Florida HB 837: A Political Stunt or Legitimate Civil Justice Reform?

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Introduction

During Florida's 2023 legislative session, the state legislature passed several high-profile bills addressing a variety of social and political issues.[1] Sandwiched amongst this highly publicized avalanche of legislation was a comprehensive tort reform bill, HB 837: Civil Remedies,[2] passed by the legislature and signed by Governor Ron DeSantis on March 24, 2023.[3] Although not receiving as much publicity as some of the other new enactments, HB 837 made waves in Florida's legal community.[4]

With the stated goal of stabilizing the state's insurance market, the bill contained numerous sweeping provisions aimed at overhauling the Florida civil justice system.[5] Specifically, HB 837 codified several

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[1] *Here's How 18 Big Issues Settled from the 2023 Florida Legislative Session*, WUFT (May 9, 2023), https://www.wuft.org/news/2023/05/09/heres-how-18-big-issues-settled-from-the-2023-legislative-session (stating that the 2023 Florida legislative session brought new laws touching on various hot-button political issues such as abortion, LGBTQIA+ rights, gun control, elections, and immigration).

[2] H.B. 837, 2023 Leg., Reg. Sess. (Fla. 2023).

[3] Jessica Zelitt, *Florida Tort Reform HB 837—What Insurers Need to Know*, JDSUPRA (Apr. 4, 2023), https://www.jdsupra.com/legalnews/florida-tort-reform-hb-837-what-8488509.

[4] *See* Patrick R. Fargason, *Comprehensive Tort Reform Spurs Record Filings*, FLA. BAR NEWS (Apr. 6, 2023), https://www.floridabar.org/the-florida-bar-news/comprehensive-tort-reform-spurs-record-filings (explaining that the passage of HB 837 may be directly related to the high influx of portal activity and cases initiated).

[5] *See generally* Fla. H.B. 837.

common law tort principles.[6] Also, it changed the existing liability apportionment scheme in tort, limited bad faith claims against insurers, modified premises liability rules, and limited attorney's fee awards.[7] The bill also affected the admissibility of evidence relating to medical damages in personal injury and wrongful death cases, placing limits on the admissibility of charges for medical care.[8]

After signing the legislation, Governor DeSantis commented:

> Florida has been considered a judicial hellhole for far too long and we are desperately in need of legal reform that brings us more in line with the rest of the country. I am proud to sign this legislation to protect Floridians, safeguard our economy and attract more investment in our state.[9]

Other Florida lawmakers have praised the bill, claiming it "strik[es] the right balance" between safeguarding the public from "the hidden costs of prolonged litigation" while still providing legal recourse for individuals who have been injured.[10] These lawmakers tout the law as aiming to reduce and prevent "frivolous" lawsuits.[11]

Of course, HB 837 has also faced backlash. The Florida Justice Association opposed the bill, with President Curry Pajcic claiming that the bill "weakens accountability for insurance companies and multi-

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[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Governor Ron DeSantis Signs Comprehensive Legal Reforms Into Law*, RON DESANTIS, 46TH GOVERNOR OF FLA. (Mar. 24, 2023), https://www.flgov.com/2023/03/24/governor-ron-desantis-signs-comprehensive-legal-reforms-into-law.

The term "judicial hellhole" is used by proponents of tort reform such as the American Tort Reform Association and American Tort Reform Foundation to describe legal systems "plagued by excessive litigation, frivolous lawsuits, and outrageous damages." Press Release, Am. Tort Reform Ass'n, Florida Lawmakers Pass Landmark Legal Reform (Mar. 23, 2023), https://www.atra.org/2023/03/23/lorida-lawmakers-pass-landmark-legal-reform. These organizations sponsor the annual Judicial Hellhole Report, which "shine[s] a light on the worst of the worst." ATR Foundation, *Current Hellholes*, JUDICIAL HELLHOLES, https://www.judicialhellholes.org (last visited Aug. 14, 2023). For more information about the American Tort Reform Association, see Part I, *infra*.

[10] *Id.*

[11] *Id.* (statements of Florida House Speaker Paul Renner, Florida Senator Travis Hutson, and Florida Representative Tom Fabricio, claiming that the bill would "prevent," "cut down on," and "reduce" frivolous lawsuits).

billion-dollar corporations by creating roadblocks to the ability of average Floridians to be able to access the courts."[12] Other critics of the legislation took issue with the bill's focus on plaintiffs' lawyers and its lack of attention to the complicity of insurance companies in increasing premiums throughout the state.[13]

This Article focuses on the changes that HB 837 has made to the Florida civil justice system and attempts to predict and anticipate the impacts of these changes. Moreover, it addresses potential challenges these enactments may face and evaluates their likelihood of success. Overall, this Article challenges the legitimacy of tort reform as a movement, utilizing Florida's HB 837 as a framework.

This Article proceeds in three parts. Part I discusses the history of tort reform in the United States, providing a brief overview of what tort reform is and how it has been implemented over the years. Part II breaks down the substantial components of HB 837. Finally, Part III anticipates the long-term outcomes of the changes made by HB 837, and evaluates whether any of the bill's enactments could be subject to a successful constitutional challenge.

I. History of Tort Reform in America

The term "tort reform," as it is used today, takes on meaning beyond the basic dictionary definition of its words. Rather, the concept of tort reform is "something more substantial," consisting of "a thorough going alteration of the existing premises and governing principles of the tort system."[14] Under this definition, American tort reform has existed since the early twentieth century, beginning in 1910 when New York State passed the nation's first workers' compensation statute.[15] Other early

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[12] Press Release, Curry Pajcic, Statement from Florida Justice Association (FJA) President Curry Pajcic Regarding the Passage of HB 837 by the Florida Senate (Mar. 23, 2023), https://www.myfja.org/statement-from-florida-justice-association-fja-president-curry-pajcic-regarding-the-passage-of-hb-837-by-the-florida-senate.

[13] Mark D. Killian, *Legislature Passes Comprehensive Tort Legislation*, FLA. BAR NEWS (Mar. 24, 2023), https://www.floridabar.org/the-florida-bar-news/legislature-passes-comprehensive-tort-legislation.

[14] G. Edward White, *Tort Reform in the Twentieth Century: An Historical Perspective*, 32 VILL. L. REV. 1265, 1265 (1987).

[15] *Id.* at 1265, 1268.

instances of tort reform include the expansion of strict liability as a basis for recovery, the widespread adoption of comparative negligence, and no-fault automobile accident insurance coverage.[16]

Since these early changes, which tended to provide *more* legal protections for the public, tort reform developed into its own movement, focused on cracking down on what was perceived as outrageously high damages awards. This movement began to pick up heavily in the 1970s and 80s, sparked by a so-called "crisis" of increased liability insurance premiums, as well as institutionalized efforts by various groups to employ changes in tort law to solve such "crises."[17] The tort reform movement was, and continues to be, two-sided, as Professor Patrick Hubbard explains:

> During this time, the level and intensity of the debate increased and a major ongoing long-term struggle developed between two loosely allied groups. On one side were defense-oriented groups like liability insurance companies, physicians, and business groups, which are interested in "tort reform" as the solution to a broad "crisis" in tort liability law and insurance. On the other side are two groups: (1) plaintiffs' attorneys, occasionally joined by a variety of consumer rights organizations, claiming to represent the position of potential victims; and (2) academics using the rational model to criticize the claims of the "tort reform" movement.[18]

One's alignment with either of these groups is heavily influenced by party lines.[19] In fact, tort reform was featured as part of the Republican Party's 1994 "Contract with America."[20]

As alluded to above, the newly emerging tort reform movement focused on taking away protections already afforded to individuals and re-shaping tort law to favor business interests. As a result, the movement and its label as "reform" were counterintuitive. In his 2022 article reviewing the entirety of the tort reform movement, Professor Andrew F. Popper called out this incongruency and likened the movement to fake news and the big lie:

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[16] *Id.* at 1265.

[17] F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 438, 469-70 (2006).

[18] *Id.* at 470-71.

[19] *Id.* at 472-73.

[20] *Id.* at 471.

> Reforms do not make access to justice more difficult or limit accountability for those who cause harm, yet the tort reform initiatives did and do just that. Slapping the word "reform" on a movement that lessens consumer rights and limits access to justice is not merely fake news; it is the big lie at the core of this Article.[21]

He then went on to explain, "[r]eforms do not lessen or eliminate consumer rights, make access to justice more difficult, or limit accountability for those who cause harm. Yet, somehow, the movement that is the target of this Article, tort reform, does all of those things."[22]

A major proponent of the big lie that is tort reform is the American Tort Reform Association (ATRA), founded in 1986.[23] On its website, ATRA touts that it is "the nation's first organization dedicated exclusively to reforming the civil justice system through education and legislative enactment."[24] Despite promoting that it is "backed by 142,000 grassroots supporters,"[25] ATRA's members include numerous Fortune 500 companies, many from industries that serve to benefit directly from the organization's agenda—tobacco, insurance, automobile, and pharmaceutical companies.[26]

Historically, state-level tort reform initiatives tend to fit within three major categories.[27] The first of these are those "intended to modify primary behavior of attorneys and litigants by imposing restrictions that

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[21] Andrew F. Popper, *Backlash: After 40 Years of Tort Reform Noise, Let's Change the Tone, Undo the Harm, and Correct the Big Lie*, 49 J. LEGIS. 52, 53 (2022).

[22] *Id.* at 54.

[23] *ATRA at a Glance*, AM. TORT REFORM ASS'N, https://www.atra.org/about (last visited Sept. 18, 2023).

[24] *Id.*

[25] *Id.*

[26] *Fact Sheet: American Tort Reform Association*, CTR. JUST. & DEMOCRACY N.Y. L. SCH., https://centerjd.org/content/fact-sheet-american-tort-reform-association (last visited July 26, 2023); *Sample List of ATRA Members*, AM. TORT REFORM ASS'N, https://web.archive.org/web/20161120000718/https://www.atra.org/about/sample-members (last visited July 26, 2023) (archived by the Wayback Machine, May 13, 2008) (showing that a 2016 "sample list" of ATRA members included Eli Lilly and Co., Ford Motor Co., Johnson & Johnson, Farmers Insurance Co., Shell Oil Co., and State Farm Insurance, to name a few).

[27] *See* Michael K. Steenson, *The Fault Concept in Personal Injury Cases in Minnesota: Implications for Tort Reform*, 13 WM. MITCHELL L. REV. 373, 373-74 (1987).

must be met before suit may be brought."[28] Other proposals operate by substantively changing various rules of tort law.[29] Finally, the third type of proposal involves restrictions on remedies, such as imposing caps on recoverable damages.[30] Florida's HB 837 involves aspects of all three.

One aspect of the tort reform movement is its use of mass culture to spread and popularize its message.[31] Since the 1970s, there have been public relations campaigns "designed to shape the cultural environment surrounding civil litigation."[32] For example, in 1986, the Insurance Information Institute launched an extensive public relations campaign with a hefty $6.5 million budget:[33]

> Built around the concept of the "Lawsuit Crisis," the campaign employed a series of eye-catching dramatic print advertisements intended to drive home the idea that "we all pay the price" for the system's failures. Advertisement titles included "The Lawsuit Crisis is Bad for Babies," "The Lawsuit Crisis is Penalizing High School Sports," and "Even the Clergy Can't Escape the Lawsuit Crisis." The imagery of the ads is also very important. Each advertisement appealed to one or more of the "motherhood issues," and each was clearly intended to convey a message that there are serious problems with civil litigation that negatively affect the everyday lives of ordinary Americans. Each advertisement includes a photograph superimposed on the print. The first ad depicts a helpless, newborn baby, the second, a forlorn high school football player, and the third, a worried clergyman. The print tells the reader of problems like too many lawsuits, high awards and consequences such as "[e]xpectant mothers have had to find new doctors," or "a lot of schools are thinking about closing down their sports programs," or "[r]eligious leaders are becoming reluctant to counsel their congregations." These advertisements appeared in the Sunday magazine sections of major newspapers across the country, as well as in *Readers Digest*, *Time*, and *Newsweek*.[34]

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[28] *Id.* at 373.

[29] *Id.*

[30] *Id.* at 374.

[31] *See* Stephen Daniels & Joanne Martin, *"The Impact That It Has Had Is Between People's Ears": Tort Reform, Mass Culture, and Plaintiff's Lawyers*, 50 DEPAUL L. REV. 453, 453 (2000) (noting tort reform's vision is a part of American mass culture).

[32] *Id.* at 466.

[33] *Id.* at 467.

[34] *Id.* at 455, 467-68 (explaining that the term "motherhood issues" was coined by political scientist Deborah Stone, and refers to issues of "equity, efficiency, security, and liberty," which "dominate American policy discourse").

Later, in 1988, Atena put out its own campaign entitled "Lawsuit Abuse: Enough is Enough," which was "designed to shift the tort reform battleground out of the courtroom and place it before the public."[35] This initiative ran daily in newspapers and on the radio.[36]

By the mid-1990s, the public had been primed by these campaigns, which paved the way for the notorious and sensationalized 1994 McDonald's "Hot Coffee" case.[37] The lawsuit followed after a seventy-nine-year-old New Mexico woman, Stella Liebeck, spilled McDonald's coffee onto her lap after putting the cup between her legs and removing the lid to add cream and sugar.[38] The spill caused third-degree burns on more than sixteen percent of Liebeck's body, including her inner thighs and genitals, and required her to be hospitalized for eight days.[39] Liebeck wanted to settle with McDonald's after the incident instead of filing suit, seeking $20,000 to cover her medical expenses.[40] McDonald's rejected the offer, countering with $800, which prompted Liebeck to file her lawsuit.[41]

At trial, "[t]he jury awarded Liebeck $200,000 in compensatory damages—reduced to $160,000 because the jury found her 20[%] at fault."[42] The jury also awarded $2.7 million in punitive damages, which was reduced to $480,000 by the judge.[43] Ultimately, Liebeck reached a post-verdict settlement with McDonald's, receiving less than $600,000,

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[35] *Id.* at 466 (quoting Rick Desloge, *Atena Tests 'Lawsuit Abuse' Campaign Here*, ST. LOUIS BUS. J., Oct. 31-Nov. 6, 1988, at 1 (internal quotation marks omitted)).

[36] *Id.* at 467.

[37] German Lopez, *What a Lot of People Get Wrong About the Infamous 1994 McDonald's Hot Coffee Lawsuit*, VOX (Dec. 16, 2016), https://www.vox.com/policy-and-politics/2016/12/16/13971482/mcdonalds-coffee-lawsuit-stella-liebeck.

[38] *Legal Myths: The McDonald's "Hot Coffee" Case*, PUB. CITIZEN (Nov. 30, 1999), https://www.citizen.org/article/legal-myths-the-mcdonalds-hot-coffee-case/#_edn1 [hereinafter *Legal Myths*].

[39] Allison Torres Burtka, Liebeck v. McDonald's*: The Hot Coffee Case*, AM. MUSEUM TORT L., https://www.tortmuseum.org/liebeck-v-mcdonalds (last visited July 30, 2023).

[40] Lopez, *supra* note 37.

[41] *Id.*

[42] Center for Justice & Democracy, NYC, *McDonalds' Hot Coffee Case—Read the Facts NOT the Fiction*, TEX. TRIAL LAWS. ASS'N, https://www.ttla.com/?pg=McDonaldsCoffeeCaseFacts (last visited July 30, 2023) [hereinafter *Facts Not Fiction*].

[43] *Id.*

along with McDonald's commitment to change the serving temperature of its coffee.[44]

Liebeck's case received national attention, fueled by misinformation about the nature of her case, and it became the poster child for tort reform initiatives.[45] Much of these efforts to twist the truth were initiated by McDonald's itself before being picked up in the mainstream media news cycle.[46] In a blog post for Georgetown University Undergraduate Law Review, student author Andrew Sturgeon summarized:

> It would also quickly become evident that McDonald's PR team was far better equipped than its legal department. The fast food giant wasted no time in embarking upon a thorough smear campaign aimed at excusing itself from culpability and painting Liebeck as the money-hungry villain. Over the next few months, through a calculated series of press releases and statements to the media, McDonald's worked tirelessly to distort public perception of the fundamental facts of Liebeck's case. Tragically, they were successful, and Liebeck was made the poster child of the "frivolous lawsuit" phenomenon. CBS News Anchor Andy Rooney remarked that the case was proof that "suing has become a popular American pastime." Following Liebeck's passing, TIME Magazine sarcastically lamented that she "didn't live to see the addition of iced coffee to the McDonald's menu." As the media continued to mock a justified lawsuit, the facts of the case were quickly swept aside. Even lawmakers bought into such disinformation. Former Ohio Representative John Kasich argued that Liebeck's case "in itself is enough to tell you why we need tort reform." Perhaps the most egregious example, columnist Randy Cassingham created the "Stella Awards" in Liebeck's name, a book series dedicated to "ridiculous" and "bogus" cases.[47]

This attention surrounding Liebeck's case was unfortunate and an illustration of just how powerful the tort reform movement could be in affecting public perceptions of the legal system.

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[44] Lopez, *supra* note 37.

[45] *See Legal Myths*, *supra* note 38 (explaining the effect of Liebeck's case on tort reform).

[46] *See* Andrew Sturgeon, *The Infamous, Wildly Misunderstood Hot Coffee Case*, GEO. UNDERGRAD. L. REV. (Mar. 1, 2023), https://guulr.com/2023/03/01/the-infamous-wildly-misunderstood-hot-coffee-case (explaining how McDonald's used the media to influence the public's perception of the case).

[47] *Id.* (footnotes omitted).

In truth, Liebeck's lawsuit was anything but frivolous. Evidence presented at trial indicated that "[b]y corporate specifications, McDonald's sells its coffee at 180 to 190 degrees Fahrenheit," a temperature that will cause third-degree burns in two to seven seconds if spilled on human skin.[48] Furthermore, McDonald's admitted that it knew about the risk of severe burns from its coffee for more than ten years prior to Liebeck's case, and admitted that the coffee as sold was "not fit for consumption" due to the extreme temperature.[49] This evidence, and more, is what resulted in the multi-million dollar punitive damages award—not out-of-control trial lawyers or lax legal doctrine.[50]

This deep dive into the Liebeck Hot Coffee case is helpful in understanding how tort reform has developed over the past several decades. Cases like this, which are highly sensational and easy to twist out of context, give more power to the large corporate and industry groups in their attempts to influence legislation. The public is less likely to oppose tort reform proposals when all they have seen in the media are cases like Liebeck's and meticulously crafted public relations campaigns from companies and organizations that benefit directly from tort reform initiatives.[51]

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[48] *Facts Not Fiction*, *supra* note 42.

[49] *Id.* (having knowledge from many previous customer complaints and claims).

[50] *See id.*

[51] An eerily similar case recently went to trial in Florida's Seventeenth Judicial Circuit. Chang Che, *Jury Awards $800,000 to a Girl Burned by a Chicken McNugget*, N.Y. TIMES (July 20, 2023), https://www.nytimes.com/2023/07/20/us/mcdonalds-nugget-lawsuit-florida.html. There, the parents of a child brought an action against McDonald's and Upchurch Foods, Inc., a franchisee, after the child dropped a Chicken McNugget on herself and burned the "skin and flesh around her thighs." Amended Complaint for Money Damages and Demand for Trial by Jury, *Holmes v. Upchurch Foods, Inc.*, No. CACE19019340, 2019 WL 13400364 (Fla. Cir. Ct. Dec. 19, 2019). The case went to trial on the issue of liability in May 2023, and the jury found both McDonald's and Upchurch Foods liable. Verdict, *Holmes v. Upchurch Foods, Inc.*, No. CACE19019340, 2023 WL 5056278 (Fla. Cir. Ct. May 15, 2023). An additional trial was held in July 2023, where a jury found the child's total damages to be $800,000. Verdict, *Holmes v. Upchurch Foods, Inc.*, No. CACE19019340, 2023 WL 5056279 (Fla. Cir. Ct. July 20, 2023). As with Liebeck's case, the media took this story and ran with it. *See, e.g.*, Jamiel Lynch, *Jury Awards Family $800K in Chicken McNuggets Burn Case*, CNN BUS. (July 19, 2023, 8:53 PM EDT), https://edition.cnn.com/2023/07/19/business/chicken-mcnuggets-jury-award/index.html; Beatrice Nolan, *Florida Family Awarded $800,000 After Suing McDonald's and a Franchisee When Their Child was Burned by a Chicken Nugget*, INSIDER (July 20, 2023, 7:45 AM

II. Rundown of Florida HB 837

A full discussion of the implications and potential effects of HB 837 cannot be had without a general understanding of its provisions. The following section discusses key aspects of the bill.[52]

A. The Introduction of Modified Comparative Negligence

One of the most impactful changes to substantive law brought on by HB 837 is the transition from a pure comparative negligence regime to modified comparative negligence.[53] This was accomplished in HB 837 by adding an additional subsection to the statute governing comparative fault, Florida Statute § 768.81.[54] In pure comparative negligence jurisdictions, a plaintiff will recover in proportion to the defendant's percentage of fault, regardless of his own liability.[55] Thus, under the previous version of § 768.81, a plaintiff could be ninety percent at fault for his own injuries but could still recover ten percent of his damages from the defendant(s).[56] Now, under the new § 768.81, a plaintiff is barred from recovery if he is more than fifty percent at fault for his

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EDT), https://www.businessinsider.com/mcdonalds-child-burned-chicken-nugget-florida-lawsuit-2023-7; Allie Griffin, *Florida Jury Awards 8-Year-Old Girl $800K After She Got 2nd-Degree Burns from a McDonald's Chicken Nugget*, N.Y. POST, https://nypost.com/2023/07/19/florida-jury-awards-girl-800k-after-she-was-burned-by-mcdonalds-nugget (last updated July 19, 2023, 9:07 PM ET).

[52] This section does not highlight every single substantive change made by HB 837. It does, however, give a general overview of the most notable aspects. Fla. H.B. 837, FLA. SENATE, https://www.flsenate.gov/Session/Bill/2023/837/BillText/er/PDF (last visited Feb. 5, 2024) (providing a full text of the bill).

[53] *See* FLA. STAT. § 768.81(2),(6) (2023) (section titled "Comparative Fault"); Fla. H.B. 837 § 9.

[54] FLA. STAT. § 768.81(6) ("In a negligence action to which this section applies, any party found to be greater than 50 percent at fault for his or her own harm may not recover any damages."); Fla. H.B. 837 § 9.

[55] *See, e.g.*, Tammy E. Hinshaw & Thomas Muskus, *Plaintiff's Negligence as Defense, Generally*, 38 FLA. JUR. 2D NEGL. § 112 (2023) (explaining how pure comparative negligence works).

[56] *See* FLA. STAT. § 768.81(2).

injuries.[57] However, this change does not apply to actions based on medical negligence.[58]

B. Two-Year Negligence Statute of Limitations

The legislature reduced the statute of limitations for actions founded in negligence from four years to two years by modifying Florida Statute § 95.11,[59] which will apply to causes of action that accrue after the effective date.[60] Accordingly, it will likely be several years before we see the effects of this change play out in Florida courts.

C. Limits to Bad Faith Lawsuits Against Insurers

HB 837 creates Florida statute § 624.155(5)(b),[61] under which "[t]he insured, claimant, and representatives of the insured or claimant have a duty to act in good faith in furnishing information regarding the claim, in making demands of the insurer, in setting deadlines, and in attempting to settle the claim."[62] Under the new standard, mere negligence alone is insufficient to show bad faith against an insurer,[63] codifying the common law standard.[64]

If multiple claims arising out of a single occurrence exceed the policy limits, the insurer is not liable beyond the policy limits for failure to pay any or all of the policy limits if within ninety days after receiving notice

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[57] *Id.* § 768.81(6).

[58] *Id.*

[59] *Id.* § 95.11(4)(a); Fla. H.B. 837 § 3.

[60] *See* FLA. STAT. § 95.031 (noting that a statute of limitations begins to run once the cause of action accrues, i.e., "when the last element constituting the cause of action occurs").

[61] Fla. H.B. 837 § 4.

[62] FLA. STAT. § 624.155(5)(b).

[63] *Id.* § 624.155(5)(a).

[64] *See* Harvey v. GEICO Gen. Ins. Co., 259 So. 3d 1, 9 (Fla. 2018) (finding that mere negligence is insufficient by itself to prove bad faith, but it is relevant when making determinations of good faith).

of the claims: (a) the insurer files an interpleader action under the Florida Rules of Civil Procedure, and if the claims are found in excess of policy limits, distributes to each claimant a prorated share of the policy limit; or (b) the insurer, pursuant to binding arbitration, makes the entire policy limit available to competing third-party claimants whose prorated share is determined by the arbitrator.[65]

D. Changes to Admissibility and Recoverability of Medical Costs

HB 837 changed what constitutes admissible evidence in establishing past, present, and future medical expenses. The admissibility of evidence at trial of past medical treatment is now limited to the "amount actually paid, regardless of the source of payment."[66]

"Evidence offered to prove the amount necessary to satisfy unpaid charges for incurred medical treatment or services" includes the following categories:

> 1. If the claimant has health care coverage . . . the amount which such health care coverage is obligated to pay the health care provider to satisfy the charges for the claimant's incurred medical treatment . . . .
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> 2. If the claimant has health care coverage but obtains treatment under a letter of protection or otherwise does not submit charges for . . . health care coverage, evidence of the amount the claimant's health care coverage would pay the health care provider . . . .
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> 3. If the claimant does not have health care coverage . . . evidence of . . . the Medicare reimbursement rate in effect on the date of the claimant's incurred medical treatment or services, or, if there is no applicable Medicare rate for a service, 170 percent of the applicable state Medicaid rate.
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> 4. If the claimant obtains medical treatment or services under a letter of protection and the health care provider subsequently transfers the right to receive payment . . . to a third party, evidence of the amount the third party paid or agreed to pay the health care provider in exchange for the right . . . .
>
> 5. Any evidence of reasonable amounts billed to the claimant for medically necessary treatment or medically necessary services provided to the claimant.[67]

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[65] FLA. STAT. § 624.155(6)(a)-(b).

[66] *Id.* § 768.0427(2)(a).

[67] *Id.* § 768.0427(2)(b).

Evidence offered to prove damages for future medical treatment include: (1) if the claimant has insurance but obtains treatment under letter of protection or does not submit charges, evidence of the amount that health care coverage would have paid to satisfy charges; or (2) if the claimant does not have insurance, "evidence of 120[%] of the Medicare reimbursement rate in effect at the time of trial . . ., or if there is no applicable Medicare rate for the service, 170[%] of the applicable state Medicaid rate."[68]

After establishing new evidentiary hurdles, HB 837 limited the amounts of damages recoverable for medical treatment in personal injury and wrongful death actions. Recoverable damages are limited to costs that are "reasonable and necessary" and cannot exceed the total of (a) the funds paid by the claimant to the health care provider, (b) any funds needed to satisfy charges for treatment received but outstanding at time of trial, and (c) the funds needed "to provide for any reasonable and necessary" future treatment required by the claimant.[69]

E. Limitations on Letters of Protection

Also relating to medical treatment in personal injury cases, HB 837 places limitations on the use of letters of protection. A letter of protection (LOP) is a device used by a plaintiff's attorney in personal injury litigation.[70] "LOPs guarantee the provider payment for medical treatment from a future lawsuit settlement or verdict award."[71] However, in using a LOP, plaintiffs "generally pledge to cover the costs of their care even if it exceeds what they win in a lawsuit or other settlement—and even if the prices are far higher than most doctors would charge."[72]

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[68] *Id.* § 768.0427(2)(c)(1)-(2).

[69] *Id.* § 768.0427(4).

[70] Christine J. Sexton, *Business Groups Target Letters of Protection for Upcoming 2023 Session*, FLA. POLS. (Feb. 13, 2023), https://floridapolitics.com/archives/588036-business-groups-target-letters-of-protection-for-upcoming-2023-session.

[71] *Id.*

[72] Fred Schulte, *Crash Course: Injured Patients Who Sign 'Letters of Protection' May Face Huge Medical Bills and Risks*, KFF HEALTH NEWS (Dec. 21, 2021), https://kffhealthnews.org/news/article/letters-of-protection-personal-injury-cases-surprise-bills.

HB 837 established numerous conditions precedent to asserting a claim for medical expenses for treatment rendered under an LOP.[73] Now, a claimant must disclose a copy of the LOP and itemized billings for the claimant's medical expenses containing certain medical diagnosis codes.[74] Furthermore, in cases where "the health care provider sells the accounts receivable for the claimant's medical expenses to a factoring company or other third party," the claimant must disclose the name of such third party and the amount the third party paid to purchase the accounts.[75] Finally, the claimant must disclose whether he had health insurance coverage at the time of treatment, the nature of such coverage, and "[w]hether the claimant was referred for treatment under a letter of protection and, if so, the identity of the person who made the referral."[76]

F. Changes to Attorney Fee Awards

HB 837 also makes changes to how attorney's fees are calculated and awarded by the court. Previously, Florida law allowed for courts to consider and award contingency fee multipliers to attorney's fees.[77] Under the prior law, courts should consider factors such as those set forth in *Standard Guaranty Insurance Co. v. Quanstrom*:

> (1) whether the relevant market requires a contingency fee multiplier to obtain competent counsel; (2) whether the attorney was able to mitigate the risk of nonpayment in any way; and (3) whether any of the factors set forth [by the Florida Supreme Court] in [*Florida Patient's Compensation Fund v.*] *Rowe* are applicable, especially, the amount involved, the results obtained, and the type of fee arrangement between the attorney and his client.[78]

Now, HB 837 has side-stepped the precedent set by the Florida Supreme Court in *Rowe* and *Quanstrom*, enacting the new Florida statute

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[73] *See generally* FLA. STAT. § 768.0427(3).

[74] *Id.* § 768.0427(3)(a)-(b).

[75] *Id.* § 768.0427(3)(c).

[76] *Id.* § 768.0427(3)(d)-(e).

[77] *See Contingency Fee Multipliers*, FLA. JUST. REFORM INST., http://www.fljustice.org/files/133205927.pdf (last visited Oct. 16, 2023).

[78] 555 So. 2d 828, 834 (Fla. 1990) (citing Fla. Patient's Comp. Fund v. Rowe, 472 So. 2d 1145 (Fla. 1985)).

§ 57.104(2).[79] Under the new statute, there is a strong presumption in favor of the lodestar method in considering whether or not to apply a contingency fee multiplier.[80] Specifically, "[i]n any action in which attorney fees are determined or awarded by the court, there is a strong presumption that a lodestar fee is sufficient and reasonable."[81] This can only be overcome in "rare and exceptional circumstance[s]" where evidence is been presented that "competent counsel could not [have] otherwise be[en] retained."[82]

Additionally, HB 837 repeals many of the statutes that provide for one-way attorney's fees in actions involving insurers.[83] One-way attorney's fees are still available in declaratory judgment actions for the determination of insurance coverage against an insurer after a denial of coverage of a claim, but they are no longer available in suits against surplus lines insurers, suits against insurers to enforce an insurance policy, and several other categories of suits involving insurers.[84]

G. Presumption Against Liability of Property Owners

In addition to addressing the more typical "hot button" tort reform issues, HB 837 establishes additional protections for owners of multifamily residential property.[85] Under the new § 768.0706, there is a presumption against liability for owners and operators of multifamily residential property in cases based on criminal acts upon the premises by third parties.[86] The presumption applies to such owners who implement certain security features, including but not limited to security cameras, lighting

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[79] Fla. H.B. 837 § 1.

[80] FLA. STAT. § 57.104(2).

[81] *Id.*; Fla. H.B. 837 § 1.

[82] FLA. STAT. § 57.104(2).

[83] Fla. H.B. 837 § 2.

[84] *Id.*; FLA. STAT. § 86.121.

[85] Fla. H.B. 837.

[86] FLA. STAT. § 768.0706(2).

in common areas, a one-inch deadbolt in each dwelling unit door, window locks, and gates around pool areas.[87]

III. Potential Impacts and Challenges to HB 837

A. Short-Term Effects

The changes made by HB 837 took effect immediately upon being signed by Governor DeSantis.[88] Because of this, the bill began to make waves before it was even signed into law, as attorneys rushed to file new lawsuits prior to the law taking effect.[89] Approximately 280,122 new cases were filed in Florida in March of 2023, which exceeded the previous record set in May 2021 by 126.9%.[90] By commencing an action prior to the law's enactment, plaintiffs' lawyers were able to lock in the formerly applicable law for the entirety of their case.[91]

B. New Liability Apportionment Scheme

With the passage of HB 837, Florida transitions from a pure comparative negligence system to a modified comparative negligence system.[92] Under the prior fault apportionment scheme, a plaintiff could recover in proportion to the defendant's percentage of responsibility as assessed by the factfinder, regardless of the plaintiff's own fault for his injuries.[93]

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[87] *Id.* § 768.0706(2)(a)-(c) (also including owners who, "[b]y January 1, 2025, . . . ha[ve] a crime prevention through environmental design assessment that is no more than 3 years old completed for the property. . . [and] provide[] proper crime deterrence and safety training to its current employees").

[88] Fla. H.B. 837 § 31.

[89] Fargason, *supra* note 4.

[90] *Id.*

[91] Harris Wiener, *Florida Fights Back—Tort Reform Battles Plaintiff Bar*, WILLIS TOWERS WATSON (Apr. 12, 2023), https://www.wtwco.com/en-us/insights/2023/04/florida-fights-back-tort-reform-battles-plaintiff-bar.

[92] *Id.*

[93] *Id.*

Facially, changing the liability apportionment scheme of the state from pure to modified comparative negligence would seem to favor defendants in negligence actions. Defendants now only need to show that the plaintiff is more than fifty percent at fault for his own injuries to avoid liability entirely.[94] Additionally, given the greater chance that recovery may be barred entirely, plaintiffs will have stronger motivation to settle so as to ensure recovery of at least some portion of damages. Conversely, this provides defendants with more leverage during settlement discussions, which may result in lower settlement amounts. Essentially, the new modified comparative negligence scheme provides plaintiffs with more risk in litigation and decreases exposure for defendants.

One study, in relevant part, provides evidence that settlement amounts are generally lower in jurisdictions with modified comparative negligence schemes than in those with pure comparative negligence schemes.[95] This makes sense when looking at the data across the board because a modified comparative negligence system significantly increases the chances of a plaintiff walking away from the trial with nothing. However, the study also concludes that "estimates from a variety of models indicate that the relationship between appraised fault and settlement amount is not nearly as strong as the articulated negligence doctrines suggest."[96]

Some other available evidence suggests that Florida's new comparative negligence scheme is not the disaster for plaintiffs that some have projected. A study of United States civil trial data determined that "juries found the plaintiff between 0 and 25[%] negligent with nearly identical frequency in the two regimes," but juries tended to find the plaintiff "between 26 and 50[%] negligent more frequently in modified regimes and between 51 and 100[%] more frequently in pure regimes."[97] These

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[94] *Id.*

[95] Daniel Kessler, *Fault, Settlement, and Negligence Law*, 26 RAND J. ECON. 296, 306-07 (1995) ("[S]ettlements under pure comparative negligence are greater than those under modified comparative negligence, and . . . settlements under modified comparative negligence are greater than those under contributory negligence, across the entire spectrum of appraised fault.").

[96] *Id.* at 309.

[97] Eli K. Best & John J. Donohue III, *Jury Nullification in Modified Comparative Negligence Regimes*, 79 U. CHI. L. REV. 945, 962 (2012) (comparing data in pure comparative negligence jurisdictions to data in modified comparative negligence jurisdictions).

findings are even more stark when focusing on findings within the 40 to 50% fault range.[98] In pure comparative fault jurisdictions, juries found the plaintiff to be 40 to 50% negligent in 28.1% of cases.[99] Comparatively, in modified comparative fault jurisdictions, juries found the plaintiff to be 40 to 50% negligent in a whopping 40.4% of cases.[100] The authors of the study thus concluded:

> These results show that modified comparative negligence [versus pure comparative negligence] motivates juries to manipulate their findings in predictable ways with significant frequency. All else equal, if a case occurs in a modified comparative negligence jurisdiction . . . , a plaintiff is approximately 12 percentage points more likely to be found between 40 and 49 percent negligent, approximately 12.9 percentage points more likely to be found exactly 50 percent negligent, and approximately 21.5 percentage points less likely to be found between 51 and 100 percent negligent. The results are statistically significant at the 99 percent confidence level . . . .[101]

But why does this occur? This phenomenon may result from the discomfort that juries feel when put in a position to bar a plaintiff's recovery in situations where the defendant does bear a certain degree of fault. In these cases, it appears that juries seek to avoid what they may perceive as an unjust result, allowing the plaintiff to recover something rather than nothing. This, in turn, lessens the impact of the modified comparative negligence scheme when compared with pure comparative negligence.

On the other hand, the disparity in fault apportionment between pure and modified jurisdictions may also be a result of the type of negligence regime affecting what types of suits actually make it to trial.[102] Plaintiffs in a modified comparative negligence jurisdiction who know that their negligence is close to or greater than fifty percent are often unwilling to take their case to trial due to the "risk of zero recovery."[103] A plaintiff in this situation may be more willing to settle to avoid that risk, as

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[98] *See id.* at 963 (as evidenced by the study's results).

[99] *Id.*

[100] *Id.*

[101] *Id.* at 965.

[102] *Id.* at 966.

[103] *Id.*

explained above. However, selection effects cannot justify the difference in the number of fifty percent findings between the two types of jurisdictions.[104]

Moreover, the results of one analysis indicate that modified comparative negligence might be worse for defendants than pure comparative negligence and, therefore, works against the stated purpose of tort reform.[105] This is an unintended consequence of the jury nullification phenomenon described above.[106] Although juries do appear to "adjust their findings of liability to protect plaintiffs in modified comparative negligence regimes," they do not reduce the total amount of damages that they award.[107] Those authors explain:

> When a jury manipulates the percentage of negligence to avoid the harsh result of a plaintiff arbitrarily going home empty-handed, the defendant pays a larger percentage of the damages than it would have in a pure system where the percentages were allocated faithfully. While defendants save money in modified regimes when a jury returns a finding of plaintiff's negligence above 50 percent, they lose money in every case where the jury manipulates the result in order to allow a recovery for the plaintiff. The important question from the defendants' perspective, though, is which of these effects dominates in the aggregate.[108]

Using the data discussed above, if each case had a total damages award of $100, plaintiffs in pure comparative negligence jurisdictions would recover $60.81 on average, while plaintiffs in modified jurisdictions would recover $63.69.[109]

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[104] *See id.* at 966-67 ("The reason is that plaintiffs and their attorneys cannot predict the plaintiff's share of negligence with enough accuracy to explain the discrepancies in jury findings near 50 percent across jurisdictions. . . . The fact that we see more observations from 40 to 49 percent and at exactly 50 percent in modified regimes, in the ranges where we would expect to see fewer observations resulting from selection effects, is strong evidence that jury manipulation is driving the result.").

[105] *See id.* at 975-77 (indicating that, on average, "defendants pay close to 5 percent more in modified jurisdictions than in the pure jurisdictions").

[106] *See id.* at 975-76.

[107] Best & Donohue III, *supra* note 97.

[108] *Id.* at 975-76.

[109] *Id.* at 976.

What does this information mean for prospective negligence cases? Defendants should not rely on the modified comparative negligence total bar of recovery as a primary litigation strategy in jury trials. If a jury is informed of how the modified comparative negligence scheme works, it may seek to tailor its fault apportionment in order to allow the plaintiff to recover some amount in damages. Given this phenomenon, Florida's switch to modified comparative negligence likely will not result in the outcomes predicted by HB 837's proponents.

C. The Bad Faith Safe Harbor and "Bad Faith Traps"

As previously explained,[110] HB 837 bars bad faith actions against insurers when the insurer either pays the amount demanded by the claimant or pays the full policy limits within ninety days of receiving notice of the claim. There are also now protections for insurers in situations where multiple claims arise out of a single occurrence which well exceeds policy limits.[111] This new safe harbor against bad faith actions will likely reduce the use of "bad faith traps," which have previously been used by plaintiffs to establish liability of insurers beyond policy limits.[112]

Prior to the enactment of HB 837, the law allowed a person to bring a civil action against an insurer when that person was damaged as a result of the insurer "[n]ot attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests."[113] Using this statute, plaintiffs' attorneys have been able to manufacture liability on the part of insurers, providing plaintiffs with an

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[110] For a more detailed explanation of HB 837's effects on bad faith actions, see Part II.C, *supra*.

[111] FLA. STAT. § 624.155(6)(a)-(b).

[112] *HB 837: Florida Ushers in Changes to Bad Faith Law*, ZINOBER DIANA & MONTEVERDE P.A. (Apr. 19, 2023), https://www.zinoberdiana.com/hb-837-florida-ushers-in-changes-to-bad-faith-law/#:~:text=Florida%20has%20become%20known%20as,with%20incomplete%20information%2C%20and%20many.

[113] FLA. STAT. § 624.155(1)(b)(1).

additional method of recovery apart from the original, underlying tort claim.[114] The process of setting a bad faith trap is extensive:

> [I]n many instances, plaintiff's counsel acts unfairly toward the insurer in making the set-up settlement offer. The offer is either never intended to resolve all the litigation or is so unreasonable as to be nothing more than an attempt to induce the insurer to commit a tort in order to explode the policy limits. When the plaintiff and the attorney are disappointed when the insurer accepts the offer, when they refuse to extend a very short deadline for settlement, and when they subsequently refuse their own offer because acceptance is one day too late, one can be sure that mischief and not settlement was the ultimate goal. Those plaintiffs who try to set up insurers through settlement offers never intended to be accepted actually are attempting to obtain for the insured and ultimately for the plaintiff the benefit of limits higher than those the insured, before the loss, had decided to purchase.[115]

This scheme is not guaranteed to work in all instances, but the nature of bad faith statutes, like Florida's previous version, creates a breeding ground for manufactured bad faith.[116]

Extant case law exposes the statutory gap that causes frivolous bad faith claims,[117] but under HB 837, it will be harder for plaintiffs to manufacture bad faith claims against insurers, and this, in turn, will reduce insurers' exposure in litigation. Now, plaintiffs' attorneys are unable to utilize unreasonably low and unreasonably high settlement

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[114] Stephen R. Schmidt, *The Bad Faith Setup*, 29 TORT & INS. L. J. 705, 708-09 (1994) (noting that the ability to pursue statutory bad faith actions "turns the personal injury lawsuit into the first round of the battle—the round in which the tort plaintiff attempts to set up the insurer for round two by inducing it to commit a tort by violating a duty either to its insured or to the tort plaintiff . . . or to both").

[115] *Id.* at 709-10.

[116] *See id.* at 709 ("[T]he direct cause of action [for bad faith] may result in a demand for, and payment by the insurer of, a premium in any settlement to buy protection from a statutory bad faith claim related to the personal injury action."); *see also* Moradi-Shalal v. Fireman's Fund Ins. Co., 758 P.2d 58, 66 (Cal. 1988) (noting that the recognition of a private cause of action for statutory bad faith "encourage[d] unwarranted settlement demands by claimants, and coerce[d] inflated settlements by insurers seeking to avoid the costs of a second lawsuit and exposure to a bad faith action").

[117] *See, e.g.*, Harvey v. GEICO Gen. Ins. Co., 259 So. 3d 1, 1 (Fla. 2018).

offers to bait insurers into violating the bad faith statute.[118] HB 837 also codified the concept of "comparative bad faith" as a defense to a bad faith claim by imposing a duty on the insured, the claimant, and their representatives to act in good faith "in furnishing information regarding the claim, in making demands of the insurer, in setting deadlines, and in attempting to settle the claim."[119]

Moving forward, this change to Florida law is sure to receive mixed feedback. In early 2011, a pair of articles were published in the Florida Bar Journal, each parroting different sides of the bad faith aisle.[120] In their article, Gwynne Young and Johanna Clark identified the problems with Florida's one-sided bad faith statute and suggested new legislation imposing a corresponding duty of good faith for claimants.[121] Their proposed legislative solution, in fact, was very similar to that enacted by the legislature in HB 837's amendments to Florida statute § 624.155(5).[122]

The next month, Rutledge Liles directly responded to Young and Clark, referring to their article as "a troubling presentation on insurance bad faith."[123] Liles explained that the proposed changes to § 624.155 provided by Young and Clark were unnecessary, given that bad faith claims were already to be evaluated based on the totality of the circumstances, which allows courts to consider actions of the claimant and its attorneys in addition to the insurer.[124] Liles concluded with an impactful explanation as to why imposing drastic changes to the law of bad faith would be problematic:

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[118] *See* FLA. STAT. § 624.155(4)(a).

[119] *Id.* § 624.155(5)(b). "Comparative bad faith" refers to the bad faith of the insured or claimant when used by the insurer as a defense to a bad faith claim against the insurer. Schmidt, *supra* note 114, at 717. The California Supreme Court likened the duty of good faith to a "two-way street running from the insured to his insurer as well as vice versa." *Id.* (quoting Com. Union Assurance Cos. v. Safeway Stores, Inc., 610 P.2d 1038, 1041 (Cal. 1980)).

[120] *Compare* Gwynne A. Young & Johanna W. Clark, *The Good Faith, Bad Faith, and Ugly Set-Up of Insurance Claims Settlement*, FLA. BAR J., Feb. 2011, at 9, *with* Rutledge R. Liles, *Florida Insurance Bad Faith Law: Protecting Businesses and You*, FLA. BAR J., Mar. 2011, at 8.

[121] *See* Young & Clark, *supra* note 120.

[122] *Compare id. with* Fla. H.B. 837 § 4 (amending FLA. STAT. § 624.155(5)).

[123] Liles, *supra* note 120.

[124] *Id.*; *see* Young & Clark, *supra* note 120.

> I would like to emphasize the need to be practical and realistic. In any area of law or business, there are practitioners who will attempt to "game the system," and thereby harm those who seek to employ the system in good faith for its proper purpose. This is true in insurance matters, on both sides of the negotiations. However, the solution is not to enact an amendment to the common law and statutory bad faith remedies that drastically and dramatically alters the balance of power and creates complexities and ambiguities that would render it virtually impossible for an individual insured to attempt to resolve insurance claims on his or her own behalf. This is especially true considering the complete absence of any showing that either the courts or the legislature have failed to address attempts to "game the system." . . . . The law of bad faith is not broken and need not be fixed to create an unlevel playing field. The citizens of Florida will recognize this for what it is: An attempt by a powerful lobby to trample the rights of businesses and individuals who pay a premium for insurance coverage they desperately need in today's environment and expect fair treatment in return.[125]

These words are just as applicable today in reference to HB 837 as they were in 2011 when addressing the Young and Clark article.[126]

So yes, the changes to the law of bad faith imposed by HB 837 will likely hinder the ability of claimants to manufacture bad faith claims, but for what cost? Arguably, it is better to maintain and protect the ability of individuals to hold their insurance providers accountable without imposing additional roadblocks to recovery. After all, it is the insured who relies on their insurer to be available and to provide coverage when a claim is made.

D. Substantive Due Process

The changes implemented by HB 837 may be subject to substantive due process challenges under the United States and Florida Constitutions.[127] Such a challenge to the acts of a legislature hinges on the

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[125] Liles, *supra* note 120.

[126] *See* Young & Clark, *supra* note 120.

[127] *See, e.g.*, Blocktree Prop., LLC v. Pub. Util. Dist. No. 2 of Grant Cnty., Wash., 447 F. Supp. 3d 1030, 1040 (E.D. Wash. 2020). "Procedural due process does not apply to legislative acts. Therefore, before procedural due process rights attach, a plaintiff must show that the deprivation occurred as a result of an adjudicatory process rather than a legislative process." *Id.* (citations omitted) (citing Bi-Metallic Inv. Co. v.

type of right that was allegedly infringed and whether the government was justified in its actions in limiting the exercise of that personal right or liberty.[128]

"[S]ubstantive due process has two strands—one that protects against deprivation of fundamental rights and one that protects against arbitrary legislation."[129] When a law infringes upon a fundamental right, a court will review the law by applying strict scrutiny.[130] To pass muster under strict scrutiny, the government must show that the law is narrowly tailored to further a compelling government interest.[131]

Conversely, if a law does not implicate a fundamental right, a court will conduct a rational basis review, upholding the law "if it bears a rational basis to a legitimate government purpose."[132] When a challenge to the constitutionality of a statute is evaluated under rational basis review, "the burden is on the one attacking the legislative enactment to negate every conceivable basis which might support it."[133] Generally, courts presume that statutes are constitutional, so, when applicable, disputes should be resolved by finding constitutionality as "a court may not substitute its judgment, for that of the legislature, as to the wisdom and policy of a particular statute."[134] Additionally, "Florida's substantive due process test [is] indistinguishable from the federal one."[135]

HB 837 contains several provisions which may be subject to a substantive due process challenge. One such challenge may be the shortened

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State Bd. of Equalization, 239 U.S. 441, 445-46 (1915) *and* Harris v. City of Riverside, 904 F.2d 497, 501 (9th Cir. 1990)).

[128] *See In re* Forfeiture of 1969 Piper Navajo, 592 So. 2d 233, 235 (Fla. 1992) ("[T]he basic test [of substantive due process] is whether the state can justify the infringement of its legislative activity upon personal rights and liberties.").

[129] Hillcrest Prop., LLP v. Pasco Cnty., 915 F.3d 1292, 1297 (11th Cir. 2019).

[130] *See, e.g.*, Silvio Membreno v. City of Hialeah, 188 So. 3d 13, 21-22 (Fla. Dist. Ct. App. 2016).

[131] *See, e.g.*, Price-Cornelison v. Brooks, 524 F.3d 1103, 1109 (10th Cir. 2008) (citing Johnson v. California, 543 U.S. 499, 505 (2005)).

[132] *Silvio Membreno*, 188 So. 3d at 19.

[133] E. Air Lines, Inc. v. Dep't of Revenue, 455 So. 2d 311, 314 (Fla. 1984).

[134] All. of Auto. Mfrs., Inc. v. Jones, 897 F. Supp. 2d 1241, 1251 (N.D. Fla. 2012).

[135] State v. Sobieck, 701 So. 2d 96, 103 (Fla. Dist. Ct. App. 1997).

limitations period for filing an action founded on negligence.[136] However, such a challenge is likely to be unsuccessful. The United States Supreme Court has previously held that legislative actions shortening the time to file suit are permitted:

> It is the settled doctrine of this court that the legislature may prescribe a limitation for the bringing of suits where none previously existed, as well as shorten the time within which suits to enforce existing causes of action may be commenced, provided, in each case, a reasonable time, taking all the circumstances into consideration, be given by the new law for the commencement of suit before the bar takes effect.[137]

Here, the Supreme Court indicates that freedom from limitation to bring a lawsuit is not a fundamental right, thus subjecting legislation imposing such to rational basis review. The imposition of a shortened limitations period easily passes this review.

Additionally, while HB 837 took effect immediately upon being signed into law, the provision shortening the negligence limitations period from four years to two years only applies to causes of action that have accrued after the effective date of the legislation.[138] Thus, actions based upon injuries that have already accrued are unaffected.

Other potential areas of contention under HB 837 are the changes to Florida's tort law scheme, overall. These include the change to modified comparative negligence, the safe harbor given to insurers for bad faith claims, the elimination of contingency fee multipliers, and the presumption against liability for certain owners of multifamily residential property.[139] Each of the "rights" that are eliminated or modified by the above were created under Florida statute.[140]

However, "areas in which substantive rights are created only by state law (as is the case with tort law and employment law) are not subject to substantive due process protection under the Due Process Clause because

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[136] *See* Fla. HB 837 § 3; FLA. STAT. § 95.11(4)(a).

[137] Wheeler v. Jackson, 137 U.S. 245, 255 (1890).

[138] *See* Fla. H.B. 837 § 3; FLA. STAT. §§ 95.11(4)(a), 95.031.

[139] *See* Fla. H.B. 837 §§ 1, 5, 7, 9.

[140] *See* FLA. STAT. §§ 57.104, 624.1552, 768.0701, 768.81.

'substantive due process rights are created only by the Constitution.'"[141] "As a result, these state law-based rights constitutionally may be rescinded so long as" their rescission does not run afoul of any other constitutional provision, such as procedural due process.[142] Here, because each of the above-listed changes eliminates or modifies a right originally created under Florida statute, they are not considered fundamental rights for the purposes of a substantive due process analysis. Being subject to rational basis review, these changes do bear a rational basis to a legitimate government interest.

Conversely, some of the changes established by HB 837 may implicate enumerated rights contained within the Florida Constitution, such as access to courts.[143] This topic is lengthy, and warrants its own separate discussion.

E. Access to Courts

The Florida Constitution mandates that "[t]he courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay."[144] In determining whether a limitation on court access is permissible, the Florida Supreme Court in *Kluger v. White* provides guidance:

> [W]here a right of access to the courts for redress for a particular injury has been provided by statutory law predating the adoption of the Declaration of Rights of the Constitution of the State of Florida, or where such right has become a part of the common law of the State pursuant to Fla. Stat. § 2.01, F.S.A., the Legislature is without power to abolish such a right without providing a reasonable alternative to protect the rights of the people of the State to redress for injuries, unless the Legislature can show an overpowering public necessity for the abolishment of such right, and no alternative method of meeting such public necessity can be shown.[145]

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[141] McKinney v. Pate, 20 F.3d 1550, 1556 (11th Cir. 1994) (quoting Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 229 (1985) (Powell, J., concurring)).

[142] *Id.*

[143] *See, e.g.*, FLA. CONST. art. I, § 21.

[144] *Id.*

[145] 281 So. 2d 1, 4 (Fla. 1973).

Essentially, the test the Court is applying in *Kluger* is strict scrutiny, as described above.[146] This makes sense, as access to courts is a fundamental right enumerated by the Florida Constitution.[147]

Here, it is unlikely that any of the provisions within HB 837 consist of an impermissible restriction on a claimant or insured's access to courts. Regarding the new safe harbor for bad faith actions against insurers: the bad faith statute was originally codified in 2003,[148] which was well after the adoption of the Florida Constitution,[149] so even repealing the statute entirely would not be unconstitutional. Common law bad faith claims, on the other hand, *do* predate the adoption of Florida's Constitution,[150] meaning that the legislature could not abolish the right to pursue these claims entirely without first passing the requirements provided in *Kluger*. Here, HB 837 merely establishes new limits on bad faith claims in the interest of protecting insurers and does not go so far as to "abolish" such claims entirely.[151]

Similarly, other provisions of HB 837 merely limit the scope of already established legal doctrines. The new Florida statute § 768.0706 does not bar lawsuits against property owners for injuries caused by third-party criminal acts on their properties.[152] Rather, it creates a presumption against such liability.[153] Thus, litigants will still be able to bring their actions in court but will have to provide evidence to rebut the presumption.

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[146] *See* Mitchell v. Moore, 786 So. 2d 521, 528 (Fla. 2001).

[147] Weaver v. Myers, 229 So. 3d 1118, 1139 (Fla. 2017) ("[E]ach of the personal liberties enumerated in the Declaration of Rights . . . is a fundamental right.") (quoting State v. J.P., 907 So. 2d 1101, 1109 (Fla. 2004)) (internal quotation marks omitted).

[148] FLA. STAT. § 624.155 (effective June 26, 2003).

[149] The latest revision of the Florida Constitution was ratified on November 5, 1968. *See The Florida Constitution*, ONLINE SUNSHINE, http://www.leg.state.fl.us/statutes/index.cfm?submenu=3 (last visited Sept. 20, 2023).

[150] Florida common law recognized third-party bad-faith actions involving insurance companies as early as 1938. *See* Auto Mut. Indem. Co. v. Shaw, 184 So. 852, 859 (Fla. 1938).

[151] *Abolish*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("To annul, eliminate, or destroy, esp. an ongoing practice or thing; specif., to officially end an established law, system, tradition, etc.").

[152] *See* FLA. STAT. § 768.0706(2).

[153] *See id.*

What about the shift from pure comparative negligence to modified comparative negligence? This, too, does not run afoul of the Florida Constitution, as HB 837 does not eliminate the ability to pursue negligence actions.[154] Furthermore, Florida did not transition away from the common law contributory negligence doctrine until 1973, when the Supreme Court of Florida adopted pure comparative negligence in *Hoffman v. Jones*.[155] In 1976, the doctrine was codified by the Florida legislature.[156]

Prior to the 1973 *Hoffman* decision, the traditional doctrine of contributory negligence was the prevailing theory in Florida.[157] Modified comparative negligence serves as a middle ground between contributory negligence and pure comparative negligence theories with regard to plaintiffs' ability to recover despite being allocated some degree of fault.[158] Thus, the modified comparative negligence scheme provides *greater* access to courts than the doctrine that was in place when the Florida Constitution was ratified.[159]

Conclusion

The long-term effects of HB 837 have yet to be seen, and it will likely take several years before we will be able to assess its full impact. However, the motives behind this legislation are already apparent. Although Governor DeSantis and the conservative members of the Florida legislature tout HB 837 as a massive win for the general public,[160]

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[154] *See* Fla. H.B. 837 § 9.

[155] *See* Vincent S. Walkowiak, *Innocent Injury and Loss Distribution: The Florida Pure Comparative Negligence System*, 5 FLA. ST. U. L. REV. 66, 67 (1977) (citing 280 So. 2d 431 (Fla. 1973) (abandoning contributory negligence in favor of pure comparative negligence)).

[156] *Id.* at 106.

[157] *See id.* at 67-68 ("The doctrine of contributory negligence totally bars recovery by a plaintiff whose own fault contributes to his injury in however slight a degree. Recovery is barred regardless of the obviousness of the defendant's negligence or its causal proximity to the plaintiff's injury.").

[158] *See id.* at 69-70.

[159] *See generally* FLA. CONST. art. I, § 21.

[160] *See generally* RON DESANTIS, *supra* note 9.

what has actually occurred is a systematic, government-sponsored stripping of consumer protection and corporate accountability disguised behind the label of "reform." Hopefully, the public will catch onto this soon, learning that the new policies are not the end-all solution to "fixing" the Florida judicial system. Until then, Florida attorneys must work to balance their own interest in maintaining a just and equitable civil justice system with the duty of loyalty owed to their clients.[161]

[161] *See* FLA. BAR REG. r. 4-1.7 cmts.; MODEL RULES OF PRO. CONDUCT r. 1.7 cmts. (AM. BAR ASS'N 1983).