



February 20, 2008

Task Force on Citizens Property Insurance Claims Handling & Resolution

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Re: FJA Comments on SB 1018 by Sen. Fasano

Members:

Thank you for the opportunity to submit our thoughts and suggestions on SB 1018 – Property Insurance Appraisal Umpires by Senator Mike Fasano.

While we question the need to regulate appraisal umpires, we respect your request that we submit our proposed amendments and thoughts directly to the Task Force on Citizens Property Insurance Claims Handling and Resolution. We also appreciate the opportunity to address the Task Force next Tuesday, February 26th. Speaking on behalf of the Florida Justice Association will be Richard Benrubi, West Palm Beach, chair of our Insurance Committee, and Jason Mulholland of Tampa.

As members of the FJA review this legislation over the next few weeks, additional concerns are certain to be raised. Please consider the amendments and comments we submit today as a starting point for our discussions, as all of our members who are interested in this issue may not have had ample time to review the document and make additional suggestions. Nevertheless, in an effort to meet the deadline given to us, we submit our draft responses to SB 1018, with the caveat that some of our submissions may be subject to changes and additions.

With that, we look forward to discussing these issues further.

Thank you.

Debra Henley

Debra Henley
Deputy Executive Director
Florida Justice Association

Sen./Rep. _____ moved the following amendment:

Amendment 1

On line 354, after the period

insert:

However, retired judges and Circuit Court civil Certified Mediators approved by the Florida Supreme Court pursuant to the Florida Rules of Certified and Court Appointed Mediators or from the list of approved mediators pursuant to Rule 69B-166.031, F.A.C. are exempt from the umpire licensing requirements of this section.

EXPLANATION: Retired judges and Circuit Court civil certified mediators are currently serving as umpires. These individuals are qualified and independent and possess a wealth of experience in resolving disputes. They are highly unlikely to subject themselves to the requirements of a separate application process, renewals, fees, courses and fingerprinting, and consequently a pool of objective and qualified umpires will be lost.

This change exempts retired judges and certified mediators from the licensing requirements.

Sen./Rep. _____ moved the following amendment:

Amendment 2

Remove lines 358 - 360

and insert:

626.9941, 626.9942, and 626.9934, is created to read:

626.9931 Purpose.—The Legislature finds that it is in the interest of the public welfare to regulate property insurance **loss appraisers and property insurance**

EXPLANATION: We could not find support in the record of the Task Force for the finding that it is in the best interests of the public welfare that appraisal umpires should be licensed. To the contrary, the experience of FJA members who practice in this area is that many of the problems with the appraisal process involve the conduct of the insurance appraisers retained by the insurance industry, and the lack of timeframes for commencement and completion of the process.

A section is added in a subsequent amendment that would impose some requirements and ethical standards on appraisers, as well as some timeframes.

Sen./Rep. _____ moved the following amendment:

Amendment 3

Between lines 375 and 376

insert:

(2) "Competent" means properly or sufficiently qualified or capable to perform any given appraisal.

(3) "Independent" means not subject to control, restriction, modification or limitation by the appointing party.

Renumber subsequent subsections

EXPLANATION: Provides definitions of terms used in the bill. Currently, standards for appraisers are controlled by policy language that is not consistent from contract to contract. These definitions would apply to all appraisers consistently.

Sen./Rep. _____ moved the following amendment:

Amendment 4

On line 495, strike 24

and insert: 4

EXPLANATION: This changes makes the classroom course work requirement for all-lines property and casualty adjusters the same as the classroom course work for the other professionals qualified to become umpires. There is no reason the course work requirement should be greater for this group of individuals.

Sen./Rep. _____ moved the following amendment:

Amendment 5

Remove lines 500-503

~~(d) Has acted as an appraiser or umpire in a minimum of 20 appraisal proceedings under a property insurance contract within the 4 years immediately preceding the date on which an insurer or insured demands an appraisal.~~

EXPLANATION: Deletes licensing qualification tied to the number of appraisal completed by date of demand.

This language would be problematic because a license cannot be tied to variable events, such as a given demand for appraisal. This language should be deleted or changed to tie the trigger to the effective date of this act.

Sen./Rep. _____ moved the following amendment:

Amendment 6

Between lines 672 and 673

insert:

626.9943 Ethical Standards for Property Insurance Loss

Appraisers.--

(1) INTEGRITY AND IMPARTIALITY.--

(a) An appraiser may not accept an appointment unless he can serve impartially; can serve independently from the party appointing him; is competent to serve; and is available to promptly commence the appraisal and thereafter devote the time and attention to its completion that the parties are reasonably entitled to expect.

(b) An appraiser should conduct the appraisal process so as to advance the fair and efficient resolution of the matters submitted for decision. An appraiser should make all reasonable efforts to prevent delays in the appraisal process, harassment of parties or other participants or other abuse or disruption of the appraisal process.

(c) Once an appraiser has accepted an appointment, the appraiser should not withdraw or abandon the appointment unless compelled to do so by unanticipated circumstances that would render it impossible or impracticable to continue.

(d) The appraiser should, after careful deliberation, decide all issues submitted for determination. An appraiser should decide no other issues. An appraiser should decide all matters justly, exercising independent judgment, and should not permit outside pressure to affect the decision. An appraiser should not delegate the duty to decide to any other person.

(2) COMMUNICATIONS WITH PARTIES.--If an agreement of the parties establishes the manner or content of the communications between the appraisers and the parties, the appraiser should abide by such agreement. In the absence of such agreement, an appraiser should not discuss a proceeding with any party in the absence of any other party,

except in the following circumstances:

(a) When the appointment of the appraiser is being considered, the prospective appraiser may ask about the identities of the parties, counsel and the general nature of the case and may respond to inquiries from a party or its counsel designed to determine his suitability and availability for the appointment;

(b) To consult with the party who appointed the appraiser concerning the selection of a neutral umpire; and

(c) To make arrangements for any compensation to be paid with the party who appointed the appraiser.

(d) With the party who appointed the appraiser to make arrangements for obtaining materials and inspection of the property. Such communications shall be limited to scheduling and the exchange of materials.

(e) There shall be no communications whereby a party dictates to an appraiser what the result of the proceedings must be, what matters or elements may be included or considered by the appraiser, or what actions the appraiser may take.

(3) GIFTS AND SOLICITATION.--An appraiser may not give or accept any gift, favor, loan, or other item of value in an appraisal process. During the appraisal process, an appraiser may not solicit or otherwise attempt to procure future professional services.

(4) CONFLICTS OF INTEREST.--An appraiser may not participate in a matter that presents a clear or undisclosed conflict of interest. A conflict of interest arises when any known existing or past financial, business, professional or personal relationship between the appraiser and the appraisal participants or the subject matter of the dispute might reasonably affect impartiality or lack of independence in the eyes of any of the parties.

(5) BURDEN OF DISCLOSURE.--The burden of disclosure of any potential conflict of interest rests on the appraiser. Disclosure must be made before accepting an appointment, or if the conflict of interest arises after accepting an appointment, then as soon as practical after the appraiser becomes aware of the interest or relationship giving rise to the potential conflict of interest.

(6) EFFECT OF DISCLOSURE.--After appropriate disclosure, the appraiser may serve if all parties agree. However, if an appraiser is requested to withdraw by all parties, he must withdraw. If an appraiser is requested to withdraw because of alleged partiality, the appraiser should withdraw. Should the appraiser refuse to withdraw, a party may challenge the appraiser's partiality by filing a petition with a county or circuit court in the jurisdiction in which the covered property is located.

(7) FEES and EXPENSES.--An appraiser holds a position of trust. Fees charged for appraisal services shall be reasonable and consistent with the nature of the case. An appraiser shall be guided by the following general principles in determining fees:

(a) Any charges for services as an appraiser based on time may not exceed actual time spent or allocated; and

(b) Charges for costs shall be only for those actually incurred.

(8) MAINTENANCE OF RECORDS.--An appraiser shall maintain records to support charges for services and expenses and upon request shall provide an accounting of all applicable charges to the parties.

(9) ADVERTISING.--An appraiser may not engage in marketing practices that contain false or misleading information. An appraiser shall ensure that any advertisements of the appraiser's qualifications, services to be rendered, or the appraisal process are accurate and honest. An appraiser may not make claims of achieving specific outcomes or promises implying favoritism for the purpose of obtaining business.

(10) SKILL AND EXPERIENCE.--An appraiser shall decline an appointment or selection, withdraw, or request appropriate assistance when the facts and circumstances of the appraisal are beyond the appraiser's skill or experience.

EXPLANATION: Creates a new section 626.9943. Adds ethical standards for Property Insurance Loss Appraisers. These standards are taken directly from the American Arbitration Association and American Bar Association Code of Ethics for Arbitrators in Commercial Disputes. These rules govern the conduct, communications and standards required of appraisers and should be considered by the Task Force, in the event umpires are to be regulated.

Sen./Rep. _____ moved the following amendment:

Amendment 7

Remove lines 684 and 685

and insert:

comply with the proof of loss obligations of the insured as set forth in the policy conditions. The insurer will be deemed to have waived its right to demand appraisal if it fails to invoke appraisal within 30 days of the insured's substantial compliance with the proof of loss obligation as set forth in the policy conditions.

EXPLANATION: One of the major problems with the appraisal process is the lack of timeframes for requesting appraisal and for the completion of appraisals. Insurers often wait until the case is in suit before demanding appraisal. This practice creates unnecessary and unfair delays for the insured and should be prohibited.

This amendment requires the insurer to invoke the appraisal process, if they desire to, within 30 days of the insured submitting proof of loss, or waive the right to demand appraisal.

NOTE: An alternative timeline may need to be drafted to account for additional time needed to evaluate large commercial losses or a catastrophic event involving a high volume of claims.

Sen./Rep. _____ moved the following amendment:

Amendment 8

Remove line 686

and insert:

(1) Each party shall select a competent, **impartial**, and
independent

EXPLANATION: Requires that the appraiser also be impartial.

Sen./Rep. _____ moved the following amendment:

Amendment 9

Remove line 691

and insert:

insurance appraisal umpires or is otherwise qualified and exempt from licensure as provided in s. 626.112(10). If the appraisers are unable to

EXPLANATION: Allows selection of a retired judge or certified civil court appointed mediator to serve as an umpire as provided in an earlier amendment.

Sen./Rep. _____ moved the following amendment:

Amendment 10

Remove lines 704-710

and insert:

(3) Within 60 days of having been appointed, each appraiser shall appraise the lost and submit a written report to the other appraiser, separately stating the cost of the loss, the actual cash value, or the cost to repair or replace each item. Within the following 30 days, the appraisers shall attempt to resolve any differences in their appraisals and reach a mutual agreement on all matters. If the appraisers are unable to agree, they shall, within 5 days, submit the differences in their findings in writing to the umpire.

EXPLANATION: Furthers the goal of creating fair timeframes for the appraisal process by requiring the appraisals to be completed with 60 days; thereafter for both appraisers to consult and try to reach an agreement within 30 days; and failing that, to submit the differences to an umpire within 5 days.

Sufficient timeframes must be enacted to prevent the appraisal process from taking in upwards of 1 year in some instances.

Sen./Rep. _____ moved the following amendment:

Amendment 11

Remove lines 720-723

and insert:

(6) The appraisal award is binding on the insurer and the insured with regard to the amount of the loss. ~~If the insurance policy so provides, the insurer retains the right to assert that there is no coverage under the policy for the loss as a whole or that there has been a violation of the policy conditions regarding fraud, lack of notice or failure to cooperate.~~

EXPLANATION: this language is consistent with Florida Supreme Court rulings on the scope of the appraisal process. The Florida Supreme Court has established in *Johnson v. Nationwide Mutual Insurance Company* (828 So.2d 1021) and *State Farm Fire and Casualty Company v. Licea* (685 So.2d 1285) what can be contested in the appraisal process. If coverage is going to be disputed, the insured should not have been subjected to the appraisal process to begin with.

The amendment specifies the rights that the insurer does retain if the policy so provides.

Sen./Rep. _____ moved the following amendment:

Amendment 12

On line 730, after the period (.)

insert:

However, nothing in this subsection should be construed in any manner to affect an insured's claim for attorneys' fees under s. 627.428.

EXPLANATION: Under current Florida law, a consumer who prevails against an insurer has the right to obtain attorneys fees in order to be made whole. A consumer would not be able to make repairs on their home if they were required to pay their attorney out of the proceeds.

This amendment clarifies that nothing stated in this bill addressing who pays the costs of appraisal shall impact this important insurance consumer right.

Sen./Rep. _____ moved the following amendment:

Amendment 13

Remove lines 727 and 728

and insert:

determination of the amount of the loss is 50 percent greater than the insurer's preappraisal estimate of the loss communicated to the insured in writing, the insurer shall pay all of the

EXPLANATION: The costs associated with the appraisal process can be substantial, and under the bill are to be shared equally - with an exception.

The trigger for the exception requiring the insurer to pay these costs should be tied to the insurer's original estimate of the loss. These oftentimes "low ball" offers by the insurer is what causes the insured to have to go through the appraisal process to begin with. Consequently, beating the insurer's original assessment by 50% is what should trigger the cost shift, rather than 50% of the insurer's appraisal.

Florida Justice Association
Additional Comments re: SB 1018

Comment #1 (Page 19, line 533)

Here DFS is given authority regarding violations by the umpires, but the language is too vague to provide a workable framework for enforcement. Also, an umpire can be said to have violated a duty imposed upon her or him by the terms of a contract whenever the parties have differing interpretations of what the insurance policy requires. This could lead to intimidation when umpires disagree with the other appraiser.

Comment #2 (Page 20, line 574)

This subparagraph (5) designed to prevent collusion and bias. If this section is designed to reveal the existence or extent of financial incentives, it should be required that all umpires maintain accounting records reflecting the parties to every appraisal in which they participate and the fee charged for each. This way, parties to the appraisal will know if a particular umpire has been retained on hundreds of cases for a particular insurer, and what percentage of the umpire's income derives from appraisals with a particular insurer.