

Insurance law

Fee statute win for plaintiffs attorneys, loss for policy holders

By Jason Wolf
Daily Business Review

The official end of hurricane season is near. And here in South Florida we escaped without any devastating catastrophes, but we continue to



watch one-third of the nation dig out from the aftermath of Hurricane Sandy. Although the season may be drawing to a close,

another will begin too soon; now is a good time to explore the way property insurance litigation is rapidly changing the legal landscape in Florida.

While South Florida hasn't faced a major hurricane since Wilma came and went on Oct. 24, 2005, we had two named storms this season. This means that claims are in the works — and many will become lawsuits over the next three to six months.

First-party property lawsuits — when a policyholder sues an insurance company, usually because the insurer denied their claim or paid less for a claim than the policyholder believed was warranted — are popular among plaintiff attorneys because of a statute that the general public doesn't pay much attention to but is key for the plaintiff's bar: Florida Statute 627.428 awards attorney fees to lawyers who successfully obtain a judgment against an insurance company.

Cashing in

The statute doesn't limit fees by percentage or by dollar amount, which can occasionally lead to absurd results. For example, a plaintiff/policyholder wins a few dollars in a lawsuit, but the attorney wins more than \$100,000 for

litigating the case through final verdict.

Since SB 408 was enacted into law, after a contentious fight in the legislature, there has been a tangible rise in these first-party property lawsuits.

Plaintiff attorneys see the fee statute as a win-win for everyone. They know that insurers usually settle cases rather than risk the potentially devastating situation in which the plaintiff wins a little bit of money at trial, but the insurer is stuck with a massive legal bill, both to its own defense attorneys and to the plaintiff attorney. This means

first-party property lawsuits have become a volume based business for many plaintiff firms. And insureds who become plaintiffs have little to lose.

It's much easier — and almost always cheaper — for the insurer to settle the case.

Stacked deck

There is another reason insurance companies are reluctant to take first-party property cases all the way to trial: bad faith. If the fee statute is the Holy Grail, bad faith is nirvana for plaintiff attorneys.

Bad faith is governed by statute 624.155 of the Florida Statutes for the Insurance Code regarding civil remedies, and it means just what it sounds like: the insurance company acted unfairly to its policyholder, either specifically for the claim at issue or in its general claims handling practices.

To even bring a bad faith claim, a policyholder needs to first establish liability on the part of the insurer, usually through a breach of contract lawsuit.

This means bad faith is an entirely separate lawsuit that the insurance company has to defend if it risks going to trial in the initial lawsuit and losing the breach of contract action. The deck is heavily stacked against insurers.

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More attorneys, more litigation

SB 408 also placed limitations on the earnings and business practices of public adjusters.

Initially, when states started creating the concept of public adjusters, it was a well-intentioned concept by which public adjusters would adjust claims on behalf of the public — instead of on behalf of insurance companies — and help unsophisticated policyholders deal with insurance companies. As time progressed, public adjusters, who earn a contingent percentage of the insured's recovery, became increasingly looked upon as problematic by the insurance industry because of the perception that they could manufacture higher than needed estimates, merely so that they could obtain a percentage of the recovery.

The inherent and glaring flaw in the process whenever a public adjuster is involved may result in an unscrupulous or self-serving public adjuster inflating the estimate so he can increase his own recovery is self-evident. This is not to say that every public adjuster is out to cheat the insurance company, but the increases in litigation and claims has tarred all public adjusters with a broad brush — whether deserved or not.

SB408 placed limits on what public adjusters could earn and numerous limitations on their

business practices and contingency percentages. As a result, there are now more lawsuits in which public adjusters are not involved in the process at all.

This means that attorneys are becoming involved in lawsuits from the beginning. A few years ago, a policyholder who had an insurance claim would call the insurer to file a claim directly. Now the policyholder immediately turns this work over to an attorney. It used to be a rare occurrence when I defended lawsuits in which the plaintiff's attorney was involved from the get-go. These days, it happens approximately 75 percent of the time.

On a practical level, it's difficult to argue that more of these types of lawsuits are a benefit to either the policyholder or the insurance companies. On the one hand, with an attorney working for you from day one, you can probably be confident that your rights will be protected.

But, if the attorney's sole goal is to work up the case, then settle it after discovery but before trial so he can get his fees — and then move onto the next one — is the policyholder really benefiting? No doubt there are some instances in which having an attorney from day one may be helpful, such as for a major loss. But are attorneys really necessary every time your toilet

overflows and the baseboard gets a little soggy? Does anyone benefit besides the plaintiff attorney?

The industry's future

So what does the future hold for the property insurance industry?

Will insurance companies lobby for changes to the fee statute? If attorneys couldn't get fees for suing insurance companies, this practice area would be reduced to a fraction of its present condition, as attorneys would only become involved in large-dollar lawsuits and policyholders with smaller claims would be unable to find legal redress.

As claims increase, and insurance companies are forced to spend more money on defense attorneys, who do you think will eventually bear the brunt of the increase in spending? It will eventually trickle down to the policyholders in the form of increased premiums.

As with many legal practice areas that come and go over the years in response to changes in the law, first-party property litigation is currently thriving. How long this lasts is anyone's guess.

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