

ALERT

JUNE 20, 2011

GLOBAL INSURANCE GROUP

News Concerning
Recent Insurance Coverage Issues



NEW FLORIDA LAW BENEFITTING PROPERTY INSURERS

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On May 17, 2011, Florida Governor Rick Scott signed into law Senate Bill 408 (SB 408), an "Act Relating to Property and Casualty Insurance." The bill was passed after much insurer lobbying and two years of discussions amongst Florida lawmakers regarding the need to change Florida insurance law to more adequately address potential natural disasters such as hurricanes and resulting sinkholes. Although SB 408 primarily concerns residential property insurance, it also makes changes to Florida property insurance in general, and enforcement of the new provisions is expected to have a profound effect on the insurance landscape in Florida. This alert highlights the most significant changes concerning policy renewals and notice provisions, surplus requirements and rate standards, replacement cost coverage, public adjusters, sinkhole reforms, and Florida law on the submission of claims and the clarification of the statute of limitations on insurance claims.

Claim Time Limits

Hurricane Wilma was the 5th costliest natural disaster in U.S. history and the 6th major hurricane of the record-breaking 2005 hurricane season. Five years after the storm, lawsuits flooded the court systems with reopened claims and new claims. It is estimated by some that about 25 percent of the reopened claims from Hurricane Wilma are claims that were adjusted, settled and closed years ago. More surprisingly are the cases where new Wilma claim notices were sent to carriers just days before litigation commenced.

A noticeable trend in this flurry of Wilma lawsuits, was the creative arguments of the policyholders bar that the statute of limitations provided an insured or claimant with five years to bring legal action against an insurance company from the moment the claim is denied or an insurance contract

is violated – effectively morphing the statute of limitations period into a claimant's period of repose. The passage of SB 408 is a direct response to plaintiffs' pioneering efforts to elongate the statute of limitations period.

The most immediately visible changes effected by SB 408 relate to the timing of claim submission (a novel addition to Florida statutory law) and the amendment of the statute of limitations (a direct response to the current climate of property litigation). SB 408 requires that an initial, supplemental or reopened hurricane or windstorm claim must be made to the insurer within three years after the hurricane first makes landfall or the windstorm causes covered damage, and that an initial, supplemental or reopened sinkhole claim must be made to the insurer within two years after the policy holder knew or reasonably should have known about the sinkhole loss. SB 408 also creates a five year statute of limitations for bringing an action for the breach of a property insurance contract that runs from the date of the loss.

Sinkhole Reforms

SB 408 creates a substantially new process for an insurer's investigation of a sinkhole claim, requiring the insurer to determine whether the building has incurred structural damage that has been caused by sinkhole activity. Under the bill, coverage for a sinkhole loss is not available if there is no structural damage or if the sinkhole activity is not the cause of the structural damage. Moreover, insurers may limit coverage for catastrophic ground cover collapse to the "principal building," as that term is defined in the property insurance policy. SB 408 also requires insureds to enter into a contract for the performance of building stabilization or foundation repairs within 90 days after the insurer notifies

the insured that it will cover the sinkhole loss, and requires that the stabilization or repair work be completed within 12 months after entering into the contract. Finally, SB 408 provides that the insured must repair sinkhole damage in accordance with the insurer's professional engineer's recommendations, and if the repairs cannot be completed within policy limits, the insurer has the option to either pay to complete the recommended repairs or tender policy limits.

Replacement Cost Coverage

SB 408 fundamentally changes the rights and obligations of insureds and insurers regarding payment of dwelling or personal property losses. Under the old scheme, for a dwelling loss, insurers were required to "pay the replacement cost without reservation or holdback of any depreciation in value, whether or not the insured replaces or repairs the dwelling or property." Typically, the issue of replacement cost value (RCV) payment would then be brought before the court on policy language interpretation.

SB 408 essentially codifies the reasoning in Florida court decisions that have interpreted RCV policy provisions according to their plain language and have concluded that an insurer's obligation to pay RCV arises only when the insured has actually repaired or replaced the property at issue. For instance, the Florida Supreme Court in *Ceballos v. Citizens Property Ins. Corp.*, 967 So. 2d 811, 815 (Fla. 2007), explained, "Courts have almost uniformly held that an insurance company's liability for replacement cost does not arise until the repair or replacement has been completed." Also, in *United States District Court for the Northern District of Florida in Langhorne v. Fireman's Fund Ins. Co.*, 432 F. Supp. 2d 1274, 1279 (N.D. Fla. 2006), the court reasoned that "because the plaintiff has not 'actually expended' any amount to repair, rebuild or replaces his dwelling, defendant has no obligation to pay him under the [Extended Replacement Cost Coverage] endorsement."

Now, SB 408 provides that for a dwelling loss, the insurer must initially pay the actual cash value, minus the deductible, and subsequently must pay any amounts necessary to perform repairs as the repair work is actually performed.

Additionally, under the old scheme, for a personal property loss, the insurer was obligated to pay the replacement cost value coverage offered in the policy without reservation

or holdback for depreciation. Although an insurer may still offer policies with language requiring same, SB 408 provides insurers with the option to offer policies which specifically limit the initial payment to the actual cash value of the personal property to be replaced. Under these types of policies, the insured must provide the insurer with a receipt for the replaced property to receive payment from the insurer for the full replacement value of the personal property. Policies containing the first set of rights and obligations will be subject to a slightly higher premium. Thus, SB 408 provides the consumer the opportunity to choose which option and corresponding rate he or she prefers.

Public Adjusters

As of June 2009, Florida had approximately 2,914 licensed public adjusters, which represents a significant increase since 2004. It is reported that the number of licensed public adjusters increased 330 percent between Fiscal Year 2003-04 and Fiscal Year 2008-09, growing from 678 to 2,914. It is estimated that Florida has more public adjusters than other states that have experienced declared disasters in recent years.

SB 408 significantly alters the rules regulating Florida public adjusters' compensation, their ability to solicit business, and their interactions with insurers. Specifically, SB 408 limits public adjuster fees related to reopened or supplemental claims to a maximum of 20 percent of the payment, and limits public adjuster fees to 20 percent of an insurance claim payment made by the insurer more than one year after events that are subject to a declared "state of emergency," such as hurricane damage claims. Moreover, as SB 408 alters the regulations of Citizens Property Insurance Corporation (Citizens), it also provides that a public adjuster fee related to a policy issued by Citizens may not exceed 10 percent of the additional amount paid in excess of the amount originally offered by Citizens on the claim. Under SB 408, public adjusters must give prompt notice of a property loss claim to the insurer and ensure that the insurer has access to inspect the property, can interview the insured directly about the loss and claim, and obtain information necessary to investigate and respond to the claim. However, the insurer must allow the public adjuster to be present for the insurer's in-person meetings with the insured. Finally, SB 408 requires licensed contractors to also be licensed as public adjusters to adjust a claim on behalf of the insured.

Policy Renewals and Notice Provisions

SB 408 revises the notice of cancellation, non-renewal and termination requirements for personal lines and commercial lines residential property insurance policies, allowing an insurer to cancel or non-renew property insurance policies after 45 days notice if the Office of Insurance Regulation (OIR) finds that the early cancellation is necessary to protect the best interests of the public or policyholders, or if the OIR approves the insurer's cancellation or non-renewal plan. Additionally, SB 408 allows an insurer to issue renewal policies containing a change in policy terms, provided it gives notice of the change to the insured with a "Notice of Change in Policy Terms." The insured is deemed to have accepted the change in policy terms upon the insurer's receipt of the premium payment for the renewal policy.

Surplus Requirements and Rate Standards

SB 408 raises the surplus requirements to \$15 million for an insurer transacting residential property insurance that is not a wholly owned subsidiary of an insurer domiciled in another state, and provides that new insurers must immediately

have a surplus of \$15 million, while existing insurers with certificates of authority have specific periods of time to acquire a surplus of \$15 million. SSB 408 requires increases in property insurance rate filings to be submitted via the "file and use" method. The rate filing may not result in a premium increase of more than 15 percent for an individual insured, and an insurer may only make one such filing per 12-month period.

Overall, SB 408 positively impacts the insurance market in Florida by implementing necessary changes to decrease fraud and increase competition in a way that ensures industry solvency.

Cozen O'Connor is a global leader in representing the insurance industry in all coverage areas. For further analysis of SB 408 and how it may impact various coverage issues, please contact William P. Shelley, in our Philadelphia office (wshelley@cozen.com, 215.665.4142) or C. Tyler Havey in our Philadelphia office (thavey@cozen.com, 215.665.2054).