

SUBJECT: Creating exclusive remedies and appeal process for claims against TFPA

COMMITTEE: Insurance — favorable, without amendment

VOTE: 7 ayes — Lucio, Oliverson, G. Bonnen, S. Davis, Lambert, Paul, Vo

2 nays — Julie Johnson, C. Turner

WITNESSES: For — Jay Thompson, AFACT; (*Registered, but did not testify*: Joe Woods, American Property Casualty Insurance Association; Ryan Brannan and Henry Freudenburg, Coastal Windstorm Insurance Coalition; Lee Loftis, Independent Insurance Agents of Texas; Paul Martin, National Association of Mutual Insurance Companies; Pat Avery, Port Arthur Chamber of Commerce; Jim Rich, Southeast Texas Economic Development Foundation; Lee Parsley, Texans for Lawsuit Reform; Beaman Floyd, Texas Coalition for Affordable Insurance Solutions; Cathy DeWitt, USAA; David King)

Against — Craig Eiland, Texas Trial Lawyers Association; Ware Wendell, Texas Watch

On — (*Registered, but did not testify*: David Muckerheide, Texas Department of Insurance; Jennifer Armstrong and David Durden, Texas Windstorm Insurance Association)

BACKGROUND: Insurance Code ch. 2211 governs Fair Access to Insurance Requirements (FAIR) plans, which are issued by the Texas FAIR Plan Association. Under sec. 2211.051, the insurance commissioner is authorized to establish a FAIR plan to deliver residential property insurance to residents of the state in underserved areas if the commissioner determines that:

- in all or part of the state, residential property insurance is not reasonably available in the voluntary market to a substantial number of insurable risks; or
- at least 25 percent of qualified applicants to the residential property market assistance program have not been placed with an insurer in

the preceding six months.

**DIGEST:** HB 1897 would amend claims, dispute, and other processes of the Texas FAIR Plan Association (TFPA). The bill would also create an ombudsman program to assist TFPA policyholders.

**Required policy provisions.** Under the bill, an insurance policy issued by TFPA would have to require an insured person to file a claim under the policy before the first anniversary of the date on which the damage to property that is the basis of the claim occurred, unless the deadline was extended by the insurance commissioner. The policy also would have to contain a conspicuous notice detailing certain dispute procedures.

**Filing of claim.** An insured person would be required to file a claim under a TFPA policy by the first anniversary of the date on which the damage to property that was the basis of the claim occurred.

The claimant could submit certain written materials related to the claim to the TFPA. If the claimant failed to submit information in the claimant's possession that was necessary for the association to determine whether to accept or reject the claim, TFPA could request in writing the necessary information no later than the 30th day after the date the claim was filed.

On request, TFPA would be required to provide a claimant with reasonable access to all information relevant to the association's determination regarding the claim, as provided by the bill.

Within 60 days of receiving a claim or information requested of the claimant under this section, unless the deadline was extended by the insurance commissioner, TFPA would have to notify the claimant in writing that:

- the association had accepted coverage for the claim in full;
- the association had accepted coverage for part of the claim and denied coverage for the part of the claim; or
- the association had denied coverage for the claim.

If the association accepted coverage for the claim in full, the notice also would have to inform the claimant of the amount of loss the association would pay and the time limit to demand appraisal. If the association decided to deny part or all of the claim, the notice would have to inform the claimant, as applicable, of:

- the portion of the loss for which TFPA accepted coverage and the amount of loss the association would pay;
- the portion of the loss for which TFPA denied coverage and a detailed summary of the manner in which the association determined not to accept coverage; and
- the time limit to demand appraisal of the portion of the loss for which the association accepted coverage and to provide notice of intent to bring an action.

TFPA also would be required to provide a claimant with a form on which the claimant could provide the association notice of intent to bring an action.

If the association notified a claimant that coverage for a claim had been accepted in full or in part, TFPA would have to pay the accepted claim or portion of the claim by the 10th day after the notice was given. If payment of the claim was conditioned on the performance of an act by the claimant, TFPA would have to pay the claim by the 10th day after the act was performed.

**Disputes of accepted coverage.** If a claimant disputed the amount of loss TFPA would pay for a claim, the claimant could request a detailed summary of the manner in which the association determined the amount of loss it would pay.

Within 60 days after a claimant received notice that TFPA would pay part or all of a claim, the claimant could demand appraisal in accordance with the association's policy. This 60-day period could be extended by an additional 30 days if the claimant showed good cause and requested the

extension.

If a claimant demanded appraisal under the bill, the appraisal would have to be conducted as provided by TFPA policy and the provisions of the bill. The claimant and association would be equally responsible for paying any costs incurred or charged in connection with the appraisal.

Except under certain circumstances, such as if an appraisal decision was obtained by corruption or fraud, an appraisal decision reached under the process specified in the bill would be binding on the claimant and the association. A claimant that did not demand appraisal within the 60-day period would waive the claimant's right to contest TFPA's determination of the amount of loss the association would pay for a claim. Except in cases involving fraud, corruption, or other misconduct, a claimant could not bring legal action against TFPA for a claim for which the association accepted coverage in full.

**Disputes of denied coverage.** If TFPA denied coverage of a claim in part or in full and the claimant disputed the determination, the claimant would have to provide TFPA with notice that the claimant intended to bring an action against the association by the first anniversary of the date on which the damage that was the basis of the claim occurred. If the claimant did not provide notice by this deadline, the claimant would waive the right to contest the denial of coverage and would be barred from bringing an action against TFPA.

TFPA could require a claimant that had provided notice of intent to bring action to submit the dispute to alternative dispute resolution by remediation or moderated settlement conference as a prerequisite to filing the action. The association would have to request alternative dispute resolution within 60 days of receiving the claimant's notice of intent, and the resolution would have to be completed within 60 days after the request was made. This deadline could be extended by the insurance commissioner or by the association and claimant by mutual assent.

If the claimant was not satisfied after completion of alternative dispute

resolution or if the alternative dispute resolution was not completed by the deadline, the claimant could bring an action against TFPA in a district court in the county in which the loss that was the subject of the coverage denial occurred. The action would be presided over by a judge appointed as required by statute, and the judge would have to be a resident of the county in which the loss occurred or of an adjacent county.

The court would be required to abate an action brought by a claimant against TFPA concerning a denial of coverage until the notice of intent was provided and, if requested by TFPA, the dispute had been submitted to alternative dispute resolution.

If TFPA requested mediation, the association and the claimant would be equally responsible for paying any costs incurred or charged in connection with the mediation. The bill would specify how a mediator would be selected and what fees could be charged.

The insurance commissioner would have to establish rules to implement this section, including provisions for expediting alternative dispute resolution, facilitating the ability of a claimant to appear with or without counsel, establishing qualifications necessary for mediators, and providing that formal rules of evidence would not apply to proceedings.

**Issues brought to suit.** The only issues a claimant would be permitted to raise in an action brought against TPFA would be whether the association's denial of coverage was proper and the amount of the damages to which the claimant was entitled, if any. A claimant could recover only the covered loss payable under the terms of the association policy less, if applicable, the amount of loss already paid by the association for any portion of a covered loss, interest on the claim, and court costs and attorney's fees.

Nothing in the bill could be construed to limit the consequential damages, or the amount of consequential damages, that a claimant could recover in an action against the association under common law.

A claimant also could recover damages in addition to the covered loss and any consequential damages if the claimant proved by clear and convincing evidence that TFPFA intentionally mishandled the claimant's claim to the claimant's detriment, as specified in the bill.

**Voluntary arbitration.** The bill would allow a person insured by the TFPFA to elect to purchase a binding arbitration endorsement. A person who elected to purchase an endorsement under the bill would have to arbitrate a dispute involving an act, ruling, or decision of the association relating to the payment of, the amount of, or the denial of a claim. Such arbitration would have to be conducted in the manner and under rules and deadlines prescribed the insurance commissioner by rule.

TFPFA could offer policyholders who purchased a binding arbitration agreement a premium discount of no more than 10 percent on a TFPFA-issued policy. The insurance commissioner would have to adopt rules necessary to implement and enforce this provision.

**Ombudsman program.** The Texas Department of Insurance (TDI) would be required to establish an ombudsman program to provide information and educational programs to assist persons insured by the TFPFA with claim processes. The program would be administratively attached to TDI.

The ombudsman program could provide information and educational programs to individuals through informational materials, toll-free telephone numbers, public meetings, or other reasonable means. The program also would have to prepare and make available to each insured person information describing the ombudsman program's functions, and TFPFA would be required to notify each person insured by the association about the program's operation.

By March 1 of each year, the department would have to prepare and submit a budget for the program to the insurance commissioner. The commissioner would have to adopt the budget by April 1 of the same year. Money in an amount equal to the budget would be transferred to the ombudsman program as specified in the bill.

Not later than the 60th day after the date of a catastrophic event, TDI would prepare and submit an amended budget to the insurance commissioner for approval and report to the commissioner the approximate number of claimants eligible for ombudsman services.

**Other changes.** Under the bill, a person could not bring a private action against TFPA, including a claim against an agent or representative of the association. A class action could be brought against the association only by the attorney general at the request of the Texas Department of Insurance.

The bill would require presiding officers who were insured by the TFPA and presided over a dispute between the association and an insured person to give written notice that the officer was insured by the association. TFPA or another party to the dispute could object to the designation of such a presiding officer by the insurance commissioner under a process laid out in the bill, and the commissioner would be required to assign a different presiding officer if it was determined that the original officer had a direct financial or personal interest in the outcome of the dispute.

The insurance commissioner would be required to adopt rules regarding the provisions of the bill, including rules concerning the qualifications and selection of appraisers and procedures for handling claims. All rules would have to promote the fairness of the process, protect the rights of policyholders, and ensure that policyholders could participate in the claims review process without the necessity of legal counsel.

Many of the bill's provisions relating to policy requirements would take effect 60 days after the effective date.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2019.

SUPPORTERS      HB 1897 would help protect the Texas FAIR Plan Association (TPFA)

**SAY:** against frivolous lawsuits, which can threaten the insurance market's viability and can ultimately raise the insurance costs borne by consumers. By preventing this practice, the bill would help TFPA continue to serve in its role as insurer of last resort for underserved areas of the state. The alternative dispute resolution process offered by the bill prescribes a clear path for claims settlements, and the bill includes transparency measures to ensure the claims and dispute process is navigable for all policyholders.

**OPPONENTS**  
**SAY:** HB 1897 would take away important consumer protections for FAIR Plan policyholders and could impose significant costs on those consumers if they disputed a claim award amount. TPFA insures some of the state's most vulnerable policyholders, who should be allowed to contest certain insurance claims to ensure they are being treated fairly.