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Navigating the New Pre-Suit Notice Requirements for Property Insurance Carriers Set Forth in Fla. Stat. § 627.70152. to Leverage Settlements and Avoid Lawsuits

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By now, property insurance carriers and their counsel are likely familiar with Senate Bill 76, in which the Florida Legislature finally codified long-needed changes to the current property insurance litigation framework. The bill is a nice start in reigning in frivolous and fraudulent property insurance claims made by homeowners, public adjusters, contractors, and disingenuous homeowners' counsel seeking egregious attorney fee payouts that have plagued both Florida's property insurance industry and courts for many years. The insurance industry hopes this bill provides much needed relief, but doubts remain as to whether it went far enough. The most beneficial feature is the mandatory pre-suit notice requirements set forth in Fla. Stat. § 627.70152. This article focuses on how property carriers may use the new pre-suit notice requirements to limit homeowner suits, and create leverage when these suits are inevitably filed.

The notice provision provides that, after a carrier makes a coverage decision on a property insurance claim, as a condition precedent for a homeowner to file a lawsuit against the carrier the claimant must send the carrier a notice of intent to litigate. Most carriers have interpreted the new law to apply to claims where the issuance of the policy post-dates the July 1, 2021 statute change. As a result, most carriers are not requiring these notices of intent from homeowners at this time. But as claims made through policies post-dating the legislation's passage are fully adjusted in the coming weeks and months, property carriers must be ready to

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flex their new-found muscles with the new pre-suit framework to limit lawsuits and create attorney fee leverage for covered and denied insurance claims.

Pre-Suit Notice of Intent's Requirements

Fla. Stat. § 627.70152's pre-suit notice provision requires homeowners to: (a) reference the statute upon which the demand is made; (b) state the alleged acts of omissions of the carrier giving rise to the dispute;; (c) if the underlying claim was denied, provide an estimate of damages for the claim if known; *and most importantly* (d) if coverage was provided for the underlying claim, make a numerical settlement demand which identifies the amount sought for the claim, and if the claimant is represented by counsel, states separately the amount of attorney fees requested by the homeowners' attorney. For claims made by an agent of the homeowner, the notice must also state that a copy of the notice was provided to the claimant. The homeowner must provide ten business days for the insurer to respond to the notice of intent before filing suit. The statute requires courts to dismiss lawsuits when homeowners fail to comply with these requirements, and counsel for homeowners may not recover fees and costs due to a dismissal caused by a non-compliant pre-suit notice.

Insurer's Response to Pre-Suit Notice if the Claim Was Denied

After receipt of the pre-suit notice, the insurer must respond in writing. If the underlying claim was denied, the carrier's written response must either accept coverage, continue to deny coverage, or assert the right to re-inspect the property. Any re-inspection must occur within 14 business days of the request. This provision provides a strong opportunity for another adjuster, in-house counsel or senior decision-maker to revisit denials that may not be strongest, either through re-inspection or a desk review, and allows for carriers to potentially settle badly-decided claims. Allowing carriers a second chance to avoid the most litigated cases - the ill-conceived denial - through a second review or re-inspection could create significant savings for Florida carriers. An independent review of the coverage decision and the savings provided by avoiding even some meritorious lawsuits should greatly offset additional administrative costs of facilitating the process.

Insurer's Response to Pre-Suit Notice of Intent if the Claim Was Covered

If the underlying claim was covered, including even within the policy deductible, the insurer must respond within 10 business days by making a settlement offer, and may require the claimant to participate in an appraisal or another form of dispute resolution. This provision provides the most robust protection to carriers from frivolous lawsuits, and when used correctly, can force settlements of claims that otherwise do not belong in litigation.

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In the event of a covered claim where the carrier makes a settlement offer, this new statute requires homeowners to meet certain benchmarks to obtain an attorney fee award in a subsequent lawsuit on the claim. If the difference between the amount obtained by the claimant and the pre-suit settlement offer, exclusive of attorney fees and costs, is less than 20 percent of the disputed amount, the court cannot award counsel for claimant its attorney fees. For example, if the claimant demands $50,000 in the pre-suit notice and the insurer counters at $20,000, the disputed amount is $30,000. If ultimately there is an award to homeowner for $25,000, the settlement offer of $20,000 would be subtracted from the award, with the difference being $5,000. This difference of $5,000 is less than 20% of the disputed amount of $30,000, such that counsel for the homeowner may not recover attorney fees in a subsequently-filed lawsuit. In this numerical example, the Court must award less than $26,000 of indemnity for the claim in order for the insurer to avoid paying the homeowner's attorney fees and costs through trial.

Additionally, the statute provides that if the difference between a court's award to a claimant and the pre-suit settlement offer, excluding reasonable attorney fees and costs, is at least 20% but less than 50% of the disputed amount, the insurer only pays the claimant's attorney fees and costs equal to the percentage of the disputed amount obtained times the total attorney fees and costs. Thus for example, if pre-suit the claimant demands $70,000 and the insurer counters at $10,000, the disputed amount is $60,000. If there is an award to homeowner for $30,000, the $10,000 settlement offer is subtracted from the $30,000 award, with the difference being $20,000. This difference of $20,000 totals 33% of the $60,000 disputed amount. Here, counsel for the homeowner may recover only 33% of its reasonable fees and costs incurred during the case.

Finally, if the difference between the amount ultimately obtained by the claimant and the pre-suit settlement offer, excluding reasonable attorney fees and costs, is at least 50% of the disputed amount, then the insurer pays the claimant's full attorney fees and costs. Using the same settlement offers discussed above, the Court must award more than $40,000 for homeowners' counsel to receive all of its fees and costs.

So how can property carriers use this framework to their advantage? First, when a carrier receives the notice of intent for a covered claim, a different adjuster or decision maker should evaluate the initial coverage decision, and then decide how to respond. It is human nature that the original adjuster won't take full advantage of the new statute, and will rather look to support his or her initial coverage decision with a negligible counteroffer, if any. The new decision-maker's first consideration will be whether to respond to the notice seeking appraisal of the claim. Clearly in claims with little to no scope issues and meaningful initial coverage, the appraisal process should be invoked to avoid the possibility of a lawsuit. For claims with small amounts in controversy or with fair-minded public adjusters or homeowners, pre-suit mediation should also be considered.

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If these favorable claim conditions don't exist, making an intelligent numerical counter-offer can potentially force the parties into a pre-suit settlement, because prospective counsel for the homeowner will not feel confident in a fee recovery at trial given the offer's fairness, or it at least creates considerable leverage against the homeowner before a lawsuit is even filed. Given that a major consideration is avoiding fees and costs in a suit, the decision-maker responding to the pre-suit notice should be a litigation adjuster or in-house attorney so the correctly-appraised litigation risk can be baked into the counter-offer. A realistic counter-offer becomes a win-win for the carrier as it either resolves the case or provides immense leverage during the lawsuit.

Potential Issue with the Pre-Suit Notice Process

There are some holes in the legislation that must be filled through common law. First, the claimant must provide an attorney fee demand separate and apart from the indemnity request in the pre-suit notice when homeowners are represented by lawyers during this pre-suit process. What if the carrier agrees with the homeowner on the indemnity portion of the claim but not the requested fees and costs? May the homeowner still file suit? Attorneys for homeowners will not walk away from a fee without a fight. The statute fails to address this potential conflict. In most cases, presumably the carrier and law firm will resolve their differences during the negotiation, especially when a motivated homeowner wants their additional coverage. But there will be plaintiff firms that obstruct this process and file suit despite an agreement with the homeowner on the additional coverage. Trial and appellate courts will need to decide whether unresolved attorney fee claims may permit homeowners or their counsel to file suit under this statute.

Florida carriers now have some important new tools to curb the financial burden imposed by the hotbed of property litigation in this state. If diligently and ambitiously utilized, Fla. Stat. § 627.70152 could be the game-changer for insurers that reverses the ugly financial woes that could collapse the Florida property insurance market. Use wisely!