

After latest insurance reforms, what rights do policyholders have left?

Insurance News Net

Hemorrhaging losses, Florida's property insurance industry has finally convinced the state Legislature to abolish practices it blames for skyrocketing premiums, carrier failures and plummeting availability of private-market coverage.

But while insurers and Republican legislators say the reforms enacted last week will stabilize the private insurance market — and maybe one day reduce premiums — for consumers down the road, advocates for policyholders contend that homeowners are paying a steep price. Policyholders, they say, are losing leverage they have long held to force insurers to settle claims fairly.

The reforms will likely accomplish insurers' goals of reducing litigation because fewer attorneys will be willing to take on smaller cases, says Paul Handerhan, president of the Federal Association for Insurance Reform, a consumer-oriented watchdog group. "I expect to see a lot of attorneys exiting the market," he said, "because it will be more difficult for them to get attorneys fees and when they do, the fees will be less."

Industry advocates, however, say the reforms merely moves property insurance disputes onto the same playing field as personal injury lawsuits stemming from auto accidents.

"There are thousands of lawyers willing to take these cases," says Stacey Giuliani, chief legal officer at Boca Raton-based Florida Peninsula Insurance Co.

During the year's second special session to shore up the faltering industry, state lawmakers agreed to abolish two key mechanisms, ensconced in Florida law, that insurers contended incentivized plaintiffs attorneys to file tens of thousands of lawsuits each year over claims they said were routinely solicited, exaggerated, or fabricated to harvest lucrative legal fees.

The increased frequency of cases and fees, insurers claimed, has made the insurance industry unprofitable in Florida. Because insurance is required for homebuyers with mortgage loans, availability of property insurance is a critical requirement for the continued success of Florida's real estate market.

One-way no more

Among other reforms, the Legislature abolished the so-called one-way attorney fee provision that had been in place for more than a century in Florida. This law was intended to allow policyholders to challenge insurance claims denials or inadequate settlement offers by requiring insurers to pay legal fees if policyholders win a favorable outcome, but not requiring policyholders to pay insurers' legal fees when lawsuits fail.

Instead, policyholders will have to pay an attorney upfront to take their case or find one willing to take a case on contingency — meaning the attorney won't get paid unless the client wins. Attorney payment is typically between 33.5% and 40% of the ultimate award or settlement.

Joe Ligman, a longtime plaintiff's attorney based in Palmetto Bay, says he will be less likely to take cases involving claims of less than \$100,000 without the ability to collect legal fees from the insurer.

"I understand that a \$50,000 loss to a person making \$30,000 to \$50,000 is a lot of money. But how to you litigate that and charge 35% to 40% [of the recovery]? I can't take that case."

Yet Giuliani says there will be no shortage of attorneys willing to represent homeowners on a contingency basis.

"Just like any other auto accident, tort case or collection litigation, the attorney collects a percentage of any recovery," he said. "They only pay out of a recovery — no recovery, no fee."

'Civil offer of judgment' risks

Policyholders could see faster results in smaller cases taken on contingency, Giuliani said, because without the prospect of a big one-way attorney fee payout, "the policyholder's attorney doesn't have any incentive to keep the clock ticking for years."

One remaining way policyholders can collect attorneys fees without losing a percentage of their claim payment is through a process tied to a “civil offer of judgment.” Using this process, either side in a dispute can make a settlement offer for a certain amount of money.

If the opposing party does not accept the offer within 30 days, the party who rejects the offer may be ordered to pay attorney fees to the party who makes the offer.

If the policyholder makes the offer and the insurer rejects it, the policyholder may collect attorneys fees if the case is resolved for 25% more than the insurer’s initial offer. If the policyholder rejects an insurer’s offer and the award is at least 25% less than the insurer’s offer, then the policyholder may owe the insurer’s legal fees, which would be subtracted from the amount awarded to the policyholder.

The formula is intended to encourage a reasonable settlement because of the financial risk it poses for both sides, Handerhan says.

Discount for binding arbitration

Another of the reforms allows insurers to avoid litigation by requiring the policyholder to agree to enter into binding arbitration. That’s an alternative dispute resolution available alongside mediation and appraisal.

Homeowners who agree to policies with arbitration clauses get a premium discount but lose their ability to sue the insurer.

Sen. Jim Boyd, a Tampa Bay area Republican who sponsored the Senate version of the reform bill, said during last week’s debate that policyholders could choose to enter into arbitration without hiring an attorney.

But that’s not realistic, says Amy Boggs, chairwoman of the property insurance section of the Florida Justice Association, a lobbying group for plaintiffs attorneys. “How do you go to arbitration without an attorney?” she asked. “Doesn’t the rule of evidence apply? Don’t [insurers] file motions that a normal person can’t handle?”

Homeowners who choose arbitration, she says, will have to pay for attorneys, expert witnesses and fees

of a panel of up to three arbitrators out of the money they recover if they prevail.

Amy Bach, founder of a California-based advocacy group, United Policyholders, says binding arbitration has been a bad deal for policyholders for decades. “Insurers are repeat users of the process and arbitrators can’t [make them angry] or they won’t get appointed and earn fees,” she said. “The decisions are rendered behind closed doors often with no record. Arbitration can be just as expensive as litigation but without consumer protections or a remedy at the end that makes the policyholder whole.”

Boggs suggests that homeowners think long and carefully about agreeing to a policy with a binding arbitration clause. The modest discount they’ll get won’t likely be worth surrendering the right to litigate.

No more assignment of benefits

Another major reform was elimination of the ability of repair contractors to coerce homeowners to sign over the benefits of their insurance policies as a condition of commencing repair work. The assignment of benefits often resulted in multiple lawsuits against insurers over the same claim.

For example, a single plumbing break often resulted in lawsuits from everyone involved in the mitigation or repair: the plumber who responds to shut off the water, the mold inspector that measures moisture in the drywall, the dry-out contractor that sets up big dehumidifiers in the home, the engineer that scopes out the repairs and the company that makes the repairs.

Eliminating assignments of benefits doesn’t change the cost of making the homeowner whole again, but prevents multiple parties from filing suit, often by the same attorney who collects fees for every lawsuit, said Michael Packer, supervising attorney for the Insurance Services Practice Group at the insurance defense firm Marshall Dennehey.

The legislature also diminished the threat that insurers could be sued for carrying out their duties in “bad faith.” Instead of filing a bad faith lawsuit before a case is resolved, the revised law requires a court finding that an insurer violated the policyholder’s contract before a case can be filed.

No agreement to this bargain

Without the reforms, insurers contended, untold numbers of carriers faced dissolution prior to the

upcoming hurricane season. Reinsurers — providers of insurance that insurers must buy to guarantee they can pay all claims after catastrophes — have been signaling an unwillingness to continue to provide coverage in Florida at affordable rates unless reforms were enacted to reduce litigation costs and make loss estimating more predictable.

The reforms amount to a bargain that policyholders did not agree to but ultimately must accept to ensure continued availability of insurance — hopefully from more companies offering lower rates, Handerhan said.

“Certainly, policyholders are losing leverage,” he said. But insurers as well need to be aware that failure to “do everything in their power to be extremely fair to policyholders” could cause a backlash and force future legislatures to revisit the reforms, he added.

Rights newly created by the legislation

To compensate for taking away homeowners’ rights to sue insurers under the one-way attorney fee provision, the Legislature tightened claims-handling requirements for insurers.