

BILL ANALYSIS

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AUTHOR'S / SPONSOR'S STATEMENT OF INTENT

In 1995, the Texas Legislature enacted legislation which authorized the commissioner of insurance to establish the Texas Fair Access to Insurance Requirements Plan, commonly known as the Texas FAIR Plan Association or TFPA, to deliver residential property insurance to Texas residents in areas designated by the commissioner as underserved.

The FAIR Plan was activated for the entire state of Texas in December 2002 to address insurance availability problems resulting from the mold crisis, during which significant mold and water damage claims were filed in Texas and companies significantly reduced their writing of new and renewal policies.

TFPA operates as an insurance company by issuing policies, collecting premiums, and paying losses. The FAIR Plan provides limited coverage for one- and two-family residential dwellings, townhouse units, manufactured homes and condominium units that meet its underwriting standards. As a market of last resort, coverage available through the FAIR Plan is not as comprehensive as coverage available through the voluntary market. The FAIR Plan does not compete with the private market and applicants must have two declinations from other insurers in order to obtain coverage with the FAIR Plan.

As of September 2016, the FAIR Plan had approximately 125,000 policies in force statewide, with nearly 70 percent or 86,000 estimated policies in force located in Harris County alone. In total, TFPA represents nearly \$21 million in combined exposure including dwelling, contents and loss of use coverages.

Since 2008, after the landfall of Hurricane Ike, the FAIR Plan experienced a significant increase in litigated claims. Specifically, 23,827 claims with a total loss of approximately \$316 million was reported as of September 2016.

Unlike its sister organization, the Texas Windstorm Insurance Association, TFPA's claims process has not been updated to reflect similar claims handling provisions to safeguard against frivolous lawsuits.

SB 1537 amends the Texas Insurance Code to establish provisions governing claims arising under insurance policies issued by the FAIR Plan. The bill sets the deadline by which a claim must be filed, establishes certain limits on recovery, and sets out procedures for resolving certain claim disputes.

As proposed, S.B. 1537 amends current law relating to dispute resolution for certain claims arising under insurance policies issued by the Fair Access to Insurance Requirements (FAIR) Plan Association and authorizes fees.

RULEMAKING AUTHORITY

Rulemaking authority is expressly granted to the commissioner of insurance in SECTION 3 (Section 2211.159, Insurance Code) and SECTION 4 (Sections 2211.175, 2211.179, and Section 2211.181, Insurance Code) of this bill.

SECTION BY SECTION ANALYSIS

SECTION 1. Amends Section 2211.003, Insurance Code, by adding Subsection (c), to provide that Subsection (a) (relating to an applicant or affected insurer is entitled to appeal to Texas Fair Plan Association) does not apply to a person who is required to resolve a dispute under Subchapter D-1.

SECTION 2. Amends Subchapter A, Chapter 2211, Insurance Code, by adding Sections 2211.004 and 2211.005, as follows:

Sec. 2211.004. CERTAIN CONDUCT IN DISPUTE RESOLUTION PROHIBITED. (a) Defines "presiding officer."

(b) Requires the presiding officer, if a person insured under this chapter is assigned to act as presiding officer to preside over or resolve a dispute involving the Texas Fair Plan Association (TFPA) and another person insured under this chapter, to, not later than the seventh day after the date of assignment, give written notice to TFPA and to each other party to the dispute, or TFPA's or other party's attorney, that the presiding officer is insured under this chapter.

(c) Authorizes TFPA or other party that receives notice under Subsection (b), in a proceeding with respect to which the commissioner of insurance (commissioner) has authority to designate the presiding officer, to file with the commissioner a written objection to the assignment of the presiding officer to the dispute. Requires the written objection to contain the factual basis on which TFPA or other party objects to the assignment.

(d) Requires the commissioner to assign a different presiding officer to the dispute if, after reviewing the objection filed under Subsection (c), the commissioner determines that the presiding officer original assigned to the dispute has a direct financial or personal interest in the outcome of the dispute.

(e) Requires TFPA or other party to file an objection under Subsection (c) not later than the earlier of certain days.

(f) Authorizes the commissioner to, on a showing of good cause, extend the deadline to file an objection under Subsection (e).

Sec. 2211.005. APPLICABILITY OF CERTAIN OTHER LAW. (a) Prohibits a person from bringing a private action against TFPA, including a claim against an agent or representatives of TFPA, under Chapter 541 (Unfair Methods of Competition and Unfair or Deceptive Acts or Practices) or 542 (Processing and Settlement of Claims). Authorizes a class action under Subchapter F (Class Actions by Attorney General or Private Individual), Chapter 541, or under Rule 42, Texas Rules of Civil Procedure, to be brought against TFPA only by the attorney general at the request of the Texas Department of Insurance (TDI), notwithstanding any other provision of this code or this chapter.

(b) Provides that Chapter 542 does not apply to the processing and settlement of claims by TFPA.

SECTION 3. Amends Subchapter D, Chapter 2211, Insurance Code, by adding Sections 2211.158 and 2211.159, as follows:

Sec. 2211.158. REQUIRED POLICY PROVISIONS: DEADLINE FOR FILING CLAIM; NOTICE CONCERNING RESOLUTION OF CERTAIN DISPUTES. (a) Requires an insurance policy issued by TFPA to:

(1) require an insured to file a claim under the policy not later than the first anniversary of the date on which the damage to property that is the basis of the claim occurs; and

(2) contain, in boldface type, a conspicuous notice concerning the resolution of disputes under the policy, including certain information.

(b) Authorizes the commissioner, on a showing of good cause by a person insured under this chapter, to extend the one-year period described by Subsection (a)(1) for a period not to exceed 180 days.

Sec. 2211.159. VOLUNTARY ARBITRATION OF CERTAIN COVERAGE AND CLAIM DISPUTES. (a) Authorizes a person insured under this chapter to elect to purchase a binding arbitration endorsement in a form prescribed by the commissioner. Requires a person who elects to purchase an endorsement under this section to arbitrate a dispute involving an act, ruling, or decision of TFPA relating to the payment of, the amount of, or the denial of the claim.

(b) Requires an arbitration under this section to be conducted in the manner and under rules and deadlines prescribed by the commissioner by rule.

(c) Authorizes TFPA to offer a person insured under this chapter an actuarially justified premium discount on a policy issued by TFPA if the person elects to purchase a binding arbitration endorsement. Prohibits the premium discount from exceeding 10 percent of the premium for the policy, before the application of the discount.

(d) Requires the commissioner to adopt rules necessary to implement and enforce this section, including rules defining "actuarially justified" for the purposes of this section.

SECTION 4. Amends Chapter 2211, Insurance Code, by adding Subchapter D-1, as follows:

SUBCHAPTER D-1. CLAIMS: SETTLEMENT AND DISPUTE RESOLUTION

Sec. 2211.171. DEFINITIONS. Defines "association policy," "claim," and "claimant."

Sec. 2211.172. EXCLUSIVE REMEDIES AND LIMITATION ON AWARD. (a) Provides that this subchapter provides the exclusive remedies for a claim against TFPA, including a TFPA agent or representative.

(b) Prohibits TFPA, subject to Section 2211.176, from being held liable for any amount other than covered losses payable under the terms of TFPA policy.

(c) Prohibits TFPA, or a TFPA agent or representative, from being held liable for damages under Chapter 17 (Deceptive Trade Practices), Business & Commerce Code, or, except as otherwise specifically provided by this chapter, under any provision of any law providing for additional damages, exemplary damages, or a penalty.

Sec. 2211.173. FILING OF CLAIM; CLAIM PROCESSING. (a) Requires an insured, subject to Section 2211.158(b), to file a claim under a TFPA policy not later than the first anniversary of the date on which the damage to property that is the basis of the claim occurs.

(b) Authorizes the claimant to submit written materials, comments, documents, records, and other information to TFPA relating to the claim. Authorizes TFPA, if the claimant fails to submit information in the claimant's possession that is necessary for TFPA to determine whether to accept or reject the claim, to, not later than the 30th day after the date the claim is filed, request in writing the necessary information from the claimant.

(c) Requires TFPA to, on request, provide a claimant reasonable access to all information relevant to the determination of TFPA concerning the claim.

Authorizes the claimant to copy the information at the claimant's own cost or to request TFPA to provide a copy of all or part of the information to the claimant. Authorizes TFPA to charge a claimant the actual cost incurred by TFPA in providing a copy of information, excluding any amount for labor involved in making any information or copy of information available to a claimant.

(d) Requires TFPA, unless the applicable 60-day period described by this subsection is extended by the commissioner under Section 2211.180, to, not later than the later of certain dates to provide the claimant, in writing, notification that TFPA has accepted coverage for the claim in full, TFPA has accepted coverage for the claim in part and has denied coverage for the claim in part, or TFPA has denied coverage for the claim in full.

(e) Requires TFPA to, in a notice provided under Subsection (d)(1), inform the claimant of the amount of loss TFPA will pay and of the time limit to demand appraisal under Section 2211.174.

(f) Requires TFPA, in a notice provided under Subsection (d)(2) or (3), to inform the claimant of, as applicable:

(1) the portion of the loss for which TFPA accepts coverage and the amount of loss TFPA will pay;

(2) the portion of the loss for which TFPA denies coverage and a detailed summary of the manner in which TFPA determined not to accept coverage for that portion of the claim; and

(3) the time limit to demand a certain appraisal and provide notice of intent to bring a certain action.

(g) Requires TFPA, in addition to a certain notice, to provide a claimant with a form on which the claimant may provide TFPA notice of intent to bring an action as required by Section 2211.175.

Sec. 2211.1731. PAYMENT OF CLAIM. (a) Requires that except as provided by Subsection (b), if TFPA notifies a claimant under Section 2211.173(d)(1) or (2) that TFPA has accepted coverage for a claim in full or has accepted coverage for a claim in part, TFPA pay the accepted claim or accepted portion of the claim not later than the 10th day after the date notice is made.

(b) Requires TFPA, if payment of the accepted claim or accepted portion of the claim is conditioned on the performance of an act by the claimant, to pay the claim not later than the 10th day after the date the act is performed.

Sec. 2211.174. DISPUTES CONCERNING AMOUNT OF ACCEPTED COVERAGE.

(a) Authorizes the claimant to request from TFPA a detailed summary of the manner in which TFPA determined the amount of loss TFPA will pay, if TFPA accepts coverage for a claim in full and a claimant disputes only the amount of loss TFPA will pay for the claim, or if TFPA accepts coverage for a claim in part and a claimant disputes the amount of loss TFPA will pay for the accepted portion of the claim.

(b) Authorizes the claimant, not later than the 60th day after the date the claimant receives the described notice, to demand appraisal in accordance with the terms of the TFPA policy if a claimant disputes the amount of loss TFPA will pay for a claim or a portion of a claim,

(c) Authorizes TFPA, if a claimant, on a showing of good cause and not later than a certain day, requests in writing that the 60-day period be extended, to grant an additional 30-day period in which the claimant is authorized to demand appraisal.

(d) Requires the appraisal to be conducted as provided by TFPA policy, and provides that the claimant and TFPA are responsible in equal shares for paying any costs incurred or charged in connection with the appraisal, including a fee charged under Subsection (e), if a claimant demands appraisal under this section.

(e) Provides that if a claimant demands appraisal under this section and the appraiser retained by the claimant and the appraiser retained by TFPA are able to agree on an appraisal umpire to participate in the resolution of the dispute, the appraisal umpire is the umpire chosen by the two appraisers. Requires the commissioner, if the appraiser retained by the claimant and the appraiser retained by TFPA are unable to agree on an appraisal umpire to participate in the resolution of the dispute, to select an appraisal umpire from a roster of qualified umpires maintained by TDI. Authorizes TDI to:

(1) require appraisers to register with TDI as a condition of being placed on the roster; and

(2) charge a reasonable registration fee to defray the cost incurred by TDI in maintaining the roster and the commissioner in selecting an appraisal umpire under this subsection.

(f) Provides that the appraisal decision, except as provided by Subsection (g), is binding on the claimant and TFPA as to the amount of loss TFPA will pay for a fully accepted claim or the accepted portion of a partially accepted claim and is not appealable or otherwise reviewable. Provides that a claimant that does not demand appraisal before the expiration of the periods described by Subsections (b) and (c) waives the claimant's right to contest TFPA's determination of the amount of loss TFPA will pay with reference to certain claims.

(g) Authorizes a claimant or TFPA to, not later than the second anniversary of the date of an appraisal decision, file an action in a district court in the county in which the loss that is the subject of the appraisal occurred to vacate the appraisal decision and begin a new appraisal process under certain circumstances.

(h) Prohibits a claimant, except as provided by Subsection (g), from bringing an action against TFPA with reference to a claim for which TFPA has accepted coverage in full.

Sec. 2211.175. DISPUTES CONCERNING DENIED COVERAGE. (a) Requires the claimant, by a certain date, if TFPA denies coverage for a claim in part or in full and the claimant disputes that determination, to provide TFPA with notice that the claimant intends to bring an action against TFPA concerning the partial or full denial of the claim. Provides that a claimant that does not provide notice of intent to bring an action before the expiration of the period described by this subsection waives the claimant's right to contest TFPA's partial or full denial of coverage and is barred from bringing an action against TFPA concerning the denial of coverage.

(b) Authorizes TFPA, if a claimant provides notice of intent to bring an action under Subsection (a), to require the claimant, as a prerequisite to filing the action against TFPA, to submit the dispute to alternative dispute resolution (ADR) by mediation or moderated settlement conference, as provided by Chapter 154 (Alternative Dispute Resolution Procedures), Civil Practice and Remedies Code.

(c) Requires TFPA to request ADR of a dispute described by Subsection (b) not later than the 60th day after the date TFPA receives from the claimant notice of intent to bring an action.

(d) Requires that ADR under this section be completed not later than the 60th day after the date a request for ADR is made under Subsection (c). Authorizes the 60-

day period described by this subsection to be extended by the commissioner in accordance with Section 2211.180 or by TFPA and a claimant by mutual consent.

(e) Authorizes the claimant, if the claimant is not satisfied after completion of ADR, or if ADR is not completed before the expiration of the 60-day period described by Subsection (d) or any extension under that subsection, to bring an action against TFPA in a district court in the county in which the loss that is the subject of the coverage denial occurred. Requires an action brought under this subsection to be presided over by a judge appointed by the judicial panel on multidistrict litigation designated under Section 74.161 (Judicial Panel on Multidistrict Litigation), Government Code. Requires a judge appointed under this section to fulfill certain criteria.

(f) Requires the court if a claimant brings an action against TFPA concerning a partial or full denial of coverage, to abate the action until the notice of intent to bring an action has been provided and, if requested by TFPA, the dispute has been submitted to ADR, in accordance with this section.

(g) Authorizes a moderated settlement conference under this section to be conducted by a panel consisting of one or more impartial third parties.

(h) Provides that if TFPA requests mediation under this section, the claimant and TFPA are responsible in equal shares for paying any costs incurred or charged in connection with the mediation.

(i) Provides that if TFPA requests mediation, and the claimant and TFPA are able to agree on a mediator, the mediator is the mediator agreed to by the claimant and TFPA. Requires the commissioner, if the claimant and TFPA are unable to agree on a mediator, to select a mediator from a roster of qualified mediators maintained by TDI. Authorizes TDI to make certain requirements of mediators and charge a certain fee.

(j) Requires the commissioner to establish rules to implement this section, including provisions for expediting ADR, facilitating the ability of a claimant to appear with or without counsel, establishing qualifications necessary for mediators to be placed on the roster maintained by TDI under Subsection (i), and providing that formal rules of evidence are required to not apply to the proceedings.

Sec. 2211.176. ISSUES BROUGHT TO SUIT; LIMITATIONS ON RECOVERY. (a) Provides that the only issues a claimant is authorized to raise in an action brought against TFPA under Section 2211.175 are whether TFPA's denial of coverage was proper; and the amount of the damages described by Subsection (b) to which the claimant is entitled, if any.

(b) Authorizes a claimant, except as provided by Subsections (c) and (d), that brings an action against TFPA under Section 2211.175 to recover only:

(1) the covered loss payable under the terms of TFPA policy less, if applicable, the amount of loss already paid by TFPA for any portion of a covered loss for which TFPA accepted coverage;

(2) prejudgment interest from the first day after the date specified in Section 2211.1731 by which TFPA was or would have been required to pay an accepted claim or the accepted portion of a claim, at the prejudgment interest rate provided by Subchapter B (Prejudgment Interest in Wrongful Death, Personal Injury, or Property Damage Case), Chapter 304 (Judgment Interest), Finance Code; and

(3) court costs and reasonable and necessary attorney's fees.

(c) Provides that nothing in this chapter, including Subsection (b), may be construed to limit the consequential damages, or the amount of consequential damages, that a claimant may recover under common law in an action against TFPA.

(d) Authorizes a claimant that brings an action against TFPA under Section 2211.175 to, in addition to the covered loss described by Subsection (b)(1) and any consequential damages recovered by the claimant under common law, recover damages in an amount not to exceed a certain amount if the claimant proves by clear and convincing evidence that TFPA mishandled the claimant's claim to the claimant's detriment by intentionally:

(1) failing to meet the certain deadlines or timelines established under this subchapter without good cause;

(2) failing to provide the notice required under Section 2211.173(d);

(3) rejecting a claim without conducting a reasonable investigation with respect to the claim; or

(4) denying coverage for a claim in part or in full if TFPA's liability has become reasonably clear as a result of TFPA's investigation with respect to the portion of the claim that was denied.

(e) Defines "intentionally," for purposes of Subsection (d). Authorizes specific intent to be inferred from certain TFPA actions.

Sec. 2211.177. LIMITATIONS PERIOD. (a) Requires a claimant that brings an action against TFPA under Section 2211.175, notwithstanding any other law, to bring the action not later than the second anniversary of the date on which the person receives a notice described by Section 2211.173 (d)(2) or (3).

(b) Provides that this section is a statute of repose and controls over any other applicable limitations period.

Sec. 221.178. CONSTRUCTION WITH OTHER LAW. (a) Provides that to the extent of any conflict between a provision of this subchapter and any other law, the provision of this subchapter prevails.

(b) Prohibits TFPA, notwithstanding any other law, from bringing an action against a claimant, for declaratory or other relief, before the 180th day after the date an appraisal under Section 2211.174, or ADR under Section 2211.175, is completed.

Sec. 2211.179. RULEMAKING. (a) Requires the commissioner to adopt rules regarding the provisions of this subchapter, including rules concerning qualifications and selection of appraisers for the appraisal procedure and mediators for the mediation process, procedures and deadlines for the payment and handling of claims by TFPA as well as the procedures and deadlines for a review of a claim by TFPA; and any other matters regarding the handling of claims that are not inconsistent with this subchapter.

(b) Requires all rules adopted by the commissioner to promote the fairness of the process, protect the rights of aggrieved policyholders, and ensure that policyholders may participate in the claims review process without the necessity of engaging legal counsel.

Sec. 2211.180. COMMISSIONER EXTENSION OF DEADLINES. (a) Authorizes the commissioner, on a showing of good cause, to extend any deadline established under this subchapter.

(b) Provides that for the purposes of Subsection (a), "good cause" includes military deployment.

Sec. 2211.181. OMBUDSMAN PROGRAM. (a) Requires TDI to establish an ombudsman program to provide information and educational programs to assist persons insured under this chapter with the claim processes under this subchapter.

(b) Requires TDI, not later than March 1 of each year, to prepare and submit to the commissioner a budget for the ombudsman program, including approval of all expenditures incurred in administering and operating the program. Requires the commissioner to adopt or modify and adopt the budget not later than April 1 of the year in which the budget is submitted.

(c) Requires TFPA, not later than May 1 of each year, to provide transfer to the ombudsman program money in an amount equal to the amount of the budget adopted under Subsection (b). Requires the ombudsman program, not later than April 30 of each year, to return to TFPA any unexpended funds that the program received from TFPA in the previous year.

(d) Requires TDI to, not later than the 60th day after the date of a catastrophic event, as defined by the commissioner for the purposes of this subsection, prepare and submit an amended budget to the commissioner for approval and report to the commissioner the approximate number of claimants eligible for ombudsman services. Requires the commissioner to adopt rules as necessary to implement an amended budget submitted under this section, including rules regarding the transfer of additional money from TFPA to the program.

(e) Authorizes the ombudsman program to provide to persons insured under this chapter information and educational programs through informational materials, toll-free telephone numbers, public meetings, outreach centers, the Internet, and other reasonable means.

(f) Provides that the ombudsman program is administratively attached to TDI. Requires TDI to provide the staff, services, and facilities necessary for the ombudsman program to operate, including administrative assistance and service, including budget planning and purchasing; personnel services; office space; and computer equipment and support.

(g) Requires the ombudsman program to prepare and make available to each person insured under this chapter information describing the functions of the ombudsman program.

(h) Requires TFPA, in the manner prescribed by the commissioner by rule, to notify each person insured under this chapter concerning the operation of the ombudsman program.

(i) Authorizes the commissioner to adopt rules as necessary to implement this section.

SECTION 5. (a) Provides that, except as otherwise specifically provided by this section, this Act applies only to an insurance policy that is delivered, issued for delivery, or renewed by TFPA on or after the 60th day after the effective date of this Act. Provides that an insurance policy that is delivered, issued for delivery, or renewed by TFPA before the 60th day after 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.

(b) Provides that the deadline to file a claim under an insurance policy delivered, issued for delivery, or renewed before the 60th day after the effective date of this Act by TFPA

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.

(c) Provides that if a person insured by TFPA disputes the amount TFPA will pay for a partially or fully accepted claim filed by the person, Section 2211.174, Insurance Code, as added by this Act, applies only if the insurance policy under which the claim is filed is delivered, issued for delivery, or renewed on or after the 60th day after the effective date of this Act.

(d) Provides that if a person insured by TFPA disputes the amount TFPA will pay for a partially or fully accepted claim filed by the person and the insurance policy under which the claim is filed is delivered, issued for delivery, or renewed before the 60th day after the effective date of this Act:

(1) Section 2211.174, Insurance Code, as added by this Act, does not apply to the resolution of the dispute; and

(2) the claimant is required, notwithstanding any other provision of this Act, to attempt to resolve the dispute through any appraisal process contained in TFPA policy under which the claim is filed before an action may be brought against TFPA concerning the claim.

(e) Authorizes the person insured by TFPA and TFPA to agree that an appraisal conducted under Subsection (d)(2) of this section is binding on the parties.

(f) Requires an action brought against TFPA concerning a claim described by Subsection (d) of this section to be abated until the appraisal process under Subsection (d)(2) of this section is completed.

(g) Provides that notwithstanding Sections 2211.175 and 2211.176, Insurance Code, as added by this Act, Subsection (b) of this section, or any other provision of this Act, Sections 2211.176(b), (c), (d), and (e), Insurance Code, apply to any cause of action that accrues against TFPA on or after the effective date of this Act and the basis of which is a claim filed under an insurance policy that is delivered, issued for delivery, or renewed by TFPA, regardless of the date on which the policy was delivered, issued for delivery, or renewed.

SECTION 6. Effective date: upon passage or September 1, 2017.