

Florida Insurance Council, Inc.

Property Insurance Loss Appraiser
Workshop - November 16, 2007

Proposal One:

Section __. Section 627.____, Florida Statutes, is created to read:

627.000 Property insurance loss appraisal.--In the event that the insured or the insurer fail to agree as to the actual cash value, the amount of loss or the cost of repairs to property for which a claim has been filed under a property insurance contract, either party may submit a written demand to enter into the process of appraisal. The insurer may refuse to accept the demand only if the insured materially failed to comply with the post-loss obligations of the insured as set forth in the policy conditions.

(1) Each party shall select a competent and disinterested appraiser and notify the other party of the appraiser selected within twenty days of the demand for appraisal. The appraisers shall first select a competent and disinterested umpire who is on the Department of Financial Services' list of approved property insurance loss umpires; and failing for fifteen days to agree upon such umpire, then, on request of the insured or the insurer, such umpire shall be selected from the list of approved umpires by a judge of a court of record in the county in which the property covered is located.

(2) Appraisal proceedings are informal unless the insured and the insurer mutually agree otherwise. For purposes of this section, "informal" means that no formal discovery shall be conducted, including depositions, interrogatories,

requests for admission, or other forms of formal civil discovery, no formal rules of evidence shall be applied, and no court reporter shall be used for the proceedings. The appraisers shall then appraise the loss, stating separately actual cash value, loss or cost to repair for each item; and, failing to agree, shall submit their differences, only, to the umpire.

- (3) The umpire shall review the differences submitted and determine the amount of the loss for each item submitted.
- (4) If either appraiser agrees with the determination of the umpire, an itemized written appraisal award signed by the umpire and appraiser shall be filed with the insurer and shall determine the amount of the loss.
- (5) The appraisal award is binding on the insurer and insured with regard to the amount of the loss. The insurer retains the right to enforce policy terms, conditions and exclusions with regard to coverage issues.
- (6) Each appraiser shall be paid by the party selecting him and the expenses of appraisal and umpire shall be paid by the parties equally.
- (7) The provisions of the Florida Arbitration Code do not apply to property insurance loss appraisal proceedings.
- (8) The appraisal process shall not address issues involving whether or not the loss or damage is covered under the terms of the insurance contract. The appraisal process is a means to determine values for calculating the amount of the loss. However, it is permissible for the appraisers and the umpire to decide causation issues when causation is not a coverage question, but rather an issue that must be addressed in order to determine the amount of the loss.

Proposal Two:

Draft language for staying the 60- day cure period during the appraisal process: We simply inserted a new subsection (b) under 624.155(3) and re-labeled the present (b) subparagraph (c).

624.155 Civil remedy –

(3)(a) As a condition precedent to bringing an action under this section, the department and the authorized insurer must have been given 60 days' written notice of the violation. If the department returns a notice for lack of specificity, the 60-day time period shall not begin until a proper notice is filed.

(b) However, if any party to a property insurance contract invokes a Property Insurance Appraisal and/or mediation pursuant to the contract of insurance or by statute, the 60-day notice period will be tolled until such time as the Appraisal or mediation process has been completed and the loss becomes payable under the provisions of the insurance policy. If a civil remedy notice of insurer violation is served after a demand for appraisal or mediation pursuant to a policy of insurance or by statute, the entire 60-day notice period is tolled until such time as the loss becomes payable under the insurance policy, but in no event more than 30-days after the rendition of an Appraisal Award or completion of the mediation process pursuant to the policy of insurance or by statute.

(c) The notice shall be on a form provided by the department and shall state with specificity the following information, and such other information as the department may require:

Rational:

To allow the Civil Remedy time period to toll until the appraisal process is complete. We believe this helps make the process more fair for all. This is very consumer friendly.

The consumer wants their claim paid quickly and fairly and these improvements help make that happen.

Proposal Three:

By way of background, the decision of the Florida Federal Middle District in Muckenfuss v. Hanover Insurance Company (April 18, 2007). Briefly, in Muckenfuss the insured made a claim for sinkhole damage, including the dwelling, a swimming pool and additional living expenses. Hanover admitted a covered loss existed, but disputed the amount, refusing to pay for the pool, as that loss had not been incurred, only predicted by the insured's appraiser to result once repairs to the dwelling were made. (a prospective loss) After the insured filed suit, the insured requested an appraisal per his policy. The appraisal resulted in a finding for the insured for each of the claimed losses. The insured then filed a motion in the circuit court to confirm the appraisal award. Hanover objected, again contesting coverage for the pool. In reviewing the case law developed over the past few years concerning appraisal under a "standard" homeowners policy, the Court concluded that once a loss was submitted to appraisal, and an award made, an insurer could only defend not making payment of the appraisal award based on "standard policy conditions", including fraud, lack of notice and failure to cooperate. (A lack of coverage for the entire claim.)

The Court in Muckenfuss refused to follow the Florida Second District decision in Liberty Am. Ins. Co. v. Kennedy (Nov. 6, 2006), which held that the submission of a claim to appraisal does not foreclose the insurer from challenging an element of loss as not being covered by the policy. Instead the Court held that two previous Florida Supreme Court cases, State Farm v. Licea (FL 1996) and Johnson v. Nationwide (FL 2002) supported its holding that if a loss goes to appraisal the carrier may only contest paying the loss as a whole. (These decisions were also cited by the Federal Eleventh Circuit as controlling authority in Three Palms Point, Inc. v. State Farm (2004) for the same proposition.)

While the issue is not one concerning the qualifications and behavior of appraisers in assessment of residential or commercial property losses, it is one of great public importance, which could be “tacked on” or somehow incorporated into the proposals.

While overhauling the appraisal clause of the policy is an option, the recent proposals by Citizens, directed at appraisers and the appraisal process, creates an opportunity to “fix” what may be argued will ultimately cost the citizens of Florida substantial amounts in increased premiums, and litigation expense, as insurers are forced to pay uncovered losses as part of the “whole” appraisal process. The insurers’ recourse will be to remove appraisal clause from policies and favor litigation, in order to preserve the right to contest claims for items of loss not owed, or not yet owed as not incurred (prospective losses).

A provision added to the currently proposed legislation might look like this:

A residential or commercial property insurer does not, by participating in the appraisal process, whether provided for in a property insurance policy, or otherwise, give up any rights, whether in enforcing policy terms, conditions or exclusions, or in contesting whether coverage exists for any part or item of the loss appraised, including prospective and not yet incurred losses, which items, once identified by the insurer as contested, shall not be subject to confirmation by any court as part of the appraisal award.

10/30/07