SUBJECT: Handling water damage claims and licensing public insurance adjusters

COMMITTEE: Insurance — committee substitute recommended

VOTE: 6 ayes — Smithee, Seaman, Bonnen, B. Keffer, Taylor, Van Arsdale

0 nays

3 absent — Eiland, Gallego, Thompson

SENATE VOTE: On final passage, April 2, 2003 — 31-0

WITNESSES: For — None

Against — Lee Ann Edwards

On — Brian Davis; David Mintz, Texas Apartment Association

BACKGROUND: Insurance Code, art. 21.55 establishes standards for the prompt payment of insurance claims. An insurer must notify a claimant in writing of the acceptance or rejection of a claim within 15 business days after the date the insurer receives all items, statements, and forms required by the insurer to secure proof of loss. If the insurer has a reasonable basis to believe that the loss results from arson, the insurer must notify the claimant in writing of the acceptance or rejection of the claim within 30 days after receiving required information. If an insurer cannot accept or reject a claim within the specified periods, the insurer must notify the claimant within those specified periods. Within 45 days after notifying the policyholder about an initial inability to accept or reject a claim, the insurer must accept or reject the claim.

Insurance Code, art. 21.07-4 sets forth guidelines for licensing of insurance adjusters. An insurance adjuster acts on behalf of or is employed by an insurance company to settle claims. An insurer uses the claims adjustment process to evaluate and settle claims. The process includes determining whether and to what extent the loss is covered by the policy, determining the cause of the loss, and valuing the loss.

Unlike licensed insurance adjusters, public insurance adjusters (PIAs), who are not attorneys, represent the insured in loss adjustments, charging a fee for settling claims with insurers.

DIGEST:

CSSB 127 would establish requirements for underwriting, handling, and settling water damage claims and would require licensing of PIAs.

Water damage claims. CSSB 127 would add Insurance Code, art. 5.35-4, restricting the use of claims history for water damage and establishing permissible surcharges. The stated purpose of this portion of the bill would be "to protect persons and property from being unfairly stigmatized in obtaining residential property insurance by the filing of a water damage claim or claims under a residential property insurance policy."

For purposes of the new article, the bill would define "insurer" broadly but would exclude the Texas Windstorm Insurance Association and the Texas FAIR Plan.

The insurance commissioner would have to adopt rules for underwriting guidelines related to water damage claims. An insurer could not use an underwriting guideline relating to a water damage claim or claims that was not in accordance with the rules adopted by the commissioner.

Premium surcharges. An insurer could assess a premium surcharge for water damage claims at the time of issuing a residential property policy. The surcharge would be in addition to the premium charged for the policy had the claim or claims not occurred. The commissioner would have to determine the amount of any surcharge that could be assessed, not to exceed 15 percent of the total premium that would be charged if there were no water damage claim or claims. The insurer could continue to assess this premium surcharge for a period, as determined by commissioner rule.

At the time of a policy renewal, the insurer could assess an additional premium surcharge for water damage claims made in the preceding year. This surcharge would be in addition to the premium that would be charged for the policy had the claim or claims not occurred and would be in addition to the previously mentioned surcharge. The commissioner would have to determine the amount of any surcharge that could be assessed, except that it could not

exceed 15 percent of the total premium that would be charged for a policy without a water damage claim, excluding the prior premium surcharge.

For three or more water damage claims, the commissioner could authorize a surcharge that was greater than 15 percent. In determining surcharges, the commissioner could consider the number and type of water damage claims and the total amount paid in water damage claims.

Prompt handling. The commissioner could adopt rules identifying the types of water damage claims that require more prompt, efficient, and effective processing and handling. Any rule adopted under the bill would supersede the minimum standards for prompt payment of claims found in Insurance Code, sec. 21.55. By rule, the commissioner could regulate the following aspects of water damage claims: required notice; acceptance and rejection of a claim; claims handling and processing procedures and time frames; investigation requirements, procedures, and time frames; settlement of claims; and any other relevant aspect determined by the commissioner.

Licensing of public insurance adjusters. CSSB 127 would require PIAs who do business in Texas to be licensed by the insurance commissioner. Practicing without a license would be a Class B misdemeanor, punishable by up to 180 days in jail and/or a maximum fine of $2,000. The commissioner could assess administrative penalties against those who engaged in unfair competition or unfair trade practices.

The bill would define a PIA as a person paid to act on behalf of or to aid an insurance policy holder in negotiating to settle a claim for loss or damage to real or personal property. The definition would include sales personnel but would exclude federal or state government officers and employees, attorneys, and licensed insurers and agents engaged in official duties. Licensed attorneys and property and casualty insurance agents while acting for an insured concerning a loss would be exempt from the licensing requirement.

The licensing requirement would not limit or diminish a PIA's adjusting authority to less than the authority of an insurance company adjuster. A PIA could not represent a policy holder in a bodily injury claim, render legal advice, or use his or her license to practice law in Texas. A PIA could not use a badge in connection with official activities.

Contracts and records. A PIA would have to provide a written contract to a policyholder clearly explaining in large print that the adjuster represented only the insured and would have to allow the consumer to cancel the contract up to 72 hours after signing. A contract could be voided with no damages to the policyholder if a PIA were found to be practicing without a license. The PIA would have to keep full, accurate, and confidential records for at least five years after the end of each transaction, including itemized statements of all recoveries and disbursements.

Commission and claims proceeds. A licensed PIA could not collect a commission of more than 10 percent of the insurance settlement on the claim and could not collect any fee on a claim that was declared a total loss by the insurer within three days of being reported. However, a PIA could collect reasonable compensation for expenses and services rendered in such a case. All funds received as claim proceeds would have to be held by the PIA in a fiduciary capacity, and diversion of funds would be prosecuted as theft.

Ethics and conflicts of interest. A licensed PIA could not represent both the insured and the insurance company against which a claim was made. A PIA could not act as a contractor or remediator on the same claim the PIA was adjusting, nor could a PIA have any interest in a contracting or remediation firm that benefitted from the adjusted claim. A PIA could not offer to pay anyone, except another licensed PIA, a referral fee, commission, or other consideration exceeding $100. The commissioner would have to adopt a code of ethics for licensed PIAs by September 1, 2004.

A licensed PIA could solicit business only between 9 a.m. and 9 p.m. on weekdays and Saturdays and between noon and 9 p.m. on Sundays. A PIA could not solicit business during a natural disaster, nor make any misrepresentation, nor offer to advance money to a client to solicit business. Neither employees nor agents of a license holder could solicit business while representing themselves as licensed PIAs without holding their own licenses.

Licensing requirements. To obtain a license, a PIA would have to be a U.S. citizen or qualified by federal law for employment and a Texas resident at least 18 years old, of trustworthy moral character, with no felony convictions in the 10 years immediately before filing an application or only with a full pardon from any conviction, and with enough training and experience in

property values and losses, insurance contracts, and earning capabilities to avoid injuring the public. Resident license holders would have to maintain a publicly accessible place of business where process could be served.

A PIA would have to be fingerprinted and file proof of financial responsibility with respect to transactions with insureds. In determining the types of financial responsibility required, the commissioner could consider a surety bond or a professional liability policy. If the commissioner believed that a person had violated the financial responsibility requirements, the commissioner could issue an emergency cease-and-desist order and could suspend the PIA's license. A suspended license could be reinstated with the commissioner's approval.

A nonresident wishing to obtain a Texas PIA license would have to meet the same requirements as residents in terms of age, background, character, training, fingerprinting, proof of financial responsibility, and maintaining a business address for service of process. If the nonresident had been convicted of a felony, the person would have to have received a full pardon. Exam requirements could be waived for nonresident PIAs who proved that they already held a valid license in another state where a comparable exam was administered and a reciprocal agreement existed. However, a nonresident would have to submit annually to TDI an affidavit certifying knowledge of applicable state laws.

A licensed PIA would have to renew the license every two years. A PIA whose license had lapsed for less than one year could renew or reapply under certain conditions. The PIA would have to pay a penalty fee but would not have to retake the exam. A PIA whose license had lapsed for more than one year could not renew and would have to comply with all requirements for the original license. To keep a license current, a PIA would have to take 15 hours of continuing education courses each year.

Examinations. The commissioner would have to approve scheduling and administration of a written licensing exam and could appoint a five-member committee to develop the exam within 60 days of the bill's effective date. The written exam would have to be adopted no later than January 1, 2004, and could be supplemented by an oral exam. The exam would have to test the applicant's knowledge of basic insurance theory, essential elements of

contracts, claims ethics, unfair competitive and business practices, and the duties of a PIA. The commissioner could issue a temporary license to a PIA who satisfied all other requirements pending development of the exam.

Licensing and exam fees. The commissioner would have to collect nonrefundable licensing and exam-related fees from applicants in advance. The commissioner would have to set the fees in amounts reasonable and necessary to implement the bill's provisions. All fees would be deposited with the comptroller to the credit of the Texas Department of Insurance (TDI) operating account, where they could be used to pay the costs of enforcement and investigation, including salaries and expenses.

Training certificates. After registering with TDI and complying with the financial responsibility requirements, a PIA trainee could obtain up to two consecutive 180-day temporary training certificates. The training certificate could be issued only for educational and training purposes. A trainee could practice only under the supervision and control of a license holder.

Denial, suspension, or revocation. The commissioner could deny, suspend, or revoke a license for any violation under the bill, failure to pass the exam, willful misrepresentation or fraud, misappropriation or conversion of money, demonstrated incompetence, material misrepresentation of status as a PIA, or felony conviction. A person would be entitled to notice, hearing, and the right to appeal. Suspension could not exceed 12 months. The commissioner could impose an administrative penalty of up to $2,000 per violation in lieu of a suspension or revocation and could order the PIA to cease and desist from any prohibited conduct under the bill. Five years after denial or revocation of a license, a person could retake the exam and reapply.

The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2003.

SUPPORTERS SAY:

CSSB 127 would protect policyholders and their property from being stigmatized for previous water damage claims by requiring the insurance commissioner to establish underwriting rules related to water damage claims and by requiring residential property insurers to file with TDI their underwriting guidelines related to water damage.

The bill would authorize the commissioner to adopt rules that identify the types of claims that require more prompt, efficient, and effective notice. It also would create more stringent claims handling procedures and guidelines than those found in current law, which are considered minimum standards for prompt payment of claims. Delayed and improperly handled water damage claims have contributed to the current crisis in homeowners insurance, particularly with regard to mold claims. SB 127 would allow changes to current claims handling procedures so that insurers would have to respond promptly and efficiently to claimants with water damage.

By requiring licensing of PIAs, the bill would help consumers protect their largest and most important assets — their homes — when filing property insurance claims. PIAs provide a valuable service to consumers who need a qualified person to manage the complicated process of insurance claims on their behalf. CSSB 127 would assure consumers that they were dealing with licensed, competent public adjusters. By creating consistency and standards, setting forth ethics policies, and giving consumers a forum to complain about unscrupulous practitioners, the bill would make PIAs more accountable to their clients and to the state.

CSSB 127 would eliminate conflicts of interest by preventing remediators or building contractors from acting as public adjusters. Consumers have been subjected to a variety of scams by unlicensed adjusters who offer to pay their living expenses or to adjust a claim for free if the consumer agrees to use the adjuster's contracting firm to make the repairs. Legitimate public adjusters are not contractors, mold remediators, roofers, or plumbers, and they should not represent themselves as such. The bill would prevent licensed public adjusters from being involved in repairs or construction of any kind in connection with their clients' claims.

The bill would prevent scam artists from exploiting public fears or benefitting from the hysteria that surrounds catastrophic events such as floods, tornadoes, hurricanes, or events such as the current "mold crisis." These situations can open the door for unprincipled dealers to abuse the public trust, creating opportunities for individuals or companies to present themselves as public adjusters as a cover for whatever services they actually offer — construction, roofing, mold remediation, foundation repairs, and so on.

CSSB 127 would define clearly a PIA's role in handling insurance claims, making it plain that public adjusters are not authorized to practice law. The bill would not authorize PIAs to mediate disputes with insurance companies. It would state clearly that PIAs could not use their licenses to practice law, render legal advice, or represent clients in claims for bodily injury loss.

Disreputable players have given public adjusters a bad name in recent years, and honest public adjusters should have nothing to fear from state licensing. The profession of public adjusting was established more than 100 years ago, and public adjusters now are licensed in the vast majority of states. Only in Texas, Alabama, Kansas, Louisiana, Mississippi, and Wyoming do they remain unlicensed or unregulated.

According to the fiscal note, CSSB 127 would generate $62,500 per year in fee revenue over the next five years, providing the commissioner with ample funding to enforce the code and investigate alleged violations.

OPPONENTS SAY:

CSSB 127 would not go far enough in requiring speedier handling of claims. It would not require the commissioner to adopt rules that would require more prompt, efficient, and effective claims handling, but would make such rules optional. Problems related to delayed settling of water and mold damage claims have been so egregious in recent years that the Legislature should compel standards that safeguard against inefficient handling and delayed payments of these claims.

The bill would protect policyholders more if it contained specifications such as a grace period for water damage claims associated with appliances. Policyholders who have taken precautions to maintain appliances such as air conditioning units, dishwashers, washing machines, and water heaters should not suffer automatic, higher insurance premiums because an appliance unexpectedly caused water damage.

The bill's definition of a PIA would appear to give license holders the authority to negotiate disputes with insurance companies. PIAs should be limited to assessing and valuing property damage, and if a dispute arises, a lawyer should be engaged. While the bill would prohibit licensed PIAs from representing clients in bodily injury claims, it also should state explicitly that adjusters could not represent clients in any third-party claim.

This bill could have unintended consequences that would damage consumers by legitimizing a profession that preys on unsuspecting citizens during stressful events. Insurance company adjusters already are trained and licensed to handle claims for property damage or loss. Public adjusters merely go from door to door seeking commission fees for claims that the insurance company would have paid anyway.

Legitimate, honest contractors and roofers spend hours of time providing free estimates of the cost to repair damaged property. It is much more convenient for a consumer to designate the claims process to a knowledgeable contractor or roofer in a one-stop process than to assign a claim to an adjuster who wants to take a percentage of the claim. Current law prohibits contractors from padding estimates, rebating deductibles, or giving discounts. Strengthening these standards would do more to get rid of bad actors and would do a greater service to consumers than preventing honest contractors from doing high-quality work. Relatively few PIAs now practice in Texas. In the event of a catastrophic event such as a tornado or hurricane, not enough licensed PIAs would be available to handle the volume of claims.

CSSB 127 would not establish a disciplinary board to oversee license holders' conduct. Instead, it would give full responsibility for oversight to the commissioner with insufficient funds for implementation.

NOTES:

The committee substitute changed the Senate engrossed version of SB 127 by removing provisions that would prohibit an insurer from using appliance-related claims as underwriting guidelines and by establishing claims handling procedures specific to water damage claims, rather than to all other types of claims. The substitute also would specify that a PIA licensee could not have been convicted of a felony within the 10 years before filing the application, whereas the Senate engrossed version would prohibit issuance of a license to any convicted felon who had not received a full pardon.

The portions of CSSB 127 related to PIA licensing largely correspond with provisions of HB 392 by Seaman, et al., which passed the House on April 1 and has been referred to the Senate Business and Commerce Committee.