



March 10, 2021

Subject: **Strong Opposition to HB 3171 and HB 3272**

House Business and Labor Committee

Dear Mr. Chair and Members of the Committee:

For the record, my name is Kelsey Wood with Gordon Wood Insurance in Roseburg. I am opposed to both HB 3171 and HB 3272. Both bills contain provisions allowing second lawsuits against insurance companies and agents.

My comment, after study of this complex legal topic, revolves around the Sharon Tennyson, William Warfel study: First-Party Insurance Bad Faith Liability: Law, Theory, and Economic Consequences by Sharon Tennyson, Ph.D., and William J. Warfel, Ph.D., CPCU, CLU, September 2008.

The study says “this idea of penalty for unfair claim settlement practices involving first-party insurance coverage is a relatively recent development in the long history of insurance law. Many states now do allow for recovery of consequential, or incidental, damages, attorney’s fees, and prejudgment interest, in addition to the benefit owed under the policy, in a first-party insurance bad faith case.

“And in theory, allowing policyholders to recover damages over and above the insurance benefit owed may provide insurers with added incentives to engage in fair and efficient claims settlement, enhancing the efficiency of contracting in insurance markets to the advantage of both policyholders and insurers. However, many observers have raised concerns that the development of the law of first-party bad faith and its implementation by the courts have not achieved uniformly desirable results. Critiques have centered on issues that arise from the expansion of bad faith actions into the area of tort law.

“The majority of states that recognize insurance first-party bad faith liability allow actions under tort law rather than contract law despite the existence of a contract, and without requiring the policyholder to allege a traditional tort such as fraud or intentional infliction of emotional distress. This increases both potential damages and the uncertainty of judgments and changes the dynamics of the bad faith litigation process. Moreover, the variation in state legal regimes increases the uncertainty and complexity of the legal environment in which insurance companies must settle claims.”

Both proposed new laws appear to give a new right of action under tort law, rather than contract law:

- HB 3171; *“Permits person to obtain, and court to award, appropriate equitable relief in addition to monetary damages under Unlawful Trade Practices Act.”*
- HB 3272: *“Provides insured with cause of action for insurer’s unfair claim settlement practices. Creates duty of reasonable due care for insurance producer toward insured.”*

This paper provides a discussion and analysis of first-party insurance bad faith liability. It traces the evolution of first-party insurance bad faith law and identifies and discusses the various approaches that have been taken by the courts and state legislatures. The paper identifies a number of potential adverse effects of excessive or uncertain first-party bad faith liability claims for insurance markets and analyzes insurance claims data to investigate the empirical importance of these effects. If these bills pass allowing new rights of action outside contract law, they will result in a more expensive and limited insurance marketplace for Oregon consumers.

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Quoting from the article: "The empirical evidence suggests that bad faith remedies function less than optimally in practice. Specifically, the evidence supports the idea that allowing tort liability for insurance bad faith results in reduced insurer incentives to challenge disputable claims, and in higher claims costs as a result."

"In light of these findings, the paper discusses and evaluates state legislative expansions of policyholder remedies for first-party bad faith that occurred in 2007 and 2008. The paper concludes that certain features of recent legislation in several states will create incentive distortions that may lead to greater uncertainty and higher costs for insurers, higher levels of insurance fraud, and correspondingly higher insurance premiums for consumers."

The paper summarizes: "In view of this evidence, an examination of recent state legislation expanding first-party insurance bad faith liability suggests that the acts passed in most states are likely to create substantial negative side effects for insurance markets. In particular, we note that the Washington law combines two features – lax standards for proving bad faith and excessive damage awards – that are likely to produce negative consequences for insurers and policyholders. The states should carefully consider whether the benefits of expanded bad faith liability outweigh the costs of added uncertainty to insurers and the increased costs of insurance to consumers (Abraham, 2004). As well, if it is true as Sykes (1996) argues that the courts cannot accurately identify bad faith behavior by insurers, the states must consider the possibility that the benefits from insurer bad faith law (in terms of deterring insurer misconduct) are themselves small."

Therefore, I earnestly oppose this legislation. Please vote no. Thank you for your consideration.

Cordially,

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