *See* Ivey v. Allstate Ins. Co., 774 So. 2d 679 (Fla. 2000).

[5] *See* David Smith, *DeSantis accused of favoring insurance-industry donors at residents' expense*, THE GUARDIAN (May 3, 2023), https://www.theguardian.com/us-news/2023/may/03/ron-desantis-insurance-industry-donors-florida-governor.

governed by a Republican supermajority,[6] these historic protections have been stripped away through the passing of Senate Bill 2-A.

While Senate Bill 2-A enacted a wide range of reforms, some of which do, in fact, favor consumers, this analysis will concentrate on the changes to the long-standing attorney fee and bad faith statutes in the context of property insurance policies.[7] First, the history, intent, and application of such laws by courts throughout the state will be addressed. The recent legislation altering these long-standing laws will then be examined. Finally, a complete analysis regarding the potential retroactive application of the newly enacted laws to existing contracts and claims, and the possible effects of the law moving forward, will be performed.

II. FLORIDA'S ATTORNEY FEE STATUTE

Under the American rule regarding attorney fees, "a court may only award attorney's fees when such fees are expressly provided for by statute, rule, or contract."[8] While there is generally hesitation to create exceptions to the American rule,[9] Florida has long provided a statutory allowance for attorney fees with regard to first party insurance claims. For 130 years, section 627.428, Florida Statutes (and its predecessor statutes), otherwise known as the Fee Statute, has provided protections by superseding the American rule and affording statutory attorney fees to policyholders against their insurance carriers. The Florida Supreme Court said it best more than seventy years ago when it stated as follows:

> The business of insurance has be come [*sic*] one of the dominating businesses of the world. In the United States millions of policies are issued to residents of all the states. These people move from state to state. This is particularly true with reference to Florida. It is one of the fastest growing states in the Union. Its population is largely made up of people who have come from other states, and they naturally bring with them a great deal of their property, including insurance policies, or contracts. The business of insurance is affected with a public interest as much as any other business conducted in the United

[6] *See* Marry Ellen Klas and Ana Ceballos, *Red wave sweeps in supermajorities in Florida Legislature*, THE MIA. HERALD (Nov. 8, 2022), https://www.miamiherald.com/news/politics-government/election/article268242182.html.

[7] 2022 Fla. Sess. Law Serv. Ch. 2022-271 (S.B. 2-A) (WEST) (reflecting some favorable changes such as reducing the time in which an insurance company must respond to claims and afford coverage; however, without the attorney fee statute, and subject to changes to the bad faith statute, the ability to hold carriers accountable for violations of the new aspects of law is severely diminished).

[8] *See* Q.H. v. Sunshine State Health Plan, Inc., 305 So. 3d 543, 546 (Fla. Dist. Ct. App. 2020) (quoting Bane v. Bane, 775 So. 2d 938, 940 (Fla. 2000)).

[9] *See* Reiterer v. Monteil, 98 So. 3d 586, 587 (Fla. Dist. Ct. App. 2012).

> States. Such business is subject to reasonable regulation in the public interest. It is an undue hardship upon beneficiaries of policies to be compelled to reduce the amount of their insurance by paying attorney fees when suits are necessary in order to collect that to which they are entitled. The police power within reason may be exercised by the Legislature regulating such a business affected with a public interest.[10]

It was for this reason that the legislature sought to protect insureds throughout the State of Florida by creating such a fee statute more than a century ago.

A. HISTORY AND INTENT

The original law allowing for a recovery of attorney fees against insurance companies was enacted by the Florida legislature in 1893.[11] This law was first analyzed by the Supreme Court of Florida in 1903 when it was challenged on the basis of equal protection violations under the Fourteenth Amendment to the United States Constitution.[12] Ultimately, the Court determined that the enactment of the attorney fee statute did not deprive insurance companies of equal protections of the laws.[13] Despite this ruling, insurance carriers continued to repeatedly challenge the constitutionality of the original fee statute in an attempt to undo the effectuation of same.[14] This is important to note as the carriers believed the enaction of a one-way fee statute deprived them of rights; however, insurance contracts are contracts of adhesion "where there is virtually no bargaining between the parties."[15] In such contracts, "the commercial enterprise or business responsible for drafting the contract is in a position to unilaterally create one-sided terms that are oppressive to the consumer, the party lacking bargaining power."[16] While the unilateral fee statute may have provided the upper hand to an insured in litigation, certainly there can be no argument that it did

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[10] *See* Feller v. Equitable Life Assur. Soc. of U.S., 57 So. 2d 581, 586 (Fla. 1952).
[11] *See* Act of June 2, 1893, ch. 4173, 1893 Fla. Laws 101; *see also* Tillis v. Liverpool & London & Glove Ins. Co., 35 So. 171 (Fla. 1903) (noting that the Act of June 2, 1893, authorized "the recovery of reasonable attorney's fees against life and fire insurance companies").
[12] *See Tillis*, 35 So. 171 (Fla. 1903).
[13] *See id.* at 173.
[14] *See, e.g.*, Supreme Lodge K.P. v. Lipscomb, 39 So. 637 (Fla. 1905); U.S. Fire Ins. Co. v. Dickerson, 90 So. 613 (Fla. 1921); N.Y. Life Ins. Co. v. Lecks, 165 So. 50 (Fla. 1935); *see also e.g.*, Spach v. Monarch Ins. Co. of Ohio, 309 F. 2d 949, 953 (5th Cir. Ct. 1962).
[15] *See* Basulto v. Hialeah Auto., 141 So. 3d 1145, 1160–61 (Fla. 2014).
[16] *See id.* at 1161; *see also* Lloyds Underwriters at London v. Keystone Equip. Fin. Corp., 25 So. 3d 89, 93–94 (Fla. Dist. Ct. App. 2009) ("Insurance contracts are unusual in that, at the onset of the contractual relationship, one of the contracting parties, i.e., the insured, has not yet had the opportunity to review the terms of the insurance contract.").

anything but "level the playing field"[17] of the unilaterally drafted insurance contract.

The original law providing for attorney fees went through multiple iterations, including as section 625.08, Florida Statutes, before, in 1959,[18] the Florida legislature enacted section 627.428, Florida Statutes, broadening the scope to apply to all insurers in the State.[19,20] The most recent version of the statute, prior to any major legislative changes, stated, in pertinent part, as follows:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.[21]

In addressing the need for this historic statutory provision, courts throughout the State of Florida have achieved near uniformity in their analyses. It has often been said that the purpose of the fee statute was to "discourage the contesting of valid claims against insurance companies and to reimburse successful insureds for their attorney's fees when they are compelled to defend or sue to enforce their insurance contracts."[22] In that regard, the fee statute served to "penalize an insurance company for wrongfully causing its insured to resort to litigation in order to resolve a conflict with its insurer when it was within the [insurance] company's power to resolve it."[23] This is particularly relevant in smaller cases "where a percentage formula alone would not provide the

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[17] *See Ivey*, 774 So. 2d at 684.

[18] *See* FLA. STAT. § 625.08 (1983) (repealed by ch. 59–205, § 816, 1959 Fla. Laws); *see also* Fla. Stat. § 627.428 (renumbered in 1971, but the statute was originally enacted as Fla. Stat. § 627.0127).

[19] *See. e.g.*, Act of June 2, 1893, ch. 4173, §§ 1, 2, 1893 Fla. Laws (providing recovery of attorney fees for policyholders in judgments against insurance companies); Gen. Stat. 1906, §§ 2774, 1906 1085, 1086 (judgment against insurance companies); Act of May 22, 1917, ch. 7295, §§ 1, 2, 100, 101, 1917 Fla. Laws; Rev. Gen. St. 1920, § 4263; Comp. Gen. 1927 Fla. Laws, § 6220; *see also* Historical and Statutory Notes under Fla. Stat.§ 625.01, 2390, 2392.

[20] Unless specifically referenced, Chapter 627, Florida Statutes, does not apply to surplus lines carriers. Accordingly, there is a separate statute, FLA. STAT. § 626.9373 (and its predecessor, FLA. STAT. § 625.32) which applies to surplus lines insurers. Analyses of FLA. STAT. § 627.428 have been instrumental in interpreting the application of FLA. STAT. § 626.9373 due to the substantially similar nature of the two fee statutes; *see also e.g.*, Maloy v. Scottsdale Ins. Co., 376 F. Supp. 3d 1249, 1253 (Fla. Dist. Ct. App. 2019) (exemplifying herein that any analysis regarding FLA. STAT. § 627.428 should be treated as equally applying to Fla. Stat. § 626.9372).

[21] *See* FLA. STAT. § 627.428 (2020).

[22] *See* Ins. Co. of N. Am. v. Lexow, 602 So. 2d 528, 531 (Fla. 1992).

[23] *See* First Fla. Auto & Home Ins. v. Myrick, 969 So. 2d 1121, 1124 (Fla. Dist. Ct. App. 2007).

incentive for a lawyer to undertake a case involving the potential commitment of many hours and substantial costs."[24]

Such "small cases" in the space of residential property insurance claims most often relate to low income families where insurance is a necessary component to obtaining a mortgage.[25] In claims involving said policyholders, it is particularly important to "level the playing field so that the economic power of insurance companies is not so overwhelming that injustice may be encouraged because people will not have the necessary means to seek redress in courts."[26]

B. SENATE BILL 76

In 2021, the first major change to the Fee Statute went into effect as a result of the passage of Senate Bill 76. Effective July 1, 2021,[27] the changes[28] were as follows:

> (1) Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had. In a suit arising under a residential or commercial property insurance policy not brought by an assignee, the amount of reasonable attorney fees shall be awarded only as provided in s. 57.105 or s. 627.70152, as applicable.[29]

This change was coupled with the creation of section 627.70152, Florida Statutes, now requiring that a presuit Notice of Intent to Initiate Litigation be submitted as a condition precedent to filing suit.[30]

The Notice of Intent statute established a new process of submitting information to the insurance carrier before a lawsuit could be filed. The type of

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[24] *See* Forthuber v. First Liberty Ins., 229 So. 3d 896, 900 (Fla. Dist. Ct. App. 2017).
[25] *See generally*, *Fannie Mae Selling Guide*, FANNIE MAE, B7-3-02 (Apr. 5, 2023), https://single-family.fanniemae.com/media/35651/display (discussing mortgages and how an individual may qualify).
[26] *See Ivey*, 774 So. 2d at 684.
[27] *See* Act of July 1, 2021, Ch. 76, 2021 Fla. Laws (providing insurance regulations for residential properties).
[28] *See Types of Markups Used in Bills*, NAT. CONF. OF STATE LEG., https://www.ncsl.org/legislative-staff/relacs/types-of-markup-used-in-bills (last updated Oct. 18, 2021).
[29] *See* FLA. STAT. § 627.428 (2021).
[30] *See* FLA. STAT. § 627.70152 (2021).

notice, and type of response, mandated varies depending on the posture of the claim at the time of the Notice of Intent's submission. In matters involving a complete denial of coverage, the insured must include, in pertinent part, the actions of the insurer giving rise to the notice and an estimate of damages, if known.[31] The carrier must respond by (1) accepting coverage, (2) continuing to deny coverage, or (3) electing to reinspect the insured property within fourteen business days.[32] In claims other than those involving a complete denial of coverage, the insured must include a presuit settlement demand itemizing damages, attorney fees, and costs in lieu of the estimate of damages[33] to which insurer must respond by either (1) making a settlement offer, or (2) invoking a form of alternative dispute resolution provided in the governing policy to be completed within ninety days.[34] In either situation, the carrier must respond to any type of notice within ten business days.[35]

The ultimate practical function of the Notice of Intent statute is two-fold. First, it eliminates situations where a lawsuit was filed prior to the submission of documentation evidencing any kind of dispute. While this may seem like a necessary aspect to the institution of a presuit notice, it ignores the long-held tenets of law that payment of insurance proceeds is performance under the contract, not a breach of contract.[36] If there is no dispute presented, there cannot have been any kind of breach warranting the filing of a cause of action. Second, the statute created a calculation of a fee quotient which served to limit the potential recovery for attorney fees depending on the amount obtained in a judgment versus the amounts demanded and offered presuit.[37]

i. Issues with the Section 627.70152, Florida Statutes

It must be noted that there are three major issues related to Notices of Intent filed regarding non-denied claims that remain unresolved. First, the Notice of Intent is mandated to include the "disputed amount."[38] The statute defines "disputed amount" as "the difference between the claimant's presuit settlement demand, not including attorney fees and costs listed in the demand, and the insurer's presuit settlement offer, not including attorney fees and costs, if part of

[31] *See* § 627.70152 (3)(a)(1)-(4).
[32] *See* § 627.70152 (4)(a)(1)-(3).
[33] *See* § 627.70152 (3)(a)(1)-(3) (5).
[34] *See* § 627.70152 (4)(a)(1)-(3).
[35] *See* § 627.70152 (4).
[36] *See generally* Rizo v. State Farm Fla. Ins. Co., 133 So. 3d 1114, 1115 (Fla. Dist. Ct. App 2014) (citing Slayton v. Universal Prop. & and Cas. Ins. Co., 103 So. 3d 934 (Fla. Dist. Ct. App. 2012)) (finding payment of an insurance policy as performance and not a breach).
[37] *See* § 627.70152(8).
[38] *See* § 627.70152(3)(a)(5)(b).

the offer."[39] Instrumental in ascertaining the information required to calculate the "disputed amount" are the terms referenced in the said definition and further defined within the statute. First, the "presuit settlement demand" is defined, *in toto*, as follows:

> "Presuit settlement demand" means the demand made by the claimant in the written notice of intent to initiate litigation as required by paragraph (3)(e). The demand must include the amount of reasonable and necessary attorney fees and costs incurred by the claimant, to be calculated by multiplying the number of hours actually worked on the claim by the claimant's attorney as of the date of the notice by a reasonable hourly rate.[40]

Inherent in the "presuit settlement demand" is the inclusion of the damages, attorney fees, and costs. While not defined, it can be easily deduced that "damages" are calculated by removing attorney fees and costs from the "presuit settlement demand" resulting in a calculation of only the indemnity portion of the demand. Furthermore, "presuit settlement offer" is defined as "the offer made by the insurer in its written response to the notice. . . ."[41] Without knowledge of the "presuit settlement offer," knowledge which is quite literally impossible to possess until *after* filing a presuit Notice of Intent and receiving a response, one cannot calculate the "disputed amount" let alone incorporate it into a presuit notice. The Department of Financial Services addressed this by including a checkable box which states "[c]heck here if the Disputed Amount is unknown";[42] however, this has not stopped insurance carriers from attempting to invalidate notices which do not contain a disputed amount. Essentially, insurers wish to receive a presuit notice, respond to the notice, and require a new notice to be filed compiling all of the information found within the initial notice and response. Regardless of whether that is feasible, there is no prejudice to an insurer by not having the "disputed amount" calculated in the initial notice as same is the result of a basic arithmetic function. Any such deficiency should not be fatal to a claim for attorney fees as a lack of specificity in a notice will not invalidate same where "the defect was of a purely technical nature, the party substantially complied, the notice purpose of the statute has been fulfilled, and the opposing party has not been prejudiced by the error."[43]

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[39] *See* § 627.70152(2)(c).
[40] *See* § 627.70152(2)(d).
[41] *See* § 627.70152(2)(e).
[42] *See Property Insurance Intent to Initiate Litigation*, FLA. DEP'T OF FIN. SERV., https://piitil.myfloridacfo.gov/viewnotice (last visited Jan. 9, 2024).
[43] *See* Pin-Pon Corp. v. Landmark Am. Ins. Co., 500 F. Supp. 3d 1336 (S.D. Fla. 2020) (citing QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, Inc., 94 So. 3d 541 (Fla. 2012)).

Next, there is a question as to whether the Notice of Intent statute prevents the parties to a property insurance lawsuit from filing a proposal for settlement/offer of judgment.[44] The concern is that allowing proposals for settlement or offers of judgment in concert with the fee quotient outlined in the Notice of Intent statute would allow both policyholders and insurance carriers alike to circumvent the calculation of fees thereby rendering a large portion of the statute meaningless. When there exists a conflict between two statutes, one dealing with a specific area of law and one dealing with law in general, "a specific statute covering a particular subject area always controls over a statute covering the same and other subjects in more general terms."[45] The more specific statute is considered to be an exception to the general terms of the more comprehensive statute.[46]

This is particularly true given the legislative intent of the bill. During floor debate in the Florida House of Representatives, Representative Bob Rommel, the House sponsor of the bill, was asked the following: "Based on your comments in the Senate amendments, it is my understanding that in suits arising under a residential or commercial property insurance policy, both the insurance company and the insurer will no longer be able to use the proposal for settlement or offer of judgment statutes, is that correct?" Rep. Rommel then responded: "that is correct."[47] Accordingly, it seems clear that, in cases governed by the Notice of Intent statute as originally drafted, proposals for settlement/offers of judgment are not available to the litigants.

This sentiment is further supported by the subsequent creation of section 624.1552, Florida Statutes, which states, *in toto*, that "[t]he provisions of [the proposals for settlement/offers of judgment statute] apply to any civil action involving an insurance contract."[48] Buttressing the prospective application of this statute, as well as the inapplicability of proposals for settlement/offers of judgment in cases subject to the fee quotient, the legislature included the following in the associated bill:

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[44] *See* FLA. STAT. § 768.79 (2022).
[45] *See* McKendry v. State, 641 So. 2d 45, 46 (Fla. 1994); *see also* Adams v. Culver, 111 So. 2d 665, 667 (Fla. 1959) (noting a statute that specifically covers a subject matter is controlling over a general statute on the same subject). *See generally* State v. Billie, 497 So. 2d 889, 894 (Fla. Dist. Ct. App. 1986), *review denied*, 506 So. 2d 1040 (Fla. 1987) (noting a specific statute control over a general statute when both are on the same subject matter).
[46] *See* Floyd v. Bentley, 496 So. 2d 862, 864 (Fla. Dist. Ct. App. 1986), *review denied*, 504 So. 2d 767 (Fla. 1987) (holding that in the situation where a more specific statute controls over a more general statute, the specific statute acts as an exception or qualification to the general statute).
[47] *See 4/30/21 House Session*, at 2:53:51 (The Florida Channel Apr. 30, 2021), https://theflorida-channel.org/videos/4-30-21-house-session/.
[48] FLA. STAT. § 624.1552 (2023).

> Section 29. This act shall not be construed to impair any right under an insurance contract in effect on or before the effective date of this act [March 24, 2023]. To the extent that this act affects a right under an insurance contract, this act applies to an insurance contract issued or renewed after the effective date of this act [March 24, 2023].[49]
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> Section 30. Except as otherwise expressly provided in this act, this act shall apply to causes of action filed after the effective date of this act [March 24, 2023].[50]

Logic dictates that, if proposals for settlement/offers of judgment were available to litigants in cases subject to the fee quotient, there would have been no need to create a prospective change through legislation. Accordingly, it is easily deduced that such mechanisms are not, in fact, available in cases filed after the Notice of Intent requirement was put in place through the creation of section 624.1552, Florida Statutes, on March 24, 2023, which are subject to the fee quotient. Any case filed between December 16, 2022, and March 24, 2023, which do not have the Fee Statute incorporated therein would not have any contractual rights affected so proposals for settlement/offers of judgment would be available in those cases as well.

Finally, based on the plain language of the statute, it was initially unclear as to whether attorney fees and costs are owed at the time the Notice of Intent is filed. As noted above, the Notice of Intent "demand must include the amount of reasonable and necessary attorney fees and costs incurred by the claimant, to be calculated by multiplying the number of hours actually worked on the claim by the claimant's attorney as of the date of the notice by a reasonable hourly rate."[51] While the Fee Statute mandated that a "judgment or decree" is required to trigger entitlement to attorney fees, the purpose behind statutory attorney fees was to ensure the insured finds itself "in the place she would have been if the carrier had seasonably paid the claim or benefits without causing the payee to engage counsel and incur obligations for attorney's fees."[52] Such is the case with regard to the inclusion of a demand for fees and costs in with the Notice of Intent, something which necessitates attorney involvement to file; otherwise, the inclusion of attorney fees and costs as part of the Notice of Intent demand would be purely ceremonial and futile in nature. To this point, "[t]he law

[49] *See* Act of Mar. 24, 2023, ch. 15, § 29, 2023 Fla. Laws 1, 20.
[50] *See* Act of Mar. 24, 2023, ch. 15, § 30, 2023 Fla. Laws 1, 20.
[51] *See* FLA. STAT. § 627.70152(1)(d) (2021).
[52] *See* Lewis v. Universal Prop. & Cas. Ins. Co., 13 So. 3d 1079, 1081 (Fla. Dist. Ct. App. 2009) (quoting Travelers Indem. Ins. Co. of Ill. V. Meadows MRI, LLP, 900 So. 2d 676, 679 (Fla. Dist. Ct. App. 2005)).

requires no futile acts."[53] Accordingly, logic dictates that should the carrier pay the Notice of Intent demand or make an offer in response, so too should there be consideration for attorney fees and costs.

However, the Fourth District Court of Appeal recently issued its opinion in *Citizens Property Insurance Corporation v. Vazquez* holding that "[n]othing in the 2021 version of section 627.70152 created an independent right to attorney's fees or otherwise changed the law requiring an insured to obtain a judgment or a confession of judgment to trigger entitlement to attorney's fees under section 627.428."[54] Instead, the court deemed the inclusion of fees and costs "a notice provision designed to alert the insurer of its possible exposure to presuit attorney fees if it rejects the settlement offer and the insured later obtains a judgment or confession of judgment."[55] It will be interesting to see if other appellate courts agree with such an analysis or deviate from same.

C. SENATE BILL 2-A

Despite enacting change with Senate Bill 76 in 2021, Florida's governor called for a special legislative session in December 2022 related to property insurance.[56] During the special session, the legislature passed Senate Bill 2-A. With regard to attorney fees, effective on December 16, 2022,[57] Senate Bill 2-A effectuated the following change:

> (1) ~~Upon~~Except as provided in subsection (4), upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had. ~~In a suit arising~~

[53] *See* Artz Ex Rel. Artz v. City of Tampa, 102 So. 3d 747 (Fla. Dist. Ct. App. 2012); *see also* Waksman Enters. Inc. v. Oregon Props., Inc., 862 So. 2d 35, 43 (Fla. Dist. Ct. App. 2003) ("[T]he law does not require that a party to a contract take action that would clearly be futile."). *See generally* Hoshaw v. State, 533 So. 2d 886, 887 (Fla. Dist. Ct. App. 1988) ("The law does not require futile acts.").
[54] Citizens Prop. Ins. Corp. v. Vazquez, 368 So. 3d 456, 460 (Fla. Dist. Ct. App. 2023).
[55] *Id.*
[56] There was also a special session in May 2022 related to property insurance which will be discussed further *infra*. Part III.D. While attorney fees were removed for claims resulting from an assignment of benefits, no changes related to fees for policyholders were effectuated. As this analysis deals only with insureds, and not assignees, same is not addressed herein.
[57] *See* Act of Dec. 16, 2022, ch. 271, § 26, 2022 Fla. Laws 1, 61.

~~under a residential or commercial property insurance policy not brought by an assignee, the amount of reasonable attorney fees shall be awarded only as provided in s. 57.105 or s. 627.70152, as applicable.~~

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(4) In a suit arising under a residential or commercial property insurance policy, there is no right to attorney fees under this section.[58,59]

The new law further removed the subsections within the Notice of Intent statute pertaining to the calculation of attorney fees.[60] Put succinctly, instead of the statutory right to attorney's which had been law for 130 years, policyholders suing their property insurance carriers will now be responsible for payment of their own attorney fees. It must be noted that attorney fees are available under the offer of judgment statute[61] (with certain caveats further discussed *infra*) and through sanctions for raising unsupported defenses.[62] These methods of fee recovery, however, are more subjective and may not provide for the entirety of attorney fees.

The rhetoric which led to this most recent change is nothing new. According to data from the National Association of Insurance Commissioners, "Florida homeowners insurance claims accounted for just over 8% of all homeowners claims opened by U.S. insurers in 2019, homeowners insurance lawsuits in Florida accounted for more than 76% of all litigation against insurers nationwide."[63] While, at first glance, this number appears to be staggering, there are a some factors which must be understood. Approximately one third of these lawsuits are related to assignment of benefits lawsuits which are often a main point of blame for rising insurance related costs.[64] Given that this was deemed so problematic, Senate Bill 2-A also did away with the ability to enter into assignments of benefits contracts under property insurance policies.[65] Perhaps this measure

[58] *See* FLA. STAT. § 627.428 (2022) (effective December 16, 2022).
[59] Effective March 24, 2023, section 627.428, Florida Statutes, was repealed in its entirety. *See* Act of Mar. 24, 2023, ch. 15, § 11, 2023 Fla. Laws 1, 16. In line with the analysis contained herein, there are ostensibly insurance claims unrelated to property insurance policies between December 16, 2022, and March 24, 2023, in which statutory fees are still available.
[60] *See* FLA. STAT. § 627.70152 (2023).
[61] *See* FLA. STAT. § 768.79 (2022).
[62] *See* FLA. STAT. § 57.105(1)(a) (2022).
[63] Amy O'Connor, *NAIC Data: Florida Property Lawsuits Total 76% of Insurer Litigation in U.S.*, INS. J. (Apr. 14, 2021), https://www.insurancejournal.com/news/southeast/2021/04/14/609721.htm.
[64] *See* William Rabb, *Lawsuits vs. Citizens Insurer Continue to Rise But Legal Fees and Payouts Dropping*, INS. J. (Mar. 11, 2022), https://www.insurancejournal.com/news/southeast/2022/03/11/657804.htm.
[65] S*ee* Act of Dec. 16, 2022, ch. 271, § 26, 2022 Fla. Laws 1.

could have been enough to adequately curb litigation without the attorney fee reform effecting policyholders.

Other statistics that are often cited relate to the allocation of insurance payouts, particularly the percentage paid directly to the policyholders themselves. It is claimed that, "[s]ince 2013, $15 billion has been paid out in claims in Florida - 71% of which went to attorney fees, 21% paid for insurers' defense costs and just 8% went to property owners for their losses."[66] In a vacuum, this data is made to seem appalling; however, it is possible to shed light on the skewed nature of this rhetoric using a real world example. Take for instance the recent case of *Florida Farm Bureau Gen. Ins. Co. v. Worrell*.[67] While the facts of this case are mostly inconsequential to our purposes, in *Worrell*, the carrier chose to deny a claim for $4,103.85 in benefits and stand by its denial for more than three years of litigation in county and appellate courts.[68] By losing both the lower court and appellate court actions, the carrier will now need to pay three years' worth of legal fees and costs. In reviewing the Clerk of Court records, the lower court has 108 docket entries while the appellate court has forty-one docket entries as of the date of this writing. Assuming conservatively that each docket entry is worth an hour of time and applying a reasonable hourly rate of $350 per hour,[69] the fee judgment in *Worrell* will, at a minimum, exceed ten times the amount paid to the policyholder. While the insurance industry would be quick to blame the consumer's attorney, as has been done throughout the legislative process, proper payment of the insurance benefits would have allowed the insurer to avoid the payment of fees entirely.

The question remains, however, why such extreme changes were required when the effects of Senate Bill 76 were only just starting to be felt throughout the industry. After passing the statute first requiring the Notice of Intent, former Speaker of the Florida House of Representatives Chris Sprowls stated "[i]f what has been told to me in the eight years that I've been here, from the insurance lobby, is true, that it takes eighteen months to see an impact on rates, then we're not yet seeing the impact."[70] In fact, litigation numbers were down as much as

[66] Oscar Miniet, *Florida personal lines coverage reaches crisis levels — Part 1*, PROPERTYCASUALTY360 (Dec. 28, 2021, 01:00 AM), https://www.propertycasualty360.com/2021/12/28/florida-personal-lines-coverage-reaches-crisis-levels-part-1/.
[67] Florida Farm Bureau Gen. Ins. Co. v. Worrell, 359 So. 3d 890 (Fla. Dist. Ct. App. 2023).
[68] *See id.* at 892.
[69] *See* Lizardi v. Federated Nat'l Ins. Co., 322 So. 3d 184, 188 (Fla. Dist. Ct. App. 2021) (holding that the trial court's reduction of attorney fees from $425 to $350 without the required specific findings was erroneous and required the appellate court to reverse and remand).
[70] *Florida Insurance Bill Passes Senate, But Chances in House Uncertain*, INS. J. (Mar. 4, 2022), https://www.insurancejournal.com/news/southeast/2022/03/04/656878.htm.

22% in the wake of Senate Bill 76.[71] While there is no doubt that litigation numbers related to property insurance claims in Florida are high, apportioning all of the blame to only one side is disingenuous. The evidentiary standard for the admissibility of an expert witness's opinion in Florida requires that the opinion be based on "sufficient facts or data" which are reliably applied to the issues at hand.[72] Perhaps Florida should hold its legislators to the same standard.

III. FLORIDA'S CIVIL REMEDY STATUTES AND BAD FAITH LAW

A. HISTORY AND INTENT

Historically, there existed no cause of action for first-party bad faith in Florida common law.[73] Then, in 1982,[74] the Florida legislature created the Civil Remedy statutes,[75] otherwise known as the "bad faith statutes."[76] The Civil Remedy statutes were "designed and intended to provide a civil remedy for any person damaged by an insurer's conduct."[77] The enaction of the statutes "codified the common law concerning insurers' good faith obligations to third-party insureds and extended that law by creating a new claim that subjects insurers to liability for failing to act in good faith toward their first-party insureds—insureds who seeks benefits for a covered loss suffered directly by the insured."[78] The bad faith statute's application to first-party claims is considered in derogation of the common law requiring strict construction.[79]

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[71] *See* Jim Ash, *Governor Signs Property Insurance Reforms and Condo Safety Measures*, FLA. BAR NEWS (May 27, 2022), https://www.floridabar.org/the-florida-bar-news/governor-signs-property-insurance-reforms-and-condo-safety-measures/.

[72] *See* FLA. STAT. § 90.702 (2022).

[73] *See* Talat Enter., v. Aetna Cas. & Sur. Co., 753 So. 2d 1278, 1281 (Fla. 2000); *see also* Allstate Indem. Co. v. Ruiz, 899 So. 2d 1121, 1125 (Fla. 2005); *see also* Time Ins. Co., Inc. v. Burger, 712 So. 2d 389, 391 (Fla. 1998).

[74] *See* Act of Mar. 26, 1982, Ch. 243, § 9, 1982 Fla. Laws 1289, 1291 (codified as amended at FLA. STAT. § 624.155 (2023)).

[75] While there are numerous sections and subsections of statute related to a number of types of insurance, this analysis will focus solely on the portions of sections 624.155 and 626.9541 relating to property insurance.

[76] *See* QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n, 94 So. 3d 541, 546 (Fla. 2012).

[77] *Ruiz*, 899 So. 2d at 1124.

[78] Batchelor v. Geico Cas. Co., 142 F. Supp. 3d 1220, 1241 (M.D. Fla. 2015) (citing *Ruiz*, 899 So. 2d at 1126).

[79] *See Talat*, 753 So. 2d at 1283. *See generally* Time Ins. Co. v. Burger, 712 So. 2d 389, 393 (Fla. 1998) (explaining that when a court construes a statute in derogation of the common law, it will presume the statute only intended to alter the common law in the ways clearly and plainly specified).

B. ELEMENTS OF BAD FAITH

The first, and perhaps most important, condition precedent to a first-party bad faith cause of action is the filing of a Civil Remedy Notice.[80] The Civil Remedy Notice is submitted through Florida's Department of Financial Services which gives the insurer against whom it was filed sixty days to cure the allegations raised, whether through paying damages or correcting the complained of behavior.[81] "The sixty-day window is designed to be a cure period that will encourage payment of the underlying claim, and avoid unnecessary bad faith litigation."[82] This cure period provides the insurer with "a final opportunity 'to comply with their claim-handling obligations when a good-faith decision by the insurer would indicate that contractual benefits are owed.'"[83] If, however, an insurer does not respond to the Civil Remedy Notice within the sixty days afforded by statute, it gives rise to "a presumption of bad faith sufficient to shift the burden to the insurer to show why it did not respond."[84]

In order to file an actionable Civil Remedy Notice, it must place the insurance carrier on notice of the following:

1. The statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated.
2. The facts and circumstances giving rise to the violation.
3. The name of any individual involved in the violation.
4. Reference to specific policy language that is relevant to the violation, if any. If the person bringing the civil action is a third party claimant, she or he shall not be required to reference the specific policy language if the authorized insurer has not provided a copy of the policy to the third party claimant pursuant to written request.
5. A statement that the notice is given in order to perfect the right to pursue the civil remedy authorized by this section.[85]

While the statute requires strict construction, that does not mean that a failure to strictly abide by the statutory requirements is necessarily fatal to a Civil Remedy Notice. First, based on the plain reading of the statute, a Civil Remedy

[80] *See* FLA. STAT. § 624.155(3)(a) (2023).
[81] *See* § 624.155(3)(c).
[82] Demase v. State Farm Florida Ins. Co., 239 So. 3d 218, 221 (Fla. Dist. Ct. App. 2018) (quoting *Talat*, 753 So. 2d at 1282).
[83] Fridman v. Safeco Ins. Co. of Ill., 185 So. 3d 1214, 1220 (Fla. 2016) (quoting *Talat*, 753 So. 2d at 1284).
[84] *Demase*, 239 So. 3d at 221 (quoting *Fridman*, 185 So. 3d at 1220).
[85] § 624.155(3)(b)(1)-(5).

Notice need only reference specific policy language if such language is relevant to the alleged violations. In the event no such language exists, specific policy language is not required.[86] Additionally, as noted above, if a defect is purely technical, there has been substantial compliance, the purpose has been fulfilled, and the opposing party has not suffered prejudice by the error, any alleged defect is not fatal to the action.[87] Furthermore, any such defects must be raised in response to the Civil Remedy Notice or they may be considered waived.[88]

It is also important to note that no specific amount need be requested in the Civil Remedy Notice.[89] Even if a specific cure amount is sought, bad faith may still ripen if payment is issued beyond the cure period in an amount less than that originally claimed.[90] Ultimately, as bad faith is examined under a "totality of the circumstances" standard, the question of whether a post-Civil Remedy Notice payment is enough to establish bad faith conduct has occurred is not subject to any bright line rule but, instead, is analyzed on a case by case basis, typically as a question of fact for a jury to decide.[91]

Beyond the Civil Remedy Notice, it is well settled in the State of Florida that a statutory first-party bad faith action is premature until two additional conditions have been satisfied: (1) the insurer raises no defense which would defeat coverage (an issue for the judicial process rather than the appraisal process), or any such defense has been adjudicated adversely to the insurer; and, (2) the actual extent of the insured's loss must have been determined.[92] Essentially, the

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[86] *See* Diamond Aircraft Indus., Inc. v. Horowitch, 107 So. 3d 362, 367 (Fla. 2013).

[87] *See* Pin-Pon Corp. v. Landmark Am. Ins. Co., 500 F. Supp 3d 1336, 1345 (S.D. Fla. 2020) (citing QBE Ins. Corp. v. Chalfonte Condo. Apartment Ass'n. Inc., 94 So. 3d 541, 552–54 (Fla. 2012)).

[88] *See* Evergreen Lakes HOA, Inc. v. Lloyd's Underwriters at London, 230 So. 3d 1, 3 (Fla. Dist. Ct. App 2017) (holding that the defense alleging that the Civil Remedy Notice was mailed to the wrong address was waived when it was not timely raised in the response.); *see also* Bay v. United Services Auto. Ass'n, 305 So. 3d 294, 299 (Fla. Dist. Ct. App. 2020) (holding that the defense that a Civil Remedy Notice was filed against United Services Automobile Association as opposed to USAA Casualty Insurance Company was waived when it was not timely raised in the response).

[89] *See* Hunt v. State Farm Florida Ins. Co., 112 So. 3d 547, 551 (Fla. Dist. Ct. App. 2013); *see also* State Farm Ins. Co. v. Ulrich, 120 So. 3d 217, 220 (Fla. Dist. Ct. App. 2013).

[90] *See* Barton v. Capitol Preferred Ins. Co., 208 So. 3d 239, 243 (Fla. Dist. Ct. App 2016) (holding that insurer's $65,000 settlement payment paid after sixty-day cure period constituted favorable resolution for insureds even though the amount was less than policy limits and that insureds initially demanded).

[91] *See* Harvey v. GEICO Gen. Ins. Co., 259 So. 3d 1, 7 (Fla. 2018) ("[T]he question of whether an insurer has acted in bad faith in handling claims against the insured is determined under the 'totality of the circumstances' standard." quoting Berges v. Infinity Ins. Co., 896 So. 2d 665, 680 (Fla. 2004)).

[92] *See* Blanchard v. State Farm Mutual Automobile Insurance Co., 575 So. 2d 1289, 1291 (Fla. 1991) ("Absent a determination of the existence of liability on the part of the uninsured tortfeasor and the extent of the plaintiff's damages, a cause of action cannot exist for a bad faith failure to settle."); *see also* Vest v. Travelers Ins. Co., 753 So. 2d 1270, 1276 (Fla. 2000).

loss must be paid in full under the policy beyond the sixty day cure window provided by statute.

Historically, "an insurer's liability for coverage and the extent of damages, and not an insurer's liability for breach of contract, must be determined before a bad faith action becomes ripe."[93] This determination could be ascertained through "litigation, arbitration, settlement, stipulation, or the payment of fully policy limits."[94] Furthermore, as is particularly pertinent to a first-party property bad faith cause of action, "[an] appraisal award was tantamount to a 'favorable resolution' necessary to proceed with a bad faith action."[95] Until very recently, the invocation of appraisal did not affect or toll the timeline for which a cure must be provided.[96]

C. DAMAGES

The damages available in a bad faith cause of action do not include any contractual damages which were available during the underlying claim or litigation.[97] This means damages related to interest, loss of use, depreciation, and the like, cannot be awarded during bad faith litigation; instead, all such damages must be adjudicated as part of the underlying matter, whether in litigation or as part of the claim adjustment. Instead, there are two specific types of damages available under the Civil Remedy statutes.

Under section 624.155, Florida Statutes, the damages available are known as extracontractual damages. These are "damages which are a reasonably foreseeable result of a specified violation of this section by the authorized insurer and may include an award or judgment in an amount that exceeds the policy limits."[98] Damages are considered reasonably foreseeable when they "are the natural, proximate, probable, or direct consequence of the insurer's bad faith."[99] Often times, demands for extracontractual damages include public adjusters' fees that are incurred as a result of an initially denied or underpaid claim. Similarly, the need to retain an attorney to recover benefits due and owing under an

[93] Demase v. State Farm Fla. Ins. Co., 239 So. 3d 218, 223; *see also Blanchard*, 575 So. 2d at 1291; *see also Vest*, 753 So. 2d at 1276.
[94] *Demase*, 239 So. 3d at 223; *see also* Fridman v. Safeco Ins. Co. of Ill., 185 So. 3d 1214, 1224 ("Certainly, the insured is not obligated to obtain the determination of liability and the full extent of his or her damages through a trial and may utilize other means of doing so, such as an agreed settlement, arbitration, or stipulation before initiating a bad faith cause of action.").
[95] Trafalgar at Greenacres, Ltd. v. Zurich Am. Ins. Co., 100 So. 3d 1155, 1157–58 (Fla. Dist. Ct. App. 2012); *see also* Cammarata v. State Farm Fla. Ins. Co., 152 So. 3d 606, 612 (Fla. Dist. Ct. App. 2014).
[96] *See* Fortune v. First Protective Ins. Co., 302 So. 3d 485, 492 (Fla. Dist. Ct. App. 2020).
[97] *See* Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co., 945 So. 2d 1216, 1222 (Fla. 2006).
[98] FLA. STAT. § 624.155(8) (2020).
[99] Cont'l Ins. Co. v. Jones, 592 So. 2d 240, 241 (Fla. 1992).

insurance policy could likely be categorized as extracontractual damages that are reasonably foreseeable to the insurance carrier. Therefore, said amounts should be recoverable as bad faith damages.

The other damages available under the Civil Remedy statutes are punitive damages derived from violations of section 626.9541, Florida Statutes. Punitive damages are those which "go beyond the actual damages suffered by an injured party and are imposed as a punishment of the defendant. . . ."[100] Such damages "are imposed in order to punish the defendant for extreme wrongdoing and to deter others from engaging in similar conduct."[101] Punitive damages are available only when "the acts giving rise to the violation occur with such frequency as to indicate a general business practice and these acts are: (a) Willful, wanton, and malicious; [or] (b) In reckless disregard for the rights of any insured."[102] It is worth noting, however, that courts have determined that the "reckless disregard" threshold for punitive damages in the Civil Remedy statutes is "less stringent" than the common law standard for punitive damages.[103] While not generally considered part of a first party bad faith cause of action, there may be circumstances where damages for mental pain and suffering damages are available. In such cases, damages can be awarded if "the insurer's conduct is so gross and extreme as to amount to an independent tort, and to merit the award of punitive damages."[104]

D. PRIOR CHANGES TO THE CIVIL REMEDY STATUTES

As noted above, the invocation of appraisal did not historically toll the cure period related to the filing of a Civil Remedy Notice.[105] In fact, the Civil Remedy Statute provided "no time limitation for when a [Civil Remedy Notice] may be filed. . . ."[106] To combat this, in 2019,[107] the Civil Remedy statute was amended to prohibit the filing a Civil Remedy Notice "within [sixty] days after

[100] Mercury Motors Exp., Inc. v. Smith, 393 So. 2d 545, 547 (Fla. 1981).
[101] Chrysler Corp. v. Wolmer, 499 So. 2d 823, 825 (Fla. 1986).
[102] § 624.155(5).
[103] *See* Howell-Demarest v. State Farm Mut. Auto. Ins. Co., 673 So. 2d 526, 528–29 (Fla. Dist. Ct. App. 1996) (citing Home Ins. Co. v. Owens, 573 So. 2d 343 (Fla. Dist. Ct. App.1990)).
[104] Dunn v. Nat'l Sec. Fire & Cas. Co., 631 So. 2d 1103, 1107 (Fla. Dist. Ct. App. 1993) (quoting Butchikas v. Travelers Indemnity Co., 343 So. 2d 816 (Fla. 1976); *see also* Saltmarsh v. Detroit Auto Inter–Ins. Exch., 344 So. 2d 862 (Fla. Dist. Ct. App. 1977)).
[105] *See generally* Fortune v. First Protective Ins. Co., 302 So. 3d 485, 490 (Fla. Dist. Ct. App. 2020) (holding the insured's invocation of the appraisal process after the cure period expired did not cure an alleged violation for failing to attempt to settle claims).
[106] Landers v. State Farm Fla. Ins. Co., 234 So. 3d 856, 859 (Fla. Dist. Ct. App. 2018), *rev'd denied sub nom.*; *see also* State Farm Fla. Ins. Co. v. Landers, SC18-292, 2018 WL 6839539 (Fla. Dec. 31, 2018).
[107] *See* 2019 Fla. Sess. Law Serv. Ch. 2019-108 (C.S.C.S.C.S.H.B. 301) (WEST).

appraisal is invoked by any party in a residential property insurance claim."[108] This did not prevent the filing of a Civil Remedy Notice, nor did it invalidate any Civil Remedy Notice, filed before the invocation of appraisal. It, instead, provided a moratorium for the filing of a Civil Remedy Notice when same was not filed prior to a demand for appraisal.

As the prior change did not halt bad faith related to appraisal awards, in 2022,[109] as part of the May special session, the legislature created section 624.1551, Florida Statutes, which now placed a requirement that "a claimant must establish that the property insurer breached the insurance contract to prevail in a claim for extracontractual damages."[110] A strict reading of this provision establishes not that there must be a judgment for breach of contract but rather a finding that a breach of contract occurred. A breach of contract can occur in any number of ways: a carrier can fail to pay at least the actual cash value of a claim,[111] a carrier can fail to pay the claim within ninety days,[112] or even if the carrier fails to timely acknowledge and respond to communications.[113] As the insurance contracts incorporate Florida Insurance Code by reference, any violation of the Florida Insurance Code can be considered a breach of contract.[114]

Finally, in 2022, the Florida Supreme Court amended the Florida Rules of Civil Procedure, specifically, the rule governing the filing of a Proposal for Settlement.[115] The new iteration of the rule stated that any proposal for settlement or offer of judgment must "exclude nonmonetary terms, with the exceptions of a voluntary dismissal of all claims with prejudice and any other nonmonetary terms permitted by statute."[116] As, until then, releases inclusive of bad faith were being incorporated as part of Proposals for Settlement, and now the ability to include a release as a nonmonetary term was removed, the acceptance of Proposals for Settlement gave rise to the elements necessary to bring a bad faith cause of action.

[108] FLA. STAT. § 624.155(3)(f) (2019).
[109] *See* Act of May 26, 2022, Ch. 268 § 6 (2022).
[110] FLA. STAT. § 624.1551 (2022).
[111] *See* FLA. STAT. § 627.7011(3)(a) (2022).
[112] *See* FLA. STAT. § 627.70131(5)(a) (2011).
[113] *See* § 627.70131(1)(a).
[114] *See* FLA. STAT. § 627.418(1) (2022); *see also infra* Part III.
[115] *See* In re Amends to Fla. Rule of Civ. Proc. 1.442, 345 So. 3d 845 (Fla. 2022).
[116] *Id.* at 846.

E. SENATE BILL 2-A

Not seven months after the creation of section 624.1551, Florida Statutes, the legislature amended it to become much more restrictive.[117] The new iteration of the statute states, *in toto*, as follows:

> Notwithstanding any provision of s. 624.155 to the contrary, in any claim for extracontractual damages under s. 624.155(1)(b), no action shall lie until a ~~claimant must establish~~ named or omnibus insured or a named beneficiary has established through an adverse adjudication by a court of law that the property insurer breached the insurance contract ~~to prevail in a claim for extracontractual damages~~ and a final judgment or decree has been rendered against the insurer. Acceptance of an offer of judgment under s. 768.79 or the payment of an appraisal award does not constitute an adverse adjudication under this section. The difference between an insurer's appraiser's final estimate and the appraisal award may be evidence of bad faith under s. 624.155(1)(b), but is not deemed an adverse adjudication under this section and does not, on its own, give rise to a cause of action.[118]

Now, despite long existing precedent, neither appraisal nor the acceptance of an offer of judgment can serve to ripen a first-party bad faith cause of action under a property insurance policy; instead, under this new law, an insured must obtain an adverse adjudication in court to ripen bad faith.

On this issue, there are two points which must be addressed. First, under the Notice of Intent statute, appraisal can be requested in response to a Notice on a non-denied claim but must be completed within ninety days or else the policyholder can file suit without further notice.[119] If a lawsuit is filed in line with the statute, and the appraisal award is entered after the initiation of litigation, "the payment of the claim is, indeed, the functional equivalent of a confession of judgment or a verdict in favor of the insured."[120] Therefore, there is still a way for appraisal awards to serve as a mechanism to ripen a bad faith cause of action. Perhaps this is why the difference between the amount paid and the appraisal award can still serve as evidence of bad faith.

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[117] Act of Dec. 16, 2022, Ch. 271 § 2 (2022).

[118] FLA. STAT. § 624.1551 (2022) (outlining specific requirements and conditions that must be met before a claimant can bring a legal action for extracontractual damages against an insurer).

[119] FLA. STAT. § 627.70152(4)(a)(1)-(3) (2021) (stating that appraisal must be completed within a ninety-day period, or the claimant can file suit without further notice to the insurer).

[120] Do v. GEICO Gen. Ins. Co., 137 So. 3d 1039, 1042 (Fla. Dist. Ct. App. 2014) (quoting Wollard v. Lloyd's & Cos. Of Lloyd's, 439 So. 2d 217, 218 (Fla. 1983) (stating that payment to an insured is the "functional equivalent" to a judgment in favor of the insured); *see also* Ivey v. Allstate Ins. Co., 774 So. 2d 679, 684 (Fla. 2000) (affirming the notion that payment to an insured constitutes a judgment in his favor).

Second, and of a much greater concern, is the removal of offers of judgment as an instrument which can ripen bad faith. Proposals for settlement/offers of judgment can be filed anytime beginning ninety days after an action has been commenced or, more concerningly, up to forty-five days before the date a matter is set for trial.[121] That means an insurer can breach a contract after, potentially, months of claim adjustment, force an insured to litigation where fees are not recoverable under the Insurance Code, and then, forty-five days before trial, make an offer of full policy limits to shield themselves from bad faith liability. This has the highest potential of abuse as it relates to the newly enacted laws. With that said, there is an easy and elegant solution to this conundrum: ignore the offer and try the case. Of course, there is risk involved in this as it may lead to exposure for the policyholder to pay the insurer's fees and costs; however, so too is there a risk for the insurer moving forward without a settlement.

IV. THE ULTIMATE QUESTION: DO THE LEGISLATIVE CHANGES APPLY RETROACTIVELY?

Taking these changes into consideration, the question remains as to which policyholders will be affected. If the changes in Senate Bill 2-A are deemed to apply retroactively across the board, that means all pending litigation, no matter how old the case, would have the ability to obtain statutory attorney fees and have rights pertaining to bad faith causes of action removed. It is the opinion of the author, grounded in extensive case law, that the changes discussed herein should not, and legally cannot, be applied retroactively.

All newly enacted statutes are presumed to apply prospectively.[122] This maxim is codified by Florida law in stating that "[t]he repeal of any statute by the adoption and enactment of [new] Florida Statutes. . . shall not affect any right accrued before such repeal or any civil remedy where a suit is pending."[123] It is under this tenet of law that courts have held "virtually no degree of contract impairment is tolerable."[124] Of course, by stating that "virtually" no harm to existing contracts is tolerable, there is an implication that "some impairment is

[121] Fla. R. Civ. P. 1.442(b) (2022) (setting time allowances for filing proposals for settlement/offers of judgment).
[122] *See* Metro. Dade County v. Chase Fed. Hous. Corp., 737 So. 2d 494, 498-99 (Fla. 1999) (stating that newly enacted statutes apply retroactively absent clear legislative intent to the contrary).
[123] FLA. STAT. § 11.2425 (2022) (clarifying that newly enacted statutes do not affect a right accrued before the availability of a new civil remedy where a matter is pending).
[124] *See* Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State, 209 So. 3d 1181, 1192 (Fla. 2017) (holding that a statutory fee limitation was "unconstitutional and may not stand when such a limitation impairs a preexisting contract." quoting Pomponio v. Claridge of Pompano Condominium, Inc., 378 So. 2d 774 (Fla. 1979)).

tolerable."[125] Therein lies the question of whether a statute can be applied retroactively in matters involving property insurance contracts.

The "Florida Insurance Code" is comprised of Chapters 624–32, 634–36, 641–42, 648, and 651.[126] As it would be cumbersome to include the entirety of the Florida Insurance Code into each individual policy written and bound in the State of Florida, any insurance policy that is not in compliance with the Code shall be construed and applied in a manner consistent with the Code.[127] Said another way, "insurance policies that are inconsistent with the Insurance Code must be harmonized with the Code."[128] Consequently, "[w]hen an insurance policy does not conform to the requirements of statutory law, a court must write a provision into the policy to comply with the law, or construe the policy as providing the coverage required by law."[129] So, while insurance policies themselves do not contain a full recitation of the Florida Insurance Code, such laws are incorporated by reference.

This falls in line with the well-established truism of contract law that "[t]he laws in force at the time of the making of a contract enter into and form a part of the contract as if they were expressly incorporated into it."[130] Additionally, as it relates specifically to insurance policies, "the statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract."[131] This is further supported by the Contract Clause of Florida's Constitution which states "[n]o bill of attainder, ex post facto law or law

[125] *See Pomponio*, 378 So. 2d at 780 (stating that some impairment is tolerable but proposing a balancing test).

[126] FLA. STAT. § 624.01 (2022) (listing the Florida Insurance Code sections).

[127] FLA. STAT. § 627.418(1) (2022) (clarifying that non-compliant provisions in policies do not render an entire policy invalid, rather it will be interpreted as if it were compliant).

[128] *See* Sawyer v. Transamerica Life Ins. Co., 09-CV-61288, 2010 WL 1372447, at 11 (S.D. Fla. Mar. 31, 2010) (stating that insurance policies must be consistent with the Florida Insurance Code).

[129] Auto-Owners Ins. Co. v. DeJohn, 640 So. 2d 158, 161 (Fla. Dist. Ct. App. 1994) (citing United States Fire Ins. Co. v. Van Iderstyne, 347 So. 2d 672 (Fla. Dist. Ct. App. 1977); Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 896 (Fla. 2003); Standard Marine Ins. Co. v. Allyn, 333 So. 2d 497 (Fla. Dist. Ct. App. 1976)).

[130] Fla. Beverage Corp. v. Div. of Alcoholic Beverages & Tobacco, Dept. of Bus. Regul., 503 So. 2d 396, 398 (Fla. Dist. Ct. App. 1987) (citing Shavers v. Duval Cnty., 73 So. 2d 684 (Fla. 1954)); Tri-Properties, Inc. v. Moonspinner Condo. Ass'n, Inc., 447 So. 2d 965, 967 (Fla. Dist. Ct. App. 1984); Cycle Dealers Ins., Inc. v. Bankers Ins. Co., 394 So. 2d 1123 (Fla. Dist. Ct. App. 1981); 11 Fla. Jur. 2d *Contracts* § 129, 17 Am. Jur. 2d *Contracts* § 257.

[131] *Hassen v. State Farm Mut. Auto. Ins. Co.*, 674 So. 2d 106, 108 (Fla. 1996); *see also Lumbermens Mut. Cas. Co. v. Ceballos*, 440 So. 2d 612, 613 (Fla. Dist. Ct. App. 1983) (holding that a policy is governed by the law in effect at the time the policy is bound and issued as opposed to the law in effect at the time a loss giving rise to a claim occurs); *see also* Hausler v. State Farm Mut. Auto. Ins. Co., 374 So. 2d 1037, 1038 (Fla. Dist. Ct. App. 1979) (holding that the date of the loss does not determine the law applicable to a subsequent dispute).

impairing the obligation of contracts shall be passed."[132] Essentially, the execution of a contract creates a snapshot in time incorporating any and all relevant laws in effect at the time of formation and incorporating them therein as if they were written in full as part of said contract.

There are, however, situations when the laws governing an already existing contract can be rewritten. In order to retroactively apply a law, a two-pronged test must be satisfied. "First, the Court must ascertain whether the Legislature intended for the statute to apply retroactively. Second, if such an intent is clearly expressed, the Court must determine whether retroactive application would violate any constitutional principles."[133] "[E]ven where the Legislature has expressly stated that a statute will have retroactive application, this Court will reject such an application if the statute impairs a vested right, creates a new obligation, [] imposes a new penalty . . . [, or] 'attaches new legal consequences to events completed before its enactment.'"[134] As further discussed below, there is no reading of any of the recent legislation which evidenced intent to apply the changes retroactively and the changes in law only affect substantive vested rights under the insurance policy. Thus, retroactivity would be improper and unconstitutional.

A. LEGISLATIVE INTENT

As stated above, the legislative changes in Senate Bills 76, 2-D, and 2-A, like all newly enacted statutes, are presumed to apply only prospectively, and that presumption can only be rebutted by "clear legislative intent."[135] "Requiring clear intent assures that [the legislature] itself has affirmatively considered the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits."[136] "The policy rationale behind this rule of construction is that the retroactive operation of statutes can be harsh and implicate due process concerns."[137] In determining the legislative intent regarding retroactivity, "both the terms of the statute and the purpose of the enactment must be considered."[138] "However, the mere fact that 'retroactive application of a new statute would vindicate its purpose more fully . . . is not sufficient to rebut the presumption against retroactivity.'"[139]

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[132] FLA. CONST. art. I, § X.
[133] Menendez v. Progressive Exp. Ins. Co., 35 So. 3d 873, 877 (Fla. 2010) (citing *Metro. Dade Cnty.*, 737 So. 2d at 499).
[134] *Menendez* at 877 (citations omitted).
[135] *Metro. Dade Cnty.*, 737 So. 2d at 499–500.
[136] *Id.*
[137] *Id.*
[138] *Id.* at 500.
[139] *Id.* (quoting *Landgraf*, 511 U.S. at 286).

It is, quite simply, not possible to reference any specific language within any of the recent bills evidencing retroactivity as such language does not exist. During the discussion of Senate Bill 2-A, the following exchange occurred between Senator Jonathan Martin and Senator Jim Boyd, the bill's sponsor:

> SENATOR MARTIN: Less than ninety days ago, Hurricane Ian made landfall in District 33, my district. Islands from Bonita Beach in the south to Boca Grande in the north including Sanibel, Fort Myers Beach, Pine Island, and much of the mainland, Cape Coral, Fort Myers, were absolutely devastated by the storm. I want to ensure today on the floor that this bill in no way prevents those impacted by Hurricane Ian from making any insurance claims pursuant to the Florida laws, both substantive and procedural, that were in place on September 28th when Hurricane Ian made landfall in my district.
>
> ***
>
> SENATOR BOYD: . . . [T]hat is a good question, Senator Martin. Thank you for bringing that forward. My answer to you would be: statutes affecting substantive rights apply prospectively absent clear legislative intent to the contrary. So in other words, if we had put the legislative intent in that it would apply retroactively, that would be the only way that it would apply that way. In other cases, without that, it would all be prospective treatment. **This bill does not contain any language as relating to . . . retroactivity.** So, Florida Courts also have consistently said that changes to the Florida Statutes only apply to insurance policies newly written or renewed after the bill's effective date. So therefore, **I do not believe this bill will have retroactive application.**[140]

This exchange eminently clarifies two things: there is no language in the bill which expresses retroactive intent and the legislature's actual intent was to apply the bill prospectively, not retroactively. Hence, because the bill does not contain any language denoting retroactivity, there can be no retroactive application.[141]

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[140] *See 12/13/22 Senate Session*, at 32:57 (The Florida Channel Dec. 13, 2022), https://theflorida-channel.org/videos/12-13-22-senate-session/ (emphasis added).

[141] *Id.* (referring to Senator Martin and Senator Boyd's exchange at the floor debate on SB 2-A. The bigger concern is the implication of Senator Martin's question. Without commenting on politics, Senate Bill 2-A was championed by the Republican caucus. Both Senators Martin and Boyd are, in fact, Republicans. Senator Martin's concern that his constituents not be affected by the removal of the Fee Statute is quite telling in that it implies a knowledge that removal of said statutory protections would have a negative impact on Hurricane Ian victims if it applied to their ongoing claims. This begs the question as to the effect on victims of the next inevitable Florida Hurricane).

This is further established through Senate Bill 7052 which was recently ratified after passing unanimously in the Florida Senate and House of Representatives on April 26, 2023, and May 3, 2023, respectively. The bill states, in pertinent part, as follows:

> Chapter 2022-271, Laws of Florida [Senate Bill 2-A], shall not be construed to impair any right under an insurance contract in effect on or before the effective date of that chapter law. To the extent that chapter 2022-271, Laws of Florida, affects a right under an insurance contract, that chapter law applies to an insurance contract issued or renewed after the applicable effective date provided by the chapter law. This section is intended to clarify existing law and is remedial in nature.[142]

The same is true for Senate Bills 76 and 2-D which lack any language reflecting retroactive intent regarding substantive rights. "If the Legislature intended to make the statute retroactive it could easily have said so."[143] It is not a court's "function to divine legislative intent of retroactivity with guess or assumption. If there is not clear evidence that the Legislature intended to apply the statute retroactively," the first prong of the requisite analysis must be answered against retroactive application.[144] Even the most nuanced argument that the bills discussed herein were written in present tense does not serve to prove retroactive intent in any way. In fact, this argument was expressly rejected by the United States Supreme Court when the Court stated that "[g]iven the well-established presumption against retroactivity . . . it cannot be the case that a statutory prohibition set forth in the present tense applies by default to acts completed before the statute's enactment."[145]

Accordingly, there can be no doubt that the changes to Florida law over the past two years in Senate Bills 76, 2-D, and 2-A, do not satisfy the first prong of the two-step analysis. Because there exists no evidence of legislative intent, clear or otherwise, permitting the retroactive application of the herein referenced bills, the inquiry can quite simply end. If the first prong of the retroactivity analysis cannot be satisfied, the statute cannot, as a matter of settled law, be applied retroactively.

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[142] 2023 Fla. Sess. Law Serv. Ch. 2023-172 (C.S.S.B. 7052) (WEST).
[143] Promontory Enterprises, Inc. v. S. Eng'g & Contracting, Inc., 864 So. 2d 479, 484 (Fla. Dist. Ct. App. 2004).
[144] *Id.*
[145] *See* Carr v. U.S., 560 U.S. 438, 473 (2010) (citing *Johnson v. United States*, 529 U.S. 694, 701 (2000)) ("Absent a clear statement of that intent, we do not give retroactive effect to statutes burdening private interests.").

It has been and, no doubt, will be argued that the statutory changes are designed to reduce litigation costs and revitalize the insurance market;[146] however, numerous prior statutory changes which seek to accomplish similar goals have been held not to apply retroactively, particularly as follows: the presuit requirements of medical malpractice statute did not apply retroactively;[147] the statute requiring underinsured motorist carrier to pay the amount of offers from liability insurer within thirty days in order to preserve subrogation claim was deemed to be a substantive amendment operating prospectively, not retroactively;[148] the 2005 amendments to section 627.7015, Florida Statutes, requiring that notice of the availability of mediation be provided to a policyholder prior to invocation of the appraisal process by residential insurers did not apply retroactively;[149] the statutory changes to the sinkhole statute did not apply retroactively;[150] the Asbestos and Silica Compensation Fairness Act section providing that particular physical impairment symptoms were an essential new element of asbestos cause of action, a requirement that never existed before the Act's enactment, could not be retroactively applied to the plaintiffs' asbestos-related claims for damages consistent with due process clause of State Constitution;[151] and the statute altering damages recoverable in statutory bad faith actions against uninsured motorist insurer cannot be applied retroactively, notwithstanding that legislature expressly stated that statute was remedial and was to be applied retroactively.[152] As a result, regardless of the intent of a statute involving retroactivity, there are legal bases to prevent such retroactive application depending on the types of changes effectuated.

B. SUBSTANTIVE VERSUS PROCEDURAL RIGHTS

Even if the legislative intent clearly favored retroactivity, the impairment of substantive rights would still render such a retroactive application impermissible as it would clearly run afoul of constitutional principles and *stare decisis*.

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[146] *The Florida Legislature Joint Proclamation*, THE FLA. SENATE (Dec. 6, 2022), https://www.flsenate.gov/PublishedContent/Offices/2022-2024/President/Documents/Floida_Legislature_Joint_Proclamation_Dec_6_2022.pdf.

[147] *See, e.g.*, Kravitz v. Benjamin, 608 So. 2d 584 (Fla. Dist. Ct. App. 1992) (finding the legislature did not intend to apply the statute retroactively).

[148] Hassen v. State Farm Mut. Auto. Ins. Co., 674 So. 2d 106 (Fla. 1996).

[149] *See* Fla. Ins. Guar. Ass'n, Inc. v. Devon Neighborhood Ass'n, Inc., 67 So. 3d 187, 197 (Fla. 2011).

[150] *See* Zawadzki v. Liberty Mut. Fire Ins. Co., No. 8:12-CV-950-T-30MAP, 2012 WL 3656456, at *4–6 (M.D. Fla. Aug. 23, 2012) (holding retroactive application "would substantially limit an insurance company's liability for damage resulting from sinkholes by narrowing the definition of a covered 'sinkhole lose'").

[151] *See* Am. Optical Corp. v. Spiewak, 73 So. 3d 120 (Fla. 2011).

[152] *See* State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55 (Fla. 1995).

"[S]ubstantive law prescribes duties and rights and procedural law concerns the means and methods to apply and enforce those duties and rights."[153] In civil cases, substantive rights come from law which "creates, defines, and regulates rights which are to be administered by the courts."[154] Furthermore, changes to "a statute that achieves a 'remedial purpose by creating substantive new rights or imposing new legal burdens' is treated as a substantive change in the law."[155] This is perfectly exemplified looking at the Civil Remedy statutes. Compare this with "[r]emedial statutes or statutes relating to remedies or modes of procedure, which do not create new or take away vested rights, but only operate in furtherance of the remedy or confirmation of rights already existing" which can be applied retroactively.[156]

i. Attorney Fees

Regarding attorney fees, the Supreme Court of Florida has held that same are substantive in nature and, therefore, the protections afforded by the Constitution of the State of Florida prevent retroactive application. "Florida law is clear that the statutory right to attorney's fees is a substantive right and that the 'statute in effect at the time an insurance contract is executed governs substantive issues arising in connection with that contract.'"[157] In fact, Florida's Supreme Court has held that "[t]he terms of section 627.428 are an implicit part of every insurance policy issued in Florida."[158] That is because "[s]ection 627.428[] is part of the Florida Insurance Code, which governs all aspects of the insurance industry, including insurance rates and contracts."[159]

Recently, the Florida Supreme Court analyzed a substantially similar statutory change as that effectuated in Senate Bill 76 requiring the Notice of Intent.

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[153] Sharps v. Provident Life & Accident Ins. Co., 826 So. 2d 250, 254 (Fla. 2002) (quoting Alamo Rent-A-Car, Inc. v. Mancusi, 632 So. 2d 1352, 1358 (Fla. 1994).
[154] Delgado v. J.W. Courtesy Pontiac GMC-Truck, Inc., 693 So. 2d 602, 606 (Fla. Dist. Ct. App. 1997).
[155] Smiley v. State, 966 So. 2d 330, 334 (Fla. 2007) (quoting Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 424 (Fla. 1994)).
[156] City of Lakeland v. Catinella, 129 So. 2d 133, 136 (Fla. 1961).
[157] Water Damage Express, LLC v. First Protective Ins. Co., 336 So. 3d 310, 313 (Fla. Dist. Ct. App. 2022) (quoting Procraft Exteriors, Inc. v. Metro. Cas. Ins. Co., No. 2:19-CV-883, 2020 WL 5943845, at 3 (M.D. Fla. May 13, 2020); *see also* Garrido v. SafePoint Ins. Co., 347 So. 3d 108, 112 (Fla. Dist. Ct. App. 2022) ("Section 627.428 is a substantive statute that prescribes an insured's right to prevailing party attorney's fees against an insurer . . . ."); *see also* Moser v. Barron Chase Sec., Inc., 783 So. 2d 231, 236 (Fla. 2001) ("[R]ights to attorney's fees granted by statute are substantive rather than procedural.").
[158] State Farm Fire & Cas. Co. v. Palma, 629 So. 2d 830, 832 (Fla. 1993); *see also* Old Republic Ins. Co. v. Monsees, 188 So. 2d 893 (Fla. Dist. Ct. App. 1966) (Former provision [now § 627.428] is "in effect a part of every insurance policy issued Florida").
[159] Snow v. Jim Rathman Chevrolet, Inc., 39 So. 3d 368, 369 (Fla. Dist. Ct. App. 2010).

In *Menendez v. Progressive*, an insurance carrier failed to pay personal injury protection benefits to its insured after she was injured in an automobile accident in June 2001.[160] The *Menendez* policy was issued with effective dates of coverage between April 1, 2001, and October 1, 2001.[161] Beginning on June 19, 2001, during the effective dates of coverage for the insured's policy, the legislature effectuated an amendment to section 627.736, Florida Statutes, which, for the first time, required that an insured seeking personal injury protection benefits must, in pertinent part, provide "written notice of an intent to initiate litigation."[162] The insured in *Menendez* initiated their lawsuit against the insurance carrier in November 2002, nearly a year and a half after the effective date of the newly enacted presuit notice provision in the relevant statute.[163] After extensive litigation at both the trial and appellate levels, *Menendez* was brought before the Supreme Court of Florida where it was ultimately determined that such a notice of intent to initiate litigation, even in the face of legislative intent for retroactive application, violated the substantive rights of the insured and, therefore, were not permissible to be applied retroactively.[164]

In reaching their decision regarding the second prong of the retroactivity analysis, the *Menendez* Court stated that "the central focus of this Court's inquiry is whether retroactive application of the statute 'attaches new legal consequences to events completed before its enactment.'"[165] In analyzing this second prong, the *Menendez* Court held that, as with the enaction of section 627.70152, Florida Statutes, the operative statutory changes in *Menendez* "(1) impose a penalty, (2) implicate attorneys' fees, (3) grant an insurer additional time to pay benefits, and (4) delay the insured's right to institute a cause of action."[166] Of course, as it relates to the amendments of Senate Bill 2-A, only attorney fees are implicated; however, as noted herein, this distinction is of no consequence to the holding in *Menendez*.

The Supreme Court of Florida previously illustrated that "statutes with provisions that impose additional penalties for noncompliance or limitations on the right to recover attorneys' fees do not apply retroactively 'because it is, in substance, a penalty.'"[167] Furthermore, the Court previously held that "the statutory right to attorneys' fees is not a procedural right, but rather a substantive right."[168]

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[160] *See Menendez*, 35 So. 3d at 874.
[161] *See id.* at 875.
[162] *See* FLA. STAT. § 627.736(11)(a) (2001).
[163] *See Menendez*, 35 So. 3d at 875.
[164] *See id.* at 880.
[165] *Id.* at 877 (citations omitted).
[166] *Id.* at 878.
[167] *Id.* (quoting State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 61 (Fla. 1995)).
[168] *Menendez*, 35 So. 3d at 878 (citing Moser v. Barron Chase Sec., Inc., 783 So. 2d 231, 236 (Fla.

Finally, the Court determined that, because the statutory amendment in *Menendez* allowed the avoidance of payment of attorney fees which were available at the time the policy took effect, permitted delayed payment regarding a claim by the insurer, and deferred the insured's ability to file a cause of action for unpaid policy benefits, the statutory changes were substantive, not procedural, in nature and could not be applied retroactively.[169]

Previously, the only decisions on the retroactive application of section 627.70152, Florida Statutes, and the need for filing a Notice of Intent, have citations to *Menendez* without written opinions;[170] however, on May 3, 2023, the Fourth District Court of Appeal issued an opinion in *Cole v. Universal Property & Casualty Insurance Company* stating that the presuit notice requirement is, in fact, a procedural requirement that should be applied retroactively whilst confirming that attorney fees were substantive in nature and should not be affected.[171] The court reasoned that the statute states that it applies to "all suits"[172] thereby evidencing retroactive intent by the legislature. This, coupled with determination that "[t]he notice provision is simply part of the 'course, form, manner, means, method, mode, order, process or steps by which a party enforces substantive rights or obtains redress for their invasion,'" thereby rendering same procedural, allowed for retroactive application of the requirement to file a Notice of Intent.[173] In distinguishing this from *Menendez*, the court explained that it was possible to apply only a portion of the statute, to wit, the notice requirement, retroactively while treating the substantive fee aspect prospectively as "[o]ne provision that is substantive in scope does not act as a bar to enforcement of another provision that is able to be applied retroactively."[174] It must be noted that the *Cole* court completed its rationale by stating that the presuit notice requirement "applies to existing policies in effect at the time of enactment."[175] The inclusion of such a specific statement created an exception for claims filed

2001)).
[169] *See Menendez,* 35 So. 3d at 878.
[170] *See* Security First Ins. Co. v. Peyton, 338 So. 3d 865 (Fla. Dist. Ct. App. 2021); Security First Ins. Co. v. Stokely, 338 So. 3d 872 (Fla. Dist. Ct. App. 2022); and Security First Ins. Co. v. Fields, 338 So. 3d 872 (Fla. Dist. Ct. App. 2022).
[171] *See* Cole v. Universal Prop. & Cas. Ins. Co., 363 So. 3d 1089 (Fla. Dist. Ct. App. 2023).
[172] *See* FLA. STAT. § 627.70152(1) (2021).
[173] *See Cole*, 363 So. 3d at 1093 (quoting Haven Fed. Sav. & Loan Ass'n v. Kirian, 579 So. 2d 730, 732 (Fla. 1991) (citation omitted); *see also* Art Deco 1924 Inc. v. Scottsdale Ins. Co., No. 21-62212-CIV, 2022 WL 706708 (S.D. Fla. Mar. 9, 2022) (finding that section 627.70152 was procedural and therefore applied retroactively).
[174] *See id.* at 1094-5 (noting that provisions of a statute declared unconstitutional may be severed); *see also* Leapai v. Milton, 595 So. 2d 12, 15 (Fla. 1992) (finding procedural aspects of another statute "severable from the language creating the substantive right to attorney fees and costs").
[175] *Id.* at 1095.

under policies which expired prior to July 1, 2021, from adhering to the presuit notice requirement.

Subsequently, on November 22, 2023, the Sixth District Court of Appeal released its decision in *Hughes v. Universal Property & Casualty Insurance Company* concluding that *Menendez* controls over the retroactivity of the presuit notice requirement and certifying conflict with the *Cole* decision.[176] In doing so, the *Hughes* court specifically asserted that the statute "contains no clear evidence of legislative intent for retroactive application. . . ."[177] In addressing the statutory language referencing "all suits," the court reasoned that the section containing such language focused on "the types of cases and policies to which the statute applies—cases involving residential or commercial insurance policies not brought by assignees, not when the statute applies."[178] Further dissecting the *Cole* opinion, the *Hughes* court noted that *Cole* inverted the requirement of clear legislative intent when it was deemed that silence, as opposed to assertive language, related to retroactive application was evidence of a legislative desire for retroactivity.[179] Finally, in applying *Menendez*, the *Hughes* court concluded that the statute's changes were substantive in nature thereby precluding retroactive application.[180]

Absent interdistrict conflict, the decision of an appellate court binds all trial courts.[181] That means the *Cole* decision was, upon its release, binding statewide. Now, with the release of the *Hughes* opinion, *Cole* remains binding upon courts within the jurisdiction of the Fourth District Court of Appeal but courts in other appellate districts now have leeway to apply their own analyses utilizing the two conflicting opinions as persuasive authority until the Florida Supreme Court inevitably resolves the conflict.[182] Given that the hierarchy of the courts in Florida also requires District Courts of Appeal to follow Supreme Court precedent,[183] the question then arises as to why the *Cole* court attempted to overrule the established precedent set forth in *Menendez*.

It should also be stated that a change in the statute regarding attorney fees not only affects the rights under the insurance contract but also potentially the contracts between insureds and their attorneys. The United States Supreme

[176] Hughes v. Universal Prop. & Cas. Ins. Co., 6D23-296, 2023 WL 8108671 (Fla. Dist. Ct. App. Nov. 22, 2023).
[177] *Id.* slip op. at 5.
[178] *Id.*
[179] *Id.*
[180] *Id.* slip op. at 9.
[181] Pardo v. State, 596 So. 2d 665 (Fla. 1992).
[182] Spencer Ladd's, Inc. v. Lehman, 167 So. 2d 731 (Fla. Dist. Ct. App. 1964), *modified on different grounds*, 182 So. 2d 402 (Fla. 1965).
[183] Hoffman v. Jones, 280 So. 2d 431 (Fla. 1973).

Court has asserted that "the freedom of speech, assembly, and petition guaranteed by the First and Fourteenth Amendments gives petitioner the right to hire attorneys on a salary basis to assist . . . in the assertion of their legal rights."[184] The Florida Supreme Court has echoed this sentiment as it relates to contingency fee contracts stating that the right to hire an attorney is "related to the First Amendment, and any impairment of that right not only adversely affects the right of the lawyer to receive his fee but the right of the party to obtain, by contract, competent legal representation to ensure meaningful access to courts . . . ."[185] Consequently, any retroactive application which would, in effect, alter existing contracts between policyholders and their attorneys would be unconstitutional.

ii. Bad Faith

While it is clear the portion of the recent legislation related to attorney fees affects substantive rights, the changes to the bad faith statutes must be addressed separately. It is routinely noted that the Civil Remedy statutes are "remedial in nature. After all, it is the 'civil *remedy* statute' of the Florida Insurance Code."[186] Even though the statute is categorized as remedial, however, statutes which "define the elements of a cause of action, affirmative defenses, presumptions, burdens of proof, and rules that create or preclude liability are so obviously substantive" in nature.[187] For that reason, the changes to the Civil Remedy statutes must be treated as substantive.

While it will certainly be argued that a finding of breach of contract as now mandated by the Civil Remedy statutes is simply adding procedural requirements to the filing of a bad faith cause of action, the real implication of the legislative changes is the addition of a new condition precedent to filing same. As discussed above, the creation of a "new obligation"[188] or the imposition of a "new legal burden"[189] is to be considered a substantive change in law. Typically, however, such obligations or burdens are not deemed to affect causes of action which have not yet accrued.

In applying substantive law, one must first determine what date controls the application of said law. Generally, absent legislative intent to the contrary, the

[184] United Mine Workers of America, Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217, 221–22 (1967).
[185] *Searcy, Denney, et al.*, 209 So. 3d at 1193.
[186] Pin-Pon Corp. v. Landmark Am. Ins. Co., 500 F. Supp. 3d 1336, 1344 (S.D. Fla. 2020) [emphasis in original] citing *Talat*, 753 So. 2d at 1281.
[187] First Coast Energy, L.L.P. v. Mid-Continent Cas. Co., 286 F. R. D. 630, 633 (M.D. Fla. 2012) quoting Computer Economics, Inc. v. Gartner Group, Inc., 50 F. Supp. 2d 980, 990 (S.D. Cal. 1999).
[188] *Menendez*, 35 So. 3d at 877.
[189] *Smiley*, 966 So. 2d at 334.

application of substantive law is controlled by the date on which the cause of action arose.[190] In tort, "[w]hether legislation may affect a vested right to a particular cause of action depends on the stage the right has attained when the legislation is enacted. In its earliest stage—before any harm or invasion has occurred—a right to sue is inchoate, a mere prospect."[191] This is because "a person has no property, [or] no vested interest, in any rule of the common law."[192] "[W]here mere inchoate rights are concerned . . . they are subject to be abridged or modified by law."[193] A good rule in tort law is that the action accrues on the date of the injury or damage in question.[194] Compare this to the date of accrual with regard to the statute of limitations. In such matters, "[a] cause of action accrues when the last element constituting the cause of action occurs."[195] With that said, these maxims relate to common law principles. The Civil Remedy statutes, as previously noted, are drafted in derogation of common law.[196] Such laws are also incorporated into the policies by reference at the time the policies take effect.[197]

Claims for bad faith conduct are "founded upon the obligation of the insurer to pay when all conditions under the policy would require an insurer exercising good faith and fair dealing towards its insured to pay."[198] Because the insurance policy specifically incorporates the laws contained with the Civil Remedy statutes as if same were drafted in full therein, to include additional conditions precedent which must be met in order to maintain a cause of action would be the creation of a "new obligation" or the imposition of "new legal burdens." Therefore, even though the cause of action may not have accrued at the time of the binding of the policy, such additions substantively affect the rights of the insured. With that said, regardless of whether the cause of action has accrued, the

[190] Young v. Altenhaus, 472 So. 2d 1152 (Fla. 1985).
[191] Williams v. Am. Optical Corp., 985 So. 2d 23, 27 (Fla. Dist. Ct. App. 2008), *aff'd sub nom.*, Am. Optical Corp. v. Spiewak, 73 So. 3d 120 (Fla. 2011).
[192] Clausell v. Hobart Corp., 515 So. 2d 1275, 1275–76 (Fla. 1987).
[193] Hart v. Bostwick, 14 Fla. 162, 180 (1872).
[194] *See* Dep't of Transp. v. Soldovere, 519 So. 2d 616, 617 (Fla. 1988) (holding that "the cause of action accrues upon the happening of an accident and the attendant injuries").
[195] FLA. STAT. § 95.031(1) (2022); *see also* State Farm Mut. Auto. Ins. Co. v. Lee, 678 So. 2d 818, 821 (Fla. 1996) (holding that "the statute of limitations . . . begins to run on the date of the insurer's alleged breach of contract").
[196] *See Talat*, 753 So. 2d at 1278 ("Because this statute is in derogation of the common law, it must be strictly construed.").
[197] *See generally* Auto-Owners Ins. Co. v. DeJohn, 640 So. 2d 158, 161 (Fla. Dist. Ct. App. 1994) (citing United States Fire Ins. Co. v. Van Iderstyne, 347 So. 2d 672 (Fla. Dist. Ct. App. 1977)); Allstate Ins. Co. v. Kaklamanos, 843 So. 2d 885, 896 (Fla. 2003); Standard Marine Ins. Co. v. Allyn, 333 So. 2d 497 (Fla. Dist. Ct. App. 1976) (citing cases where the statutory provisions are presumed to have become part of the policy).
[198] Vest v. Travelers Ins. Co., 753 So. 2d 1270, 1275 (Fla. 2000).

lack of legislative intent to apply the law retroactively means the laws at the time the policy was first in effect should still apply. While the damages sought may be extracontractual in nature, the basis for the filing of a first party bad faith claim stems solely from the existence of an insurance contract.

Even if the changes to the Civil Remedy statute can be deemed procedural in nature, which they should not, there is still no legislative intent to have the new laws apply retroactively to those which are incorporated into the policy by reference. Regardless if a cause of action under a contract accrues at the time the improper action occurs, the statute in effect at the time the contract was executed will govern the issues which arise therefrom.[199] Therefore, the changes to the Civil Remedy statutes should not be deemed to apply retroactively.

V. CONCLUSION

As is evident throughout the bills as passed and the laws created as a result of same, there is no language evidencing legislative intent which can be discerned let alone found in the plain language of the newly enacted laws which allow for retroactive application. To that point, all policies which went into effect between July 1, 2021, and December 16, 2022, are subject to the changes enacted in Senate Bill 76 and all policies or renewals which post-date December 16, 2022, are subject to the law passed with Senate Bill 2-A discussed herein. To apply either of these bodies of law retroactively to policies in existence prior to the effective dates of the laws would not only violate well-defined principles of statutory construction but also would be unconstitutional.

With that said, even without retroactively applying the laws to existing claims, all claims affected by the recent legislative changes moving forward will likely result in substantial hardship for policyholders. Take, for example, a $30,000 claim. If a public adjuster is hired for 10% and an attorney is hired for 30% plus costs, the hypothetical insured stands to recover only about half of the amount needed to return the property to its pre-loss condition. Without the fear of attorney fees or bad faith looming overhead, the litigation could last eighteen months or more with an attorney only standing to recover a small percentage of the lodestar fee.[200] Even if the attorney obtains a full settlement at that point, the insured is still only receiving around $15,000 of the benefits. These factors will serve to disincentivize not only an insured from pursuing a viable claim on which they were underpaid or denied coverage but also attorneys from agreeing

[199] *See* Lumbermens Mut. Cas. Co. v. Ceballos, 440 So. 2d 612, 613 (Fla. Dist. Ct. App. 1983).
[200] Fla. Patient's Comp. Fund v. Rowe, 472 So. 2d 1145, 1151 (Fla. 1985) ("The number of hours reasonably expended . . . multiplied by a reasonable hourly rate . . . produces the lodestar, which is an objective basis for the award of attorney fees.") (citation omitted), *modified on other grounds*.

to represent said insured regardless of the desire to move forward with litigation as the only avenue for recovery.[201]

Florida's median household income in 2022 was $61,777.[202] Applying this to the facts of our hypothetical claim means half of all Floridians would need to come out of pocket approximately 25%, if not more, of their annual wages to make the necessary repairs to their homes. In doing so, they may need to prioritize effectuating repairs against paying other everyday costs like groceries, medical bills, or even mortgage payments. It is possible the damage could be repaired in a substandard manner reflecting the decreased amount obtained by the insured, or not repaired at all, leading to a decrease in property values. In the worst-case scenario, homeowners may even default on loan payments resulting in foreclosures. While the legislature ostensibly believes these changes will bring stability to an otherwise troubled insurance market, it is plausible that far more issues may arise as a result of the grossly unbalanced anti-consumer legislation recently enacted.

[201] *See supra* Part III.D. (noting the insured could file a proposal for settlement/demand for judgment in an attempt to recover attorney fees; however, this would necessitate authorization to settle for a number which can be exceeded by 25% at trial); *see also* FLA. STAT. § 768.79(1) (2023). For example, on a $30,000 claim, the insured would need to file a proposal for settlement of no more than $24,000 to potentially trigger fees. Of course, the carrier could accept the proposal for settlement resulting in the insured netting even less than half of their total claim.

[202] *See* U.S. CENSUS BUREAU, *QuickFacts – Florida*, https://www.census.gov/quickfacts/FL (last visited Jan. 9, 2024) (using statistics from July 1, 2022).