BILL ANALYSIS

H.B. 1732
By: Smithee
Insurance
Committee Report (Unamended)

BACKGROUND AND PURPOSE

Interested parties observe that the Fair Access to Insurance Requirements (FAIR) Plan provides residential property insurance to certain consumers throughout the state as an insurer of last resort. Like other residual market insurers, the FAIR Plan does not have the same capitalization requirements as a private insurer nor does it charge its policyholders actuarially sound rates. The parties contend that, for this reason, losses associated with policies put the FAIR Plan at a higher risk for financial vulnerability than would losses for private market insurers. There are concerns that despite this structure the FAIR Plan's dispute resolution process under current law is in line with private market insurers with significantly stricter financial and capitalization requirements. H.B. 1732 seeks to establish a claims dispute process for the FAIR Plan that is similar to other residual market insurers.

CRIMINAL JUSTICE IMPACT

It is the committee's opinion that this bill does not expressly create a criminal offense, increase the punishment for an existing criminal offense or category of offenses, or change the eligibility of a person for community supervision, parole, or mandatory supervision.

RULEMAKING AUTHORITY

It is the committee's opinion that rulemaking authority is expressly granted to the commissioner of insurance in SECTION 4 of this bill.

ANALYSIS

H.B. 1732 amends the Insurance Code to set out provisions governing claims arising under insurance policies issued by the Fair Access to Insurance Requirements (FAIR) Plan Association. The bill, among other provisions, sets the deadline by which such a claim must be filed, establishes certain limits on recovery, and sets out procedures for resolving certain claim disputes.

Exclusive Remedies and Limitation on Award

H.B. 1732 provides the exclusive remedies for a claim against the association, including an agent or representative of the association, and excludes a person required to resolve a dispute under the bill's provisions from the application of statutory provisions entitling a FAIR Plan applicant or affected insurer to appeal to the association and authorizing the association's decision to be appealed to the commissioner of insurance. The bill prohibits the association from being held liable for any amount other than covered losses payable under the terms of the association policy, subject to certain bill provisions. The bill prohibits the association, or an agent or representative of the association, from being held liable for damages under Business & Commerce Code provisions regulating deceptive trade practices or, except as otherwise specifically provided by statutory provisions governing the FAIR Plan, under any provision of

any law providing for additional damages, exemplary damages, or a penalty.

Filing, Processing, and Payment of Claims

H.B. 1732 sets the deadline by which an insured is required to file a claim under an association policy as not later than the first anniversary of the date on which the damage to property that is the basis of the claim occurs and authorizes the commissioner to extend the one-year period for a period not to exceed 180 days on a showing of good cause by a person insured under the FAIR Plan. The bill authorizes the claimant to submit to the association certain information relating to the claim and authorizes the association, if the claimant fails to submit information in the claimant's possession that is necessary for the association to determine whether to accept or reject a claim, to request in writing the necessary information from the claimant not later than the 30th day after the date the claim is filed. The bill requires the association, on request, to provide a claimant reasonable access to all information relevant to the determination of the association concerning the claim. The bill authorizes the claimant to copy the information at the claimant's own cost or to request the association to provide a copy of all or part of the information to the claimant. The bill authorizes the association to charge a claimant the actual cost incurred in providing a copy of such information, excluding any amount for labor involved in making any information or copy of information available to the claimant.

H.B. 1732 requires the association, not later than the later of the 60th day after the date the association receives a claim or the 60th day after the date the association receives information requested from a claimant, unless that deadline is extended by the commissioner, to provide a claimant written notification that the association has accepted coverage for the claim in full, has accepted coverage for the claim in part and has denied coverage for the claim in part, or has denied coverage for the claim in full. The bill requires such notices to include specified information regarding the amount of loss the association will or will not cover and the time limit to take certain actions if the association's determination is disputed. The bill requires the association, if the association provides notice that the association has denied coverage for the claim in part or in full, to provide a claimant with a form on which the claimant may provide the association notice of intent to bring action concerning the denied coverage.

H.B. 1732 requires the association, if the association notifies a claimant that the association has accepted coverage for a claim in full or in part, to pay the accepted claim or accepted portion of the claim not later than the 10th day after the date notice is made or, if payment of the accepted claim or accepted portion of the claim is conditioned on the performance of an act by the claimant, not later than the 10th day after the date the act is performed.

Disputes Concerning Amount of Accepted Coverage

H.B. 1732 authorizes a claimant that disputes the amount of loss the association will pay for a fully accepted claim or for the accepted portion of a partially accepted claim to request from the association a detailed summary of the manner in which the association determined the amount of loss the association will pay. The bill authorizes such a claimant to demand appraisal in accordance with the terms of the association policy not later than the 60th day after the date the claimant receives notice of the association's decision. The bill authorizes the association to grant an additional 30-day period in which the claimant may demand appraisal if the claimant, on a showing of good cause, makes a written request to extend the 60-day period not later than the 15th day after the expiration of that period.

H.B. 1732 requires such an appraisal to be conducted as provided by the association policy and makes the claimant and the association responsible in equal shares for paying any costs incurred or charged in connection with the appraisal. The bill provides for the selection of an appraisal umpire and requires the commissioner to select an appraisal umpire from a roster of qualified umpires maintained by the Texas Department of Insurance (TDI) if the appraiser retained by the claimant and the appraiser retained by the association are unable to agree on an appraisal umpire.

The bill authorizes TDI to require appraisers to register with TDI as a condition of being placed on the roster and to charge a reasonable registration fee to defray the cost incurred by TDI in maintaining the roster and the cost incurred by the commissioner in selecting an appraisal umpire.

H.B. 1732 specifies that an appraisal decision is binding on the claimant and the association as to the amount of loss the association will pay for a fully accepted claim or the accepted portion of a partially accepted claim and is not appealable or otherwise reviewable, except as provided by the bill. The bill provides that a claimant that does not demand appraisal before the expiration of the designated periods waives the claimant's right to contest the association's determination of the amount of loss the association will pay with reference to a fully accepted claim or the accepted portion of a partially accepted claim.

H.B. 1732 authorizes a claimant or the association, not later than the second anniversary of the date of an appraisal decision, to 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 if the appraisal decision was obtained by corruption, fraud, or other undue means; if the rights of the claimant or the association were prejudiced in a certain manner; or if an appraiser or appraisal umpire took certain actions in conducting the appraisal. The bill prohibits a claimant from bringing an action against the association with reference to a claim for which the association has accepted coverage in full except under those circumstances.

Disputes Concerning Denied Coverage

H.B. 1732 requires a claimant that disputes the association's determination to deny coverage for a claim in part or in full to provide the association with notice that the claimant intends to bring an action against the association concerning the partial or full denial of the claim. The bill requires the claimant to provide the notice not later than the expiration of the limitations period for bringing such an action against the association but after the date the claimant receives the notice of the association's determination. The bill establishes that a claimant that does not provide notice of intent to bring an action before the expiration of the designated period waives the claimant's right to contest the association's partial or full denial of coverage and is barred from bringing an action against the association concerning the denial of coverage.

H.B. 1732 authorizes the association to require a claimant who provides notice of intent to bring an action to submit the dispute to alternative dispute resolution by mediation or moderated settlement conference as a prerequisite to filing the action against the association. The bill sets the deadline by which the association is required to request alternative dispute resolution and sets the deadline by which such alternative dispute resolution must be completed, unless the deadline for completion is extended by the commissioner or by the association and a claimant by mutual consent.

H.B. 1732 authorizes a claimant, if the claimant is not satisfied after the completion of alternative dispute resolution or if alternative dispute resolution is not completed before the expiration of the prescribed period or any extension to that period, to bring an action against the association in a district court in the county in which the loss that is the subject of the coverage denial occurred. The bill requires a judge who presides over such an action to meet certain criteria. The bill requires a court to abate an action against the association concerning a partial or full denial of coverage until the notice of intent to bring an action has been provided and, if requested by the association, the dispute has been submitted to alternative dispute resolution. The bill authorizes a moderated settlement conference to be conducted by a panel consisting of one or more impartial third parties. The bill makes the claimant and the association responsible in equal shares for paying any costs incurred or charged in connection with mediation requested by the association.

H.B. 1732 provides for the selection of a mediator and requires the commissioner to select a

mediator from a roster of qualified mediators maintained by TDI if the claimant and the association are unable to agree on a mediator. The bill authorizes TDI to require mediators to register with TDI as a condition of being placed on the roster and to charge a reasonable fee to defray the cost incurred by TDI in maintaining the roster and the cost incurred by the commissioner in selecting a mediator.

H.B. 1732 requires the commissioner to establish rules to implement the bill's provisions governing disputes concerning denied coverage, including provisions for expediting alternative dispute resolution, 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, and prohibiting the application of formal rules of evidence to the proceedings.

Issues Brought to Suit and Limitations on Recovery

H.B. 1732 restricts the issues a claimant is authorized to raise in an action brought against the association concerning denied coverage to whether the association's denial of coverage was proper and the amount of the damages to which the claimant is entitled, if any. The bill limits the amount that such a claimant may recover to the covered loss payable under the terms of the association policy less, if applicable, the amount of loss already paid by the association for any portion of a covered loss for which the association accepted coverage; to certain prejudgment interest; and to court costs and reasonable and necessary attorney's fees. The bill specifies that nothing under provisions governing the FAIR Plan may be construed to limit the consequential damages, or the amount of consequential damages, that a claimant is authorized to recover under common law in an action against the association. The bill authorizes such a claimant to recover certain additional damages if the claimant proves by clear and convincing evidence that the association mishandled the claimant's claim to the claimant's detriment by intentionally taking certain actions.

Limitations Period for an Action Concerning Denied Coverage

H.B. 1732 requires a claimant that brings an action against the association concerning denied coverage to bring the action not later than the second anniversary of the date on which the person receives a notice that the association has denied coverage for the claim in full or in part. The bill establishes that this limitations period is a statute of repose and controls over any other applicable limitations period.

Presiding Officer Conflicts of Interest

H.B. 1732 requires a person insured under the FAIR Plan who is assigned to act as presiding officer to preside over or resolve a dispute involving the association and another person insured under the FAIR Plan, not later than the seventh day after the date of assignment, to give written notice that the presiding officer is insured under the FAIR Plan to the association and to each other party to the dispute or to the association's or other party's attorney. The bill authorizes the association or another party that receives such notice, in a proceeding with respect to which the 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. The bill requires the written objection to contain the factual basis on which the association or other party objects to the assignment. The bill requires the commissioner to assign a different presiding officer to the dispute if the commissioner determines, after reviewing the objection, that the presiding officer originally assigned to the dispute has a direct financial or personal interest in the outcome of the dispute. The bill sets the deadline by which the association or other party is required to file such an objection and authorizes the commissioner to extend the deadline on a showing of good cause.

Required Policy Provisions

H.B. 1732 requires an insurance policy issued by the association to require an insured to file a claim under the policy issued by the association not later than the first anniversary of the date on which the damage to property that is the basis of the claim occurs and requires a FAIR Plan policy to contain a conspicuous notice concerning the resolution of disputes under the policy.

Construction With Other Law, Implementation, and Transition

H.B. 1732 provides that its provisions governing claims settlement and dispute resolution prevail to the extent of any conflict with any other law. The bill prohibits the association from bringing an action against a claimant, for declaratory or other relief, before the 180th day after the date an appraisal or alternative dispute resolution is completed.

H.B. 1732 requires the commissioner to adopt rules regarding the settlement and dispute resolution of claims under the FAIR Plan, 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 the association as well as the procedures and deadlines for a review of a claim by the association; and any other matters regarding the handling of claims that are not inconsistent with the bill's provisions. The bill requires such rules to promote the fairness of the process, to protect the rights of aggrieved policyholders, and to ensure that policyholders may participate in the claims review process without the necessity of engaging legal counsel.

H.B. 1732 authorizes the commissioner to extend any deadline established regarding settlement and dispute resolution of claims under the bill's provisions on a showing of good cause, including military deployment.

H.B. 1732 requires TDI to establish an ombudsman program to provide information and educational programs to assist persons insured under the FAIR Plan with the claims processes established by the bill's provisions. The bill sets out provisions governing the development of the ombudsman program budget and transfer of association funds to the program; establishing the means through which the program is authorized to provide information and educational programs; and providing for the administration of the program. The bill requires the ombudsman program to prepare information describing the program and to make that information available to each person insured under the FAIR Plan and requires the association to notify each such person concerning the operation of the ombudsman program in the manner prescribed by commissioner rule. The bill authorizes the commissioner to adopt rules as necessary to implement the ombudsman program.

H.B. 1732 applies only to an insurance policy delivered, issued for delivery, or renewed by the association on or after the 60th day after the bill's effective date, except that the bill's provisions regarding the limitations on recovery in certain actions apply to any cause of action that accrues against the association on or after the bill's effective date and the basis of which is a claim filed under an insurance policy that is delivered, issued for delivery, or renewed by the association regardless of the date on which the policy was delivered, issued for delivery, or renewed. The bill sets out certain transitional procedures for resolution of a dispute regarding the amount paid for a partially or fully accepted claim filed under an insurance policy delivered, issued for delivery, or renewed before the 60th day after the bill's effective date.

EFFECTIVE DATE

On passage, or, if the bill does not receive the necessary vote, September 1, 2015.