

BILL ANALYSIS

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S.B. 1628
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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

Texas' unique geographical location increases its propensity to catastrophic weather-related events and natural disasters such as hurricanes, tornadoes, wild fires, and hailstorms.

Over the last few years, various hailstorms have resulted in tens of thousands of claims filed against property and casualty insurers statewide, resulting in mass litigation. In many cases, third-party contractors, adjusters, and attorneys canvass consumers in post-event areas to solicit business and/or representation to take legal action on behalf of the policyholder against the insurer. As a result, policyholders are misinformed, contractors are circumventing statutory and policy guidelines, adjusters inflate actual damages, and attorneys are applying mass tort models to simple property damage claims.

S.B. 1628 establishes a clear deadline for an initial claim to be filed, prohibits certain public adjuster activity, requires notice of policyholder suit and proof of loss, creates a practical standard for bona fide disputes, defines actual damages, addresses liability for a person working on the adjustment of a claim on behalf of the insurer, clarifies illegal insurance practices and estimate practices, eliminates improper solicitation by public adjusters and others including but not limited to the purpose of attorney referral, and enforces the current policy appraisal process.

As proposed, S.B. 1628 amends current law relating to insurance claims and certain prohibited acts and practices in or in relation to the business of insurance and amends provisions that are or may be subject to a criminal penalty.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the commissioner of insurance in SECTION 19 (Section 4102.164, Insurance Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 541.002(2), Insurance Code, to redefine "person."

SECTION 2. Amends Section 541.060, Insurance Code, by amending Subsection (a) and adding Subsection (c), as follows:

(a) Provides that it is an unfair method of competition or an unfair or deceptive act or practice in the business of insurance for a person to engage in unfair settlement practices with respect to a claim by an insured or beneficiary as set forth herein.

(c) Provides that an insurer is solely responsible for any violation of Subsection (a) by an individual employed by the insurer as an adjuster, or a third-party individual or entity engaged by the insurer to provide adjusting, estimating, consulting, engineering, or other services related to the insurer's adjustment of a claim.

SECTION 3. Amends Section 541.061, Insurance Code, as follows:

Sec. 541.061. MISREPRESENTATION OF INSURANCE POLICY. (a) Creates this subsection from existing text. Provides that it is an unfair method of competition or an

unfair or deceptive act or practice in the business of insurance for a person to misrepresent an insurance policy by certain provisions set forth herein.

(b) Provides that an insurer is solely responsible for any violation of Subsection (a) by an individual employed by the insurer as an adjuster, or a third-party individual or entity engaged by the insurer to provide adjusting, estimating, consulting, engineering, or other services related to the insurer's adjustment of a claim.

SECTION 4. Amends Section 541.151, Insurance Code, as follows:

Sec. 541.151. New heading: PRIVATE ACTION FOR ACTUAL DAMAGES AUTHORIZED. (a) Creates this subsection from existing text and makes no further change.

(b) Defines, for purposes of this subchapter, "actual damages."

(c) Provides that an insurer is solely responsible for any violation of Subsection (a) by an individual employed by the insurer as an adjuster, or a third-party individual or entity engaged by the insurer to provide adjusting, estimating, consulting, engineering, or other services related to the insurer's adjustment of a claim.

SECTION 5. Amends the heading to Section 541.152, Insurance Code, to read as follows:

Sec. 541.152. ACTUAL DAMAGES, ATTORNEY'S FEES, AND OTHER RELIEF.

SECTION 6. Amends Section 541.154, Insurance Code, as follows:

Sec. 541.154. PRIOR NOTICE OF ACTION. (a) Requires an insured seeking damages in an action against an insurer to provide written notice to the insurer not later than the 61st day before the date the action is filed, rather than requires a person seeking damages in an action against another person under this subchapter to provide written notice to the other person not later than the 61st day before the date the action is filed.

(b) Requires that if the amount sought by the insured in the action involves a claim for damage items previously submitted to the insurer, the notice must contain:

(1) a sworn statement signed by the insured stating the specific damage items and the amount alleged to be owed by the insurer;

(2) the amount of the attorney's fees the insured reasonably incurred, rather than actual damages and expenses including attorney's fees reasonably incurred, in asserting the claim against the insurer;

(3) a stated amount that includes the amounts described by Subdivisions (1) and (2) that the insured will accept in full and final satisfaction of the claim.

Deletes existing text requiring the notice to advise the other person of the specific complaint, and the amount of actual damages and expenses, including attorney's fees reasonably incurred in asserting the claim against the other person.

(b-1) Requires that if the amount sought by the insured in the action involves a claim for damage items not previously submitted to the insurer, the notice contain:

- (1) a sworn statement signed by the insured stating the specific damage items, the amount alleged to be owed by the insured, and the reason the damage items were not previously submitted to the insurer;
- (2) copies of reports, estimates, photographs, and other items reasonably supporting the insured's additional damage items;
- (3) a statement that the insured will cooperate in allowing the insurer to inspect the insured property for purposes of investigating the additional damage items;
- (4) the amount of the attorney's fees the insured reasonably incurred in asserting the claim against the insurer; and
- (5) a stated amount that includes the amounts described by Subdivisions (1) and (4) that the insured will accept in full and final satisfaction of the claim.

(b-2) Requires that notice required by this section be sent to the insurer by certified mail, return receipt requested.

(c) Provides that notice under this section, rather than provides that the notice, is not required if giving notice is impracticable because the action is required to be filed to prevent the statute of limitations from expiring, or is asserted as a counterclaim.

SECTION 7. Amends Section 541.155, Insurance Code, as follows:

Sec. 541.155. New heading: ABATEMENT; DISMISSAL. (a) Authorizes a person against whom an action under this subchapter is pending who does not receive notice as required by Section 541.154(b), rather than Section 541.154, to file a plea in abatement not later than the 30th day after the date the person files an original answer in the court in which the action is pending. Makes a nonsubstantive change.

(b) - (d) Makes conforming changes.

(d-1) Authorizes a person against whom an action under this subchapter is pending who does not receive notice as required by Section 541.154(b-1) to file a motion to dismiss not later than the 30th day after the date the person files an original answer in the court in which the action is pending.

(d-2) Requires the court to grant the motion under Subsection (d-1) if, after a hearing, the court finds that the person is entitled to dismissal because the claimant did not provide notice as required by Section 541.154(b-1).

(e) Provides that Subsections (d-1) and (d-2) do not apply if Section 541.154(c) applies, rather than providing that this section does not apply if Section 541.154(c) applies. Prohibits the action from, if Section 541.154(c) applies, being dismissed but requires that it be abated in accordance with Subsections (b), (c), and (d).

SECTION 8. Amends Section 542.053, Insurance Code, by adding Subsection (e), as follows:

(e) Provides that this subchapter is not intended to create any right of action against an individual employed by an insurer as an adjuster or a third-party individual or entity engaged by an insurer to provide adjusting, estimating, consulting, engineering, or other services related to the insurer's adjustment of a claim. Provides that an insurer listed in Section 542.052 (Applicability of Subchapter) is solely responsible under this subchapter for an action of an individual employed by the insurer as an adjuster or a third-party

individual or entity engaged by the insurer to provide adjusting, estimating, consulting, engineering, or other services related to the insurer's adjustment of a claim.

SECTION 9. Amends Subchapter B, Chapter 542, Insurance Code, by adding Section 542.0595, as follows:

Sec. 542.0595. PRIOR NOTICE OF ACTION; ABATEMENT OR DISMISSAL. (a) Prohibits an insured from bringing suit under Section 542.060 in connection with a claim for property damage or loss unless the insured has provided written notice to the insurer with respect to the claim in accordance with Section 541.154.

(b) Provides that a suit under Section 542.060 is subject to abatement or dismissal to the same extent and in the same manner provided by Section 541.155 for an action under Subchapter D (Private Action for Damages), Chapter 541.

SECTION 10. Amends Section 542.060, Insurance Code, as follows:

Sec. 542.060. LIABILITY FOR VIOLATION OF SUBCHAPTER. (a) Provides that if an insurer that is liable for a claim under an insurance policy knowingly fails to act in compliance, rather than an insurance policy is not in compliance, with this subchapter, the insurer is liable to pay the holder of the policy or the beneficiary making the claim under the policy, in addition to the amount of the claim, interest on the unpaid amount of the claim at the rate of 18 percent a year as damages, together with reasonable attorney's fees.

(a-1) Provides that for purposes of Subsection (a), an insurer knowingly fails to act in compliance with this subchapter only if the insurer is actually aware of the insurer's failure to pay a claim for which the insurer is liable. Provides that there is no liability under this section for a claim with respect to which there is a bona fide dispute as to whether the insurer is liable.

(b) Requires interest and attorney's fees payable under this section to be taxed, if a suit is filed, as part of the costs in the case, rather than requiring attorney's fees to be taxed, if a suit is filed, as part of the costs in the case.

(c) Provides that the liability for interest and attorney's fees provided by this section are the exclusive remedy for a violation of this subchapter. Provides that this section is not intended to affect a right or remedy provided by Chapter 541 (Unfair Methods of Competition and Unfair or Deceptive Acts or Practices) or any other law outside this subchapter.

SECTION 11. Authorizes Subchapter B, Chapter 542, Insurance Code, by adding Section 542.0601, as follows:

Sec. 542.0601. LIABILITY WITH RESPECT TO CERTAIN CLAIMS. Provides that an insurer is not liable under Section 542.060 with respect to:

(1) a claim received by the insurer if it is determined through arbitration, litigation, or another dispute resolution process that the claim is not covered under the insurance policy, was properly rejected, is invalid, otherwise should not be paid by the insurer; or

(2) a claim with respect to which an appraisal process:

(A) is invoked under the terms of the policy by the insurer or insured before the commencement of litigation, by the defendant within 60 days after receiving notice of the commencement of litigation, or by the plaintiff after the commencement of litigation; and

(B) results in a valid, signed award the amount of which is paid by the insurer not later than the 15th day after the date the insurer receives the award, consistent with the coverage, conditions, and limits provided by the policy, minus any prior payments and any applicable deductible amount.

SECTION 12. Amends Subtitle A, Title 10, Insurance Code, by adding Chapter 1808, as follows:

CHAPTER 1808. CLAIMS FOR PROPERTY DAMAGE

Sec. 1808.001. DEFINITION. Defines, in this chapter, "claim for property damage."

Sec. 1808.002. APPLICABILITY OF CHAPTER. Provides that this chapter applies to any claim under or related to an insurance policy that provides insurance coverage against damage to or loss of real property or tangible personal property, including a policy issued by an insurance company, reciprocal or interinsurance exchange, mutual insurance company, capital stock insurance company, county mutual insurance company, Lloyd's plan, or other legal entity authorized to write property insurance in this state.

Sec. 1808.003. CLAIM FILING PERIOD. (a) Requires a claimant to give an insurer prompt written notice of a claim for property damage after property covered under the policy is damaged or lost, but in no event later than the second anniversary of the date on which the damage to or loss of property that is the basis of the claim occurs.

(b) Provides that failure to provide notice of a claim for property damage by the second anniversary of the date on which the damage to or loss of property that is the basis of the claim occurs is an absolute bar to recovery on the claim.

(c) Provides that nothing in this section precludes an insurer from raising any defense available under the terms of its policy relating to prompt notice or that is otherwise available under the law.

SECTION 13. Amends Section 4102.051(a), Insurance Code, to delete a reference to Section 4102.069 (Registration Program for Trainees) from a list of persons prohibited from acting as a public insurance adjuster in this state unless the person holds a license issued under sections set forth herein.

SECTION 14. Amends Section 4102.066(a), Insurance Code, to delete existing text requiring the commissioner of insurance to collect in advance a nonrefundable fee for a public insurance adjuster trainee certificate under Section 4102.069, a registration fee in an amount to be determined by rule by the commissioner.

SECTION 15. Amends Section 4102.103, Insurance Code, by adding Subsection (d), to prohibit a license holder from entering into a contract with an insured and collecting a commission as provided by Section 4102.104 (Commissions) without the intent to actually perform the services of a licensed public insurance adjuster for the insured.

SECTION 16. Amends Section 4102.104(d), Insurance Code, to prohibit a public insurance adjuster from accepting any payment that violates the provisions of this section, rather than Subsection (c) (relating to requirements for payment of a policy).

SECTION 17. Amends Section 4102.158, Insurance Code, by amending Subsection (a) and adding Subsections (d), (e), and (f), as follows:

(a) Prohibits a license holder from engaging in any other activities that may reasonably be construed as presenting a conflict of interest, including soliciting or accepting any remuneration from, having a financial interest in, or having any immediate family member own or operate, any salvage firm, repair firm, construction firm, or other firm that obtains business in connection with any claim the license holder has a contract or agreement to adjust. Makes a nonsubstantive change.

(d) Prohibits a license holder from entering into a contract with an insured for the primary purpose of referring the insured to an attorney and without the intent to actually perform for the insured the services of a licensed public insurance adjuster.

(e) Prohibits a license holder from acting on behalf of an attorney in having an insured sign an attorney representation agreement.

(f) Requires a license holder to become familiar with and at all times act in conformance with the criminal barratry statute set forth in Section 38.12 (Barratry and Solicitation of Professional Employment), Penal Code.

SECTION 18. Amends Section 4102.160, Insurance Code, as follows:

Sec. 4102.160. CERTAIN PAYMENTS PROHIBITED. Prohibits a license holder from:

(1) advancing money to any potential client or insured; or

(2) paying, allowing, or giving, or offering to pay, allow, or give, directly or indirectly, to a contractor, attorney, or any other person who is not a licensed public insurance adjuster a fee, commission, or other valuable consideration for the referral of an insured to the public insurance adjuster for purposes of the insured, rather than for the referral of an insured to the public insurance adjuster based on, entering into a contract with that public insurance adjuster or for any other purpose.

Deletes existing Subdivision (3) prohibiting a license holder from otherwise offering to pay a fee, commission, or other valuable consideration exceeding \$100 to a person not licensed as a public insurance adjuster for referring an insured to the license holder.

SECTION 19. Amends Subchapter D, Chapter 4102, Insurance Code, by adding Section 4102.164, as follows:

Sec. 4102.164. ACCEPTANCE OF REFERRAL PAYMENTS PROHIBITED. (a) Prohibits a licensed public insurance adjuster from accepting a fee, commission, or other valuable consideration of any nature, regardless of form or amount, in exchange for the referral by a licensed public insurance adjuster of an insured to any third-party individual or firm, including but not limited to an attorney, appraiser, umpire, construction company, contractor, or salvage company.

(b) Requires the commissioner to adopt rules necessary to implement and enforce this section.

SECTION 20. Amends the heading to Section 27.02, Business & Commerce Code, to read as follows:

Sec. 27.02. CERTAIN OFFERS MADE AND INFORMATION PROVIDED IN CONNECTION WITH INSURANCE CLAIMS.

SECTION 21. Amends Sections 27.02(a) and (b), Business & Commerce Code, as follows:

(a) Provides that a person who sells goods or services, including a contractor, appraiser, estimator, or insurance restoration contractor, commits an offense if, in connection with a claim for property loss or damage under a property or casualty insurance policy:

(1) the person advertises or promises to pay, waive, absorb, rebate, subsidize, credit, or otherwise cover for any reason all or part of any applicable insurance deductible or other uninsured amount owed by an insured under the terms of the policy;

(2) the person knowingly provides or causes to be provided to an insurer any estimate or other statement as to the cost of repair for the good or service to be provided that has been increased, inflated, or otherwise manipulated by an amount equal to or greater than all or part of the applicable insurance deductible or other uninsured amount owed by an insured under the policy; or

(3) the person knowingly provides or causes to be provided to an insurer any false or misleading material information within any estimate, bid, proposal, or other statement as to the scope of damage or cost of repair for the good or service to be provided, rather than paid by the person to an insurer on behalf of an insured or remitted to an insured by the person as a rebate.

Deletes existing text providing that a person who sells goods or services commits an offense if the person advertises or promises to provide the good or service and to pay all or part of any applicable insurance deductible or a rebate in an amount equal to all or part of any applicable insurance deductible, the good or service is paid for by the consumer from proceeds of a property or casualty insurance policy, and the person knowingly charges an amount for the good or service that exceeds the usual and customary charge by the person for the good or service by an amount equal to or greater than all or part of the applicable insurance deductible.

(b) Provides that a person who is insured under a property or casualty insurance policy commits an offense if the person:

(1) knowingly submits a claim under the policy based on conduct charges that are in violation of Subsection (a), rather than submits a claim under the policy based on charges that are in violation of Subsection (a) of this section; or

(2) knowingly allows a claim in violation of Subsection (a) to be submitted, unless the person promptly notifies the insurer of the conduct in violation of Subsection (a), rather than knowingly allows a claim in violation of Subsection (a) of this section to be submitted, unless the person promptly notifies the insurer of the excessive charges.

SECTION 22. Amends Section 38.12(d), Penal Code, as follows:

(d) Provides that a person commits an offense if the person:

(1) is an attorney, chiropractor, physician, surgeon, public insurance adjuster, as defined by Section 4102.001 (Definitions), Insurance Code, or private investigator licensed to practice in this state or any person licensed, certified, or registered by a health care regulatory agency of this state; and

(2) with the intent to obtain professional employment for the person or for another, provides or knowingly permits to be provided to an individual who has not sought the person's employment, legal representation, advice, or care a written communication or a solicitation, including a solicitation in person or by telephone, that:

(A)-(F) Makes no change to these subdivisions; or

(G) concerns the proposed adjustment of a property damage insurance claim and is made by a person other than the licensed public insurance adjuster who would be directly providing the proposed public insurance adjusting services to the recipient of the communication.

SECTION 23. Repealer: Section 4102.069 (Registration Program for Trainees), Insurance Code.

SECTION 24. Provides that Chapter 541, Insurance Code, as amended by this Act, applies only to conduct that occurs on or after the effective date of this Act. Provides that conduct that occurs before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 25. Provides that Subchapter B, Chapter 542, Insurance Code, as amended by this Act, applies only to a claim for which notice of claim is provided to an insurer on or after the effective date of this Act. Provides that a claim for which notice of claim is provided to an insurer before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 26. Provides that Chapter 1808, Insurance Code, as added by this Act, applies only to a claim under an insurance policy delivered, issued for delivery, or renewed on or after January 1, 2016. Provides that a claim under a policy delivered, issued for delivery, or renewed before January 1, 2016, is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 27. Provides that the repeal by this Act of Section 4102.069, Insurance Code, does not affect the authority of a person to act under a temporary certificate issued by the Texas Department of Insurance under that section before the effective date of this Act.

SECTION 28. Provides that Sections 4102.103(d) and 4102.158(d), Insurance Code, as added by this Act, apply only to a contract entered into on or after the effective date of this Act.

SECTION 29. (a) Provides that except as provided by this section, Section 4102.104, Insurance Code, as amended by this Act, applies only to payment for a service performed on or after the effective date of this Act.

(b) Provides that payment for a service performed before the effective date of this Act or performed after the effective date of this Act under a contract entered into before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 30. Provides that Section 4102.160, Insurance Code, as amended by this Act, and Section 4102.164, Insurance Code, as added by this Act, apply only to a referral made on or after the effective date of this Act. Provides that referral made before the effective date of this Act is governed by the law as it existed immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 31. Provides that the changes in law made by this Act apply only to an offense committed on or after the effective date of this Act. Provides that an offense committed before the effective date of this Act is governed by the law in effect when the offense was committed, and the former law is continued in effect for that purpose. Makes application of this Act prospective.

SECTION 32. Effect date: September 1, 2015.