WEATHERING THE STORM OF FIRST PARTY PROPERTY LITIGATION:

Identifying the key players, combating suspicious claims, and reducing the Insurers risk

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During the 2020 hurricane season, the United States suffered an estimated $25 billion in insured losses and over $60 billion in economic losses.[1] What is not accounted for in these numbers are the billions of dollars in losses to insurance carriers attributed to the increasing amount of litigation that follows each storm, which leads to rising insurance premiums. Financial incentives of roofing contractors, public adjusters, and attorneys have led some within their profession to exploit weather events, leading to increased litigation costs. This article explores common tactics conducted in concert by roofing contractors, public adjusters, and plaintiff's attorneys in first party property claims; the impact recent legislation may have on curbing the litigation costs associated with first party property claims; and tools and strategies available to insurance carriers and defense attorneys to combat these claims.

IDENTIFYING THE TRIPARTITE COHORT AND THEIR FIRST PARTY PROPERTY CLAIMS TACTICS

The following illustrates a common example of how these professionals become key players in a claim following a weather event:

A thunderstorm, tornado, or hurricane passes through an area with anecdotal reports of high winds and hail. In the following days, a homeowner is informed through mailers or a charismatic salesperson that they may be eligible for a free roof replacement. A frugal homeowner inquires and is told "all you need to do is file an insurance claim for hail or wind damage to your property." This conversation occurs before any professional has inspected their roof to verify whether the roof has storm related damage. The homeowner, unaware of any roof damage but knowing his or her roof in this geographical area is near the end of its useful life, agrees to sign the documents. The executed documents include an Assignment of Benefits (AOB), which transfers, in part, the homeowner's right to insurance proceeds under a roof claim to the roofing contractor in exchange for the possibility of obtaining a new roof. Heeding the salesperson's guidance, the homeowner files a claim for a roof replacement citing wind and/or hail damage. The insurer inspects the roof to find no recent hail or wind damage but acting in good faith offers the homeowner an amount to repair a few sections of worn-out shingles. The homeowner rejects this offer of repair believing that they are owed a new roof.

Following the partial claim denial, the salesperson instructs the homeowner to contact a public adjuster explaining that the roofing contractor has a great relationship with this public adjuster and the public adjuster has a high success rate at getting insurance carriers to pay on roof claims. The public adjuster agrees to assist the homeowner with his claim in exchange for a contingency fee on the recovery of the insurance proceeds. The public adjuster performs an inspection and creates an inflated estimate that calls for an entire roof replacement caused by the recent storm. The insurer orders a second inspection, but still finds no wind or hail damage. The claim remains partially denied.

At this point, the claim is ripe for litigation. The roofing contractor or the public adjuster then introduces the homeowner to a *trusted attorney who has a high success rate at getting insurance carriers to pay roof replacement claims.* Litigation ensues.

The above hypothetical highlights a common practice in the roofing industry. Each participant has a financial interest. With each participant's entrance into the claim, the amount of money required to resolve the claim and compensate each participant increases. Thus, each participant brings value to the claim by inflating the damages. The roofer finds storm related damage. The public adjuster recommends replacement rather than repair. The attorney, in some jurisdictions, leverages a statutory claim for attorney's fees which, in many instances, is

unrelated to the homeowner obtaining a new roof. For example, in Florida, prior to the implementation of the recently enacted SB 76 legislation, Florida had an attorney fee shifting statute that applied to first-party insurance disputes. Florida Statute § 627.428 provided, if an insured is required to resort to litigation and is successful against his insurer, the insured will be entitled to recover attorney's fees from his insurer. This fee shifting statute also incentivized contractors and public adjusters with relationships with plaintiff's attorneys to litigate the dispute in an effort to increase the recovery from the insurer. Often, this leads to the roofing contractor, public adjuster, and attorney obtaining a substantial recovery in the form of fees and leaving little for a replacement or repair of the homeowners' roof.

RECENT LEGISLATION IN FLORIDA AIMED AT CURBING EXCESSIVE FIRST PARTY PROPERTY CLAIMS AND LITIGATIONS COSTS

In speaking about the rise of first party property litigation in Florida, Mark Wilson, president and CEO, Florida Chamber of Commerce, explained, "when Florida accounts for only 8 percent of the nation's property insurance claims but 76 percent of national property insurance litigation, you know there is a problem." Addressing this problem, in May of 2021, Florida enacted SB 76. The new law went into effect on July 1, 2021, and takes aim at many of the issues discussed above. In the applicable provisions of SB 76, the legislation:

- Prohibits roofing contractors or any person acting on their behalf from:
  - Making a "prohibited advertisement," including an electronic communication, phone call or document that solicits a claim.
  - Offering anything of value for performing a roof inspection, an offer to interpret an insurance policy, file a claim, or adjust the claim on the insured's behalf.
  - Providing repairs for an insured without a contract that includes a detailed cost estimate of the labor and materials required to complete the repairs.
- Replaces the plaintiff-friendly attorney fee-statute to make the recovery of attorney fees and costs contingent on obtaining a judgment for indemnity that exceeds a pre-suit offer made by the insurance company.
- Requires claimants to file a pre-suit demand at least 10 days before filing a lawsuit against an insurer that includes an estimate of the demand, the attorney fees and costs demanded and the amount in dispute.
- Prohibits pre-suit notices to be filed before the insurance company can make a determination of coverage.
- Allows an insurer to require mediation or other form of alternative dispute resolution after receiving notice.

Proponents of SB 76 believe the law is a step in the right direction but note more is required. The impact SB 76 may have on the amount of litigation and resulting costs to insurers and homeowners is to be determined. However, roofing contractors, public adjusters, and plaintiff's attorneys are already modifying their marketing tactics and positioning themselves to remain successful in this arena. In that regard, insurers too must pivot and use the tools and strategies discussed below to combat these claims.

TOOLS AND STRATEGIES AVAILABLE TO INSURERS AND DEFENSE ATTORNEYS

Most homeowner policies include post-loss conditions requiring insureds to sit for an examination under oath, provide a sworn proof of loss, and provide documents to the insurer. Insurers may also choose to take the insured's recorded statement after the first notice of the loss. A recorded statement can help the insurer verify the facts of the claim and identify other key players involved.

Insurers should use the above tools early in the claims process to preserve time-sensitive information, identify key players and financial biases, and to solicit the insured's cooperation at the outset. Information leading to the availability of a policy exclusion is usually discovered in the initial investigation of the claim. Further, insureds bringing suspicious claims are often hesitant to cooperate which may lead to a defense for the insurer under the cooperation clause of the policy.

The majority of policies also contain an appraisal provision. Requesting an early appraisal is a useful way to prevent claims from becoming inflated. In some jurisdictions, the appraisal process is voluntary for contractors operating under an AOB. However, as noted above, Florida's SB 76 and related case law allows an insurer to require an insured or a contactor operating under an AOB to participate in an appraisal, pre-suit mediation, or other form of alternative dispute resolution.[2]

Importantly, once a claim falls into litigation many jurisdictions have separate attorney fee shifting statutes that can be used as tools to shift some of the financial risk back onto plaintiffs. This typically comes in the form of an Offer of Judgment or Proposal for Settlement. In short, in order for the insurer to recover its attorney's fees, the insurer must estimate what the value of a potential judgment will be and make an Offer or Proposal that comes under the ultimate judgment by a specified percentage. In Florida the threshold percentage is 25%. For example, if the insurer files a Proposal for Settlement for $100,000 and the Plaintiff rejects this Proposal and a judgment is entered for $75,000 or less, the insurer will recover its fees.[3] Although the enactment of SB 76 provides its own attorney fee provision, it does not appear this will impact the above.

CONCLUSION

As first-party property claims continue to rise across the country, so does litigation and the costs associated therewith. Although legislation is underway in many jurisdictions, insurers must be aware of the tactics being employed by the professionals in this industry and take pro-active steps early in the claims process to identify suspicious claims, the players involved, and the tools and defenses available to combat these claims.

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1 Source – Insurance Information Institute & Artemis

2 *See Certified Priority Restoration v. State Farm Fla. Ins. Co.*, 191 So. 3d 961, 962 (Fla. Dist. Ct. App. 2016) (Compelling appraisal of loss for which assignee sought payment from homeowner's insurer was permissible over assignee's objection.)

3 *See* Fla. R. Civ. P. 1.442; *see also* Fla. Stat. 768.79(1)