Office of the
Insurance
Consumer Advocate

REPORT ON

Homeowners' Policy & Claims Bill of Rights Working Group

October 2013

Robin Smith Westcott, Esq.
Florida Insurance Consumer Advocate

Appointed by
Jeff Atwater
Chief Financial Officer
State of Florida

TABLE OF CONTENTS

INTRODUCTION

During the summer of 2013, the Office of the Florida Insurance Consumer Advocate (Advocate) and the Department of Financial Services' Division of Consumer Services hosted consumer forums throughout the state to provide insurance consumers the opportunity to voice their experiences with homeowners insurance claims.

Subsequently, the Advocate established the Homeowners' Policy & Claims Bill of Rights Working Group (Working Group) to explore the issues raised during the consumer forums. The Working Group was specifically selected to represent the interests of consumers as well as the interests of insurers, agents, regulators and lenders in the claims handling process. The following individuals and organizations generously contributed considerable time and effort to help resolve the issues raised during the consumer forums:

- Allen Thomas McGlynn, Counsel, State Farm Florida
- Angel Bostick, Vice President & General Counsel, American Strategic Insurance Group
- Austin R. Curry, Executive Director, Elder Care Advocacy of Florida
- Bill Newton, Executive Director, Florida Consumer Action Network
- Dale S. Dobuler, Esq., Florida Justice Association
- Darius H. Grimes CRC, CSI-CDT, CWMI, Disaster Smart Consulting, Inc.
- Enrique Ruiz, Past President, Latin American Association of Insurance Agencies
- Kathy Atkins-Gunter, Senior Consultant Director, Rogers, Gunter, Vaughn Insurance, Inc.
- Kenneth Pratt, Vice President of Government Affairs, Florida Bankers Association
- Kimberly A. Salmon, Esq., Groelle & Salmon Attorneys at Law
- Lance Malcolm, Vice-President of Claims, Citizens Property Insurance Corporation
- Laura Pearce, General Counsel, Florida Association of Insurance Agents
- Logan Mitchell McFaddin, Legislative Affairs Director, Office of Chief Financial Officer Jeff Atwater
- Lynne McChristian, Florida Representative, Insurance Information Institute
- Melissa Burt DeVriese, General Counsel, Security First Insurance Company
- Michael A. Kliner, Senior Attorney, Office of the Florida Insurance Consumer Advocate
- Nicole Vinson, Esq., Merlin Law Group, P.A.
- Paul Handerhan, President-Elect, Florida Association of Insurance Public Adjusters
- Robin Smith Westcott, Esq., Florida Insurance Consumer Advocate
- Tasha Carter, Division Director, Division of Consumer Services, Department of Financial Services
- Virginia Christy, Senior Attorney, Office of Insurance Regulation

Many consumers are not aware of the complex legal terms of their homeowners insurance policies until they file a claim. In any given year only about 3-4% of policyholders file a homeowners claim, nevertheless the financial impact of homeowners insurance upon the Florida economy is significant as evidenced by Floridians paying out $8.3 billion in homeowner's premiums and receiving claim reimbursements of $2.4 billion in 2012 (the difference of $5.9 billion pays primarily for potential hurricane losses, expenses and a marginal profit).

It is the position of the Advocate that every consumer is entitled to certain rights and protections in an easily understood Claims Bill of Rights. The Claims Bill of Rights is a summary of the existing rights and protections included in current law and also includes new rights and protections to address issues identified in the forums and discussed in the Working Group.

This report will focus on the issues that indicate new rights and protections necessary to ensure a fair homeowners insurance marketplace for all stakeholders including consumers, insurance companies, insurance agents, insurance adjusters, regulators and lenders.

EXECUTIVE SUMMARY

The purpose of this report is to: 1) identify issues and practices that are adversely impacting Florida homeowners insurance consumers; and, 2) provide options for policymakers to implement corrective actions to ensure a fair homeowners insurance market for all stakeholders. The issues and practices were identified through consumer forums held throughout the state, and the options for policymakers were identified by representatives of consumers, insurance companies, insurance agents, insurance adjusters, regulators and lenders in a series of working group meetings. The following is a summary of the findings.

EDUCATION, TRANSPARENCY AND MONITORING THE MARKETPLACE

Insurance consumers need to become more educated about homeowners insurance, because Florida homeowners policies vary widely in terms of coverage and the duties and obligations of homeowners before and after a loss. Consequently, it is recommended that a robust consumer information website be developed providing a single repository of insurer coverage, rate, complaint and financial strength information. This site should provide consumers with the ability to rate the service and claim performance of insurers. Furthermore, it is recommended that funding for the Department of Financial Services' Division of Consumer Services be increased to conduct more public outreach and educational workshops for consumers.

Because there is insufficient consumer awareness of claims assistance available through the Department of Financial Services' Division of Consumer Services' toll free Help Line, it is recommended that targeted advertising campaigns be conducted to raise consumer awareness.

THE CLAIM PROCESS

With limited time or information available to make wise decisions after a loss, consumers are frequently confronted with contractor and vendor choices that will have permanent and far reaching financial impacts. For this reason, basic safeguards should be in place for consumers facing crisis claims situations. Therefore it is recommended that:

1) If the vendor seeks to have the repair work submitted as part of the damage claim sent to the insurance company by the homeowner, there must be a written contract. The contract must include a detailed written estimate of the scope of work to be performed and a quote for all materials and services to be rendered. [1]

2) The insured must be notified of any variance from the scope of work documented and agreed to in the original contract.

3) The contract must contain a right to rescind within a reasonable time period after it is executed.

4) Referral fees and kickbacks must be prohibited for all insurance inspections, repairs or work to be performed on a private residence.

ASSIGNMENT OF BENEFITS

A full assignment of policy benefits carries a risk for the consumer of not being made whole, and additionally, may constitute a breach of the mortgage contract. This leaves consumers vulnerable to fraud and abuse by unscrupulous vendors that are making major decisions, which may be detrimental to consumers.

It is recommended that any contract containing a qualified assignment of benefits must contain the following:

1) A vendor should be limited to a qualified assignment of benefits for work performed for repairs to a home for which recovery of insurance proceeds is anticipated. The qualified assignment of benefits should be restricted to claims brought only under Coverage A: Dwelling and Coverage B: Other Structures.

2) Any changes or modification to the scope of work under a contract with a qualified assignment must be presented to the

[1] In the event the insurance company elects the right to repair the property, the company must follow the provisions outlined on page 17 of this report.

homeowner for written approval for the assignment to remain valid.

EMERGENCY REMEDIATION COMPANIES / WATER LOSS

Currently, there is no required certification or license for performing remediation services. The consumer has no guarantee or protection in place to ensure that their home, frequently the most valuable asset they possess, will be repaired by an accredited professional adhering to established guidelines. The State requires licensure for other professionals like contractors and public adjusters to protect consumers from some of the same practices that are now occurring in the emergency mitigation industry. Recommendations include:

1) All Emergency Mitigation Contractors must have a certification (or qualification) from a Department of Business and Professional Regulation (DBPR) recognized organization.

2) If the contract for services by the Emergency Mitigation Contractor contains a qualified assignment of benefits, all documents submitted to the insurance company for reimbursement must be consistent with nationally recognized professional standards.

EXAMINATIONS UNDER OATH

Scheduling of Examinations Under Oaths (EUO) are often made without proper notice to, or consultation with, the policyholder. This is an issue because a claim may be legally denied if the policyholder fails to submit to an EUO before filing suit. Furthermore, EUOs may be used to intimidate policyholders by making unrealistic demands for documents or holding them over extended periods without consideration of a policyholder's work schedule, age or health issues. Recommendations include:

1) An insurer must provide a standardized written statement to the policyholder that fully explains the EUO process and sets forth the policyholder's rights.

2) An insurer may only conduct an EUO to obtain information that is relevant and reasonably necessary to process or investigate a claim.

ALTERNATIVE DISPUTE RESOLUTION

Florida consumers may elect mediation or neutral evaluation (for sinkhole claims) to resolve claim disputes with insurance companies. However, numerous mediations are not completed within the 45 day time limit required by law, and there is no administrative remedy for mediators who fail to adhere to the rules and procedures or who fail to disclose conflicts of interest. Likewise, neutral evaluations, which are for the purpose of settling sinkhole claim disputes, are often not completed within the required 90 days and there is no requirement that a neutral evaluator disclose a conflict of interest, nor is there any administrative remedy if the Department of Financial Services learns that a neutral evaluator is no longer qualified to conduct neutral evaluations.

Mediation conferences are often held at inappropriate locations and the insurance company's representatives are not prepared to negotiate settlements. The named policyholders are required to be at the mediation conferences but often surrogates attend on behalf of the named policyholder. These programs depend on the strength of the rules and laws implementing them, and it is clear reforms are necessary to make them more fair and effective tools to resolve claim disputes. Recommendations include:

1) Extend authority to the Department of Financial Services to regulate mediators, neutral evaluators and the mediation and neutral evaluation processes through legislation or administrative rule.

2) Amend the Department of Financial Services' administrative rules to establish fair standards for mediation locations.

3) Allow insurers the right to request policyholders to provide photo identification to attend mediation or neutral evaluation conferences.

4) Require entry of appropriate data into databases dedicated to facilitate research into the fairness and effectiveness of the mediation and neutral evaluation processes.

POST-CLAIM UNDERWRITING

There are serious repercussions for consumers when a claim goes unpaid or coverage is cancelled when a carrier alleges a policyholder has made a material misrepresentation on an insurance application. Application misrepresentation allegations that stem from an immaterial credit deficiency that an insured is unaware of or forgot to list on their application for insurance should not be a basis to void a policy. In

such instances, a mortgage company may retroactively purchase extremely expensive force-placed coverage and add the cost to the mortgage payments.

The home may be uninhabitable and the homeowner may not be able to afford to make the necessary repairs. As long as the home is in disrepair, the homeowner is not eligible for standard coverage with another insurance company. Ultimately, some consumers may face foreclosure and lose their home as a result. Therefore, it is recommended that a 90 day limit be established for using any credit deficiency or other public record available to the insurance company at the onset of the application to cancel an insurance policy.

REPAIR VS. INDEMNITY

Traditionally, a claim is adjusted and a partial payment to the homeowner is made on an actual cash value basis so that the homeowner can hire a contractor to begin repairs. As repairs are completed, the insurer releases the remaining estimated replacement cost insurance proceeds to the homeowner. As an alternative to the traditional method, some insurance companies choose as standard business practice to provide a list of preferred vendors to protect policyholders from unscrupulous or incompetent contractors or select a licensed or qualified contractor to perform repairs in lieu of issuing a check for damages. A program in which the insurance company selects the contractor may appeal to busy professionals and the elderly who either don't have the time or capability to manage the complexities of the re-build process. Insurers view these programs as a way to control repair costs and profit from the affiliated ownership of the repair companies. However, there is a concern that Contractual Managed Repair insurance companies may provide poor workmanship to increase profits in spite of warranting their work. Recommendations include:

1) Contractual Managed Repair contracts should remain between the insurance company and the contractor. The work of the contractor must be managed by the insurance company and payments must be made directly to the contractor by the insurance company, and the insured should have no contractual relationship with the contractor.

2) The Office of Insurance Regulation should develop rules that clearly define the limits and requirements for companies that operate managed repair or right to repair programs as standard business practice including rules concerning deductible payment requirements as a prerequisite to beginning repairs.

MORTGAGE COMPANIES WITHHOLDING FUNDS

In accordance with federal banking regulations, mortgage companies are allowed to be compensated for conducting visual inspections, but the amount of the compensation and number of inspections performed is not specified. Therefore, standards should be implemented to ensure uniform inspection plans and reasonable compensation. Inspection fees may also be deducted from the insurance proceeds. Mortgage companies may also apply insurance proceeds to the mortgage, but the mortgage must be several months in arrears and this process is carefully supervised. Federally chartered banks should develop rules consistent with the requirements for FannieMae and FreddieMac with respect to mortgages in arrears.

This proposed Bill of Rights incorporates current law and recommendations from the working group. This Bill of Rights should be codified into current law. The Claims Bill of Rights should be provided to policyholders when a claim has been filed with the insurance company.

CLAIMS BILL OF RIGHTS

This Claims Bill of Rights is a summary of your rights and responsibilities when you file a claim under your homeowners policy. The Claims Bill of Rights has been adopted by the Florida Legislature and should be presented to you when you file a claim with your insurance company for damage to your home. This Claims Bill of Rights is specific to the claims process and does not represent all your rights under Florida law regarding your insurance policy.

If you have any questions or experience any difficulty in resolving your claim with an insurance company, you should contact the Florida Department of Financial Services' Division of Consumer Services at 1-877-my-FL-CFO (1-877-693-5236) (if you are calling from outside of Florida, please dial (850-413-3089) or visit the website at https://apps.fldfs.com/ESERVICE/Default.aspx or write to the Department of Financial Services, Division of Consumer Services, at 200 East Gaines Street, Tallahassee, FL 32399-0322 for assistance in resolving your claim.

You have a duty to report the claim timely and to prevent further damage. **DO NOT** depend upon reporting a claim to your insurance agent as satisfying this duty, you should always notify your insurance company by phone or, if provided by the insurance company, report online or via a mobile phone app. Ask for and write down the assigned claim number provided. You may also want to write or fax your insurance company but you must contact the insurance company and report the damage timely. If you do not know how to contact your insurance company, the Division of Consumer Services can provide you with the contact information.

FAIR TREATMENT

You have the right to be treated fairly and honestly when you file a claim. Florida law defines Unfair Insurance Trade Practices and prohibits Unfair Claim Settlement Practices by insurers.

Insurance Companies Must:

1) Acknowledge and act promptly upon communications with respect to claims **within 14 calendar days**, your insurance company must acknowledge receipt of your claim unless your insurer's acknowledgment reasonably advises you that the claim appears **not** to be covered, the acknowledgment must also provide necessary claim forms, and instructions, including an appropriate telephone number for you to call;

2) Promptly provide a reasonable explanation in writing to you regarding the basis for the denial of a claim with the supporting documentation relied upon or for the offer of a compromise settlement;

3) Upon your written request within 30 days after the proof-of-loss statements have been completed, the insurance company must affirm or deny coverage of a claim, the dollar amount or the extent of coverage, or provide a written statement that the claim is being investigated;

4) Promptly notify you of any additional information necessary for the processing of a claim;

5) Clearly explain to you the nature of the requested information and the reasons why such information is necessary; and,

6) Pay undisputed amounts owed to you within 90 days after the insurer receives notice of a residential property insurance claim and determines the amount owed for a covered loss. [Note: there are some exceptions for situations in which it would be impossible for the company to pay on time.]

Insurance Companies May Not:

1) Make a material misrepresentation for the purpose of settling a claim on less favorable terms than those provided in the policy;

2) Misrepresent pertinent facts or insurance policy provisions relating to a coverage at issue; and,

3) Deny a claim without conducting a reasonable investigation based upon available information.

INFORMATION NOT REQUIRED FOR CLAIM PROCESSING

You have the right to refuse to provide your insurance company with information that does not relate to your claim. In addition, you may refuse to provide your bank statements and federal income tax records unless your insurer gets a court order or your claim involves lost income or a fire loss.

ALTERNATIVE DISPUTE RESOLUTION

Homeowner's have the right to request free mediation of their homeowner's claim or request neutral evaluation of their sinkhole claim. The request can be made to the Division of Consumer Services. Mediations and neutral evaluations are non-binding, and any settlement agreed upon during mediation may be rescinded within 3 business days by the policyholder.

If the homeowner seeks resolution of a claim by mediation, the homeowner must be present for the mediation and may not elect to have any other representative as proxy, including a contractor or public adjuster.

INVESTIGATION OF A CLAIM

An insurance company is allowed to inspect your property following a report of a loss under your policy. Florida law requires an adjuster to provide 48 hours notice to you to schedule a time to inspect your property. This requirement does not apply to the company's adjuster within the first 48 hours after a claim has been filed. Homeowners also have the right to waive this requirement for any adjuster.

An insurance company may ask to take recorded statements and request you undergo an Examination Under Oath (EUO), which should be limited to information that is relevant and reasonably necessary to investigate your claim. You are allowed to have a lawyer present during any recorded statements and the EUO.

A request for an EUO by an insurance company should include the following:

1) A copy of the Claims Bill of Rights;

2) The reason and purpose of the EUO and any specific information required;

3) A location and proposed time for conducting the EUO; and,

4) Notice that you may be represented by counsel at the EUO and may record the examination proceedings in their entirety.

The homeowner may request a copy, free of charge, of any transcript from the EUO and may make sworn corrections to the transcript to accurately reflect the testimony under oath. **Refusing to attend an EUO may affect your rights to recovery under your insurance contract.**

CONTRACTS FOR REPAIR

After a loss, you may need to hire and contract for the repairs to your home. READ ANY CONTRACT CAREFULLY BEFORE SIGNING. Check with the Florida Department of Business and Professional Regulation (DBPR) at 850-487-1395 to verify the contractor is licensed in Florida for the type of work to be performed on your home.

All contracts for repair work to which insurance proceeds may be applied must be in the form of a written contract. The contract must include a detailed written estimate of the work to be performed and a quote for all materials and services to be rendered. If the scope and quote need to be revised, the contractor must notify you. The contract must include a provision allowing you to rescind the contract, in writing, within 72 hours of signing it.

EMERGENCY REMEDIATION / MITIGATION OR REPAIR

Homeowner's are required to make emergency repairs. To mitigate the damage to the home but the companies offering to do emergency mitigation are not usually sent by or connected to your insurance company. If an emergency repair company says they will bill your insurance company directly, carefully review the form they are asking you to sign for such action, because the responsibility is ultimately yours. Homeowners should also be cautioned that a COMPLETE ASSIGNMENT OF BENEFITS will give this emergency mitigation company all the power for the entire claim not just during the drying out process.

Emergency Mitigation Contractors must have a certification (or qualification) from a Department of Business and Professional Regulation (DBPR) recognized organization related to their scope of

work. Any work beyond removal of certain debris and materials may require the work be performed by a licensed contractor. The contract with any Emergency Mitigation Contractor must contain a detailed scope of work and quote for materials and services to be provided.

ASSIGNING YOUR RIGHTS TO RECOVERY

You may be asked by the contractor to assign your rights to payment for your losses under the insurance contract. If you elect to sign a contract with an assignment of benefits provision, the assignment must be limited to your home and other structures and must not apply to any other coverage for your personal belongings or additional living expenses, etc.

An insurance company must be notified within 72 hours of your signing an assignment of benefits for it to be valid. Contractors are allowed to interact with your insurance company to establish the proper reimbursement under the claim; however, they may not act as an "adjuster" on the claim. Any contractor obtaining an assignment of benefits is subject to an Examination Under Oath.

CREDIT INFORMATION

Insurance companies are allowed to use your credit history or the information in public records for underwriting and determining your premiums. Your claim should not be denied if the sole reason for denial was failure to disclose a credit related issue after the policy has been in effect for more than 90 days.

RIGHT TO REPAIR / MANAGED REPAIR PROGRAMS

If your insurance company elects to repair your property, you are still entitled to fair treatment in the settlement of your claim. Under these circumstances your insurance company must ensure you are entitled to a fair complaint process and a warranty of the work performed on your home. If you experience any problems, please contact the Division of Consumer Services.

MORTGAGE COMPANIES WITHHOLDING FUNDS

Mortgage companies will often be added as an additional payee on any settlement check from the insurance company. Federal guidelines allow mortgage companies to hold your settlement funds until your repair work has been performed and inspected. Mortgage companies may also apply your settlement funds toward your mortgage if you are behind on your payments. Mortgage companies may inspect the repairs prior to releasing insurance proceeds and change an inspection fee.

EDUCATION, TRANSPARENCY AND MONITORING THE MARKETPLACE

Both the insurance purchase and claim process are very confusing to many consumers. Most consumers know they must take measures to prevent further damage after a loss but are unaware of any other duties or obligations they have under the terms of their insurance policies.

Insurance consumers need to become more educated about homeowners insurance, coverage options, and their contractual duties and obligations under the terms of their insurance policies, because Florida homeowners policies vary widely in coverage and in the duties and obligations of homeowners before and after a loss.

Mr. Austin Curry, the Working Group representative from Elder Care Advocacy of Florida, stated: "The home is usually the largest investment for an individual and usually the largest asset for estate planning purposes for our seniors." Yet, the level of consumer understanding at the point of purchase to adequately protect that asset and the amount and quality of information to help a consumer make appropriate selections is woefully inadequate.

Many consumers need to understand that there may be significant gaps in coverage depending upon their policy, and the consumer education process must begin **before** the consumer purchases the policy. Lynn McChristian with the Insurance Information Institute articulated the importance of consumers identifying their own unique personal risks and purchasing the product that gives them the right combination of coverages.

Agents have a key role to play in the consumer education process; nevertheless, the members of the Working Group representing agents favored even more public outreach and transparency with regard to coverage, rate, complaint and financial strength information for Florida property insurers. Currently, private insurers have selected over 400,000 policies for depopulation from Citizens Property Insurance Corporation (Citizens).

Although some basic financial information is available about these companies, other basic information, such as a binding premium quote is not being provided to consumers. We must empower insurance consumers with better information, if we expect to "shrink" Citizens. In furtherance of that goal, Citizens will implement a new "Clearinghouse" for the purpose of encouraging an even more efficient and competitive insurance marketplace beginning January 1, 2014.

Recommendations

1) A robust consumer information website providing a single repository of insurer coverage, rate, complaint and financial strength information. Additionally, this site should provide consumers with the ability to rate insurer service and claim performance.

2) Increased funding for the Department of Financial Services' Division of Consumer Services to conduct more public outreach and workshops for consumers.

Additionally, the Office of Insurance Regulation's (OIR) Market Investigations is charged with the enforcement of insurance company claims handling laws. Moreover, the OIR conducts market conduct examinations pursuant to Section 624.3161, Florida Statutes, and the Department of Financial Services' Division of Consumer Services (DCS) manages complaints filed by insurance consumers against insurance companies, insurance agents and public adjusters.

DCS has built a database of complaints, which is used to target companies for examination if an adverse pattern or trend is identified in this data. However, many consumers are unaware of the help available from DCS through its toll free Consumer Help Line. If consumers do not file complaints, then the identification of adverse patterns and trends may be delayed or go unrecognized.

There were 1,629 residential property insurance complaints closed by DCS in the last twelve months with claim issues other than requests for neutral evaluation and mediation. A total of 434 (26.6%) of these complaints contained one or more key words connected to a specific issue identified in the

consumer forums. However, it is suspected that many more of the complaints were related to consumer forum issues, but the consumer may not have used any of the key words to describe their concerns.

Recommendation:
Conduct targeted advertising campaigns to increase consumer awareness of the Department of Financial Services' Division of Consumer Services' toll free Help Line.

THE CLAIM PROCESS

Once a loss occurs it is imperative that the claim be reported timely to the insurance company. A delay in reporting the claim or in the response from the insurance company can leave the consumer vulnerable to frustration, fraud and abuse.

Section 626.854(14), Florida Statutes, requires that an adjuster must provide at least 48 hours notice to the insured before scheduling an onsite inspection; however, the insured may waive the 48 hour notice. While this provision seeks to protect insurance consumers by allowing them sufficient time to be present during an inspection, this has led in some situations to delays in the claim process.

Moreover, with limited time or information available to make wise decisions, consumers are frequently confronted with contractor and vendor choices that will have permanent and far reaching financial impacts. Many finance contracts, contracts for home solicitation or for services to be performed at a future time must contain a provision allowing the consumer a "cooling off" period in which to think through decisions having major financial impact or when the consumer is vulnerable to high pressure tactics.

In some situations, the vendor soliciting the homeowner has paid a "referral fee" to another party in order to secure the business. Whether it's the plumber being paid a referral fee by an Emergency Remediation Company or an insurance agent receiving a "kickback" for recommending a home inspector or mediation contractor, such practices inflate costs, invite misrepresentation and pose potential harm to consumers, and therefore basic safeguards are needed to protect consumers from profiteering intermediaries and contractors.

Recommendations:

1) Qualify the notice requirement to exclude the 48 hour window immediately following the notice of the claim for company adjusters.

2) If the vendor seeks to have the repair work submitted as part of the damage claim sent to the insurance company by the homeowner, there must be a written contract. The contract must include a detailed written estimate of the scope of work to be performed and a quote for all materials and services to be rendered.

3) The insured must be notified of any variance from the scope of work in the original contract, and such variance must be documented and agreed to in writing.

4) The contract must contain a right to rescind within a reasonable time period after it is executed.

5) Referral fees and kickbacks must be prohibited for all insurance inspections, repairs or work to be performed on a private residence.

ASSIGNMENT OF BENEFITS

For many years, Florida courts have recognized an insurance consumer's right to assign benefits under an insurance contract after a loss occurs[2]. Contracts incorporating assignment of benefits are becoming increasingly broad in scope and particularly prevalent for vendors performing emergency services to a dwelling immediately following a property loss.

Florida Courts have upheld the right to assign benefits as good public policy to protect the contractor's interest in being paid for insurance repairs. Without the assignment, the contractor's only other recourse is to seek payment from the homeowner. However, a full assignment of benefits can effectively disenfranchise the homeowner from further involvement in the claim and carries the risk of not being made whole and may constitute a breach of the mortgage contract.

Furthermore, after an assignment of benefits, the vendor may exercise rights under the policy to the detriment of other lien holders. In some cases the vendor's rights to negotiate settlement under the assignment begins to mirror the responsibility for "adjusting" the claim, which Florida law restricts to licensed individuals.

This leaves consumers vulnerable to fraud and abuse by unscrupulous vendors that are making major decisions detrimental to consumers. As a result, most of the members of the Working Group agreed that there must be some restrictions placed upon the assignment of benefits.

Recommendations:

1) A vendor should be limited to a qualified assignment of benefits for **work performed** for repairs to a home for which recovery of insurance proceeds is anticipated. The qualified assignment of benefits should be restricted to claims brought only under Coverage A: Dwelling and Coverage B: Other Structures.

2) Any contract containing the qualified assignment of benefits must contain the following to be a valid assignment:
   a. A detailed written estimate of the scope of work to be performed and a quote for all materials and services to be rendered;
   b. Notice to the homeowner that the homeowner retains all other rights and responsibilities under the contract;
   c. No contract with an assignment of benefits shall contain any language that would be considered "adjusting" the claim;
   d. The homeowner shall be given notice of all information regarding the claim submitted by the vendor to the insurance company and any action taken by the vendor to secure payment from the insurance company for work performed; and,
   e. Any changes or modification to the scope of work under a contract with a qualified assignment must be presented to the homeowner for written approval for the assignment to remain valid.

3) In order to be a valid assignment, the assignee must notify the insurance company in writing within 72 hours of the execution of the assignment.

[2] West Florida Grocery Co. v. Teutonia Fire Insurance Co., 77 So. 209 (Fla. 1918), Lexington Ins. Co. v. Simkins Indus., Inc., 704 So. 2d 1384 (Fla.1998).

EMERGENCY REMEDIATION COMPANIES / WATER LOSS

Homeowners frequently experience damage to their home that requires immediate attention and can quickly escalate to be an emergency situation. Whether it is a pipe bursting, a kitchen fire, or a tree falling and damaging the roof; all can create emergency situations. To prevent further loss, the hole in the roof must be patched or covered as soon as possible, the source of the water leak tapped off and the property dried out before mold occurs.

This is the time that the homeowner is most vulnerable to fraud, abuse or general is understanding of the rights and obligations under the insurance contract. Many of the complaints voiced in the consumer forums were related to the narrow window of time after a claim event when it is necessary to prevent further loss. The most frequently reported losses (approximately half of all claims) under a Florida homeowners insurance policy are losses due to leaking water.

Many of the issues regarding the assignment of benefits involve emergency remediation services after a water loss. Currently, there is no required certification or license for performing these emergency remediation services. The consumer has no guarantee or protection in place to ensure that their home, frequently the most valuable asset they possess, will be repaired by an accredited professional adhering to established guidelines. The State requires licensure for other professionals like contractors and public adjusters to protect consumers from some of the same practices that are now occurring in the water remediation industry.

Recommendations

1) Define Emergency Mitigation Contractor: Any individual or company who provides services regarding damages to any residential structure (or personal property contained within), which requires mitigation or remediation, including removal of property, removal of water or other contaminants, cleaning, sanitizing, incidental demolition, or other treatment, including preventive activities, where the lack of immediate mitigation will cause further damage to the property.

2) All Emergency Mitigation Contractors must have a certification (or qualification) from a Department of Business and Professional Regulation (DBPR) recognized organization related to their scope of work, in order to solicit or provide mitigation or remediation services within 48 hours of a loss **and** in order to hold themselves out to the public as a "restoration", "mitigation", or "disaster" contractor.

3) Any company may be qualified (even if the certifying body does not actually "certify" companies) if an individual who supervises Emergency Mitigation onsite is certified in the scope of work. Any company with a Division 1 license or Division 2 license under Chapter 489, Florida Statutes, is exempt from the above requirements (including Section 2) to the extent that they are providing services within the scope of their license.

4) All work of an Emergency Mitigation Contractor, other than removal of non-load bearing building materials and finishes, which requires a license under Chapter 489, Florida Statutes, must be performed by a person or company who is licensed under that chapter for the work being performed.

5) The scope of work to be included in the contract for services by Emergency Mitigation Contractors must be reviewed and approved by the supervisor holding certification and must be consistent with the provisions set forth in ANSI/IICRC S500 Standard and Reference Guide for Professional Water Damage Restoration (or in any updated version thereof.)

6) If the contract for services by the Emergency Mitigation Contractor contains a qualified assignment of benefits, all documents submitted to the insurance company for reimbursement must be consistent with the scope of work and reflect the provision set forth in ANSI/IICRC S500 Standard and Reference Guide for Professional Water Damage Restoration (or in any updated version thereof) and it must be consistent with other statutes and laws pertaining to assignments of benefits.

EXAMINATIONS UNDER OATH

A typical homeowners policy provides that the insurance company has the right to: 1) inspect the property as often as reasonably required; 2) request written information and documentation from the policyholder; and, 3) request a Sworn Proof of Loss valuing the claim.

In addition, an insured will typically be asked to give a recorded statement pertaining to the facts of an insurance loss, which is not the same as an Examination Under Oath (EUO). Most policies allow the insurance company to place the homeowner under oath to give testimony in the form of an EUO pertaining to the facts of a claim. The EUO allows the insurer to investigate a claim in greater detail when there is some confusion about the circumstances of the loss or fraud or deception is suspected.

The failure of the policyholder to appear for a scheduled EUO or to unreasonably refuse to answer questions can result in a breach of the insurance contract and a bar of recovery under the policy. Policyholders and their representatives have reported an increase in the use of EUOs even when there is no evidence of fraud or deception. The following issues have been identified by the Working Group:

- Scheduling of EUOs is often made without proper notice to the policyholder or without consultation with the policyholder. This is an important issue since the claim could be denied if the policyholder fails to submit to an EUO before filing suit.
- The policyholder may be instructed to bring a substantial number of documents, which could have been collected during the normal course of the claim review, may not be pertinent to the claim or may have been destroyed in the loss and not readily available on short notice.
- EUOs may be held for hours or over several days without consideration of the policyholders' work schedule, age or health issues.
- There is no requirement that the insurer disclose: 1) the purpose of an EUO; 2) that the company may be represented by an attorney; or, 3) that the policyholder may retain and be represented by an attorney during an EUO. Furthermore, there is no requirement that an EUO be conducted subject to the Florida Rules of Civil Procedure, which may give the insurer the opportunity to conduct the EUO in a manner detrimental to the policyholder.
- EUOs may be used to intimidate policyholders into giving up valid claims or pressuring insureds to accept unfavorable settlement payments to avoid further delay of repairs.

Recommendations:

1) An insurer must provide a standardized written statement to the policyholder that fully explains the EUO process and sets forth the policyholder's rights.

2) An insurer may only conduct an EUO to obtain information that is relevant and reasonably necessary to process or investigate a claim.

3) An insurer must inform the policyholder of his/her right to retain counsel for an EUO.

4) The insurance company shall notify the policyholder, that upon request and free of charge, it will provide the policyholder with a copy of the transcript of the proceedings. A homeowner may make sworn corrections to the transcript so it accurately reflects the testimony under oath.

5) Any vendor receiving an assignment of benefits shall be subject to the provision of a policy regarding the EUO but shall receive the same protections listed above.

ALTERNATIVE DISPUTE RESOLUTION

Consumers have several options for resolving a claim dispute before initiating litigation. The Department of Financial Services' Division of Consumer Services (DCS) administers the Personal Residential and Commercial Residential Mediation Program (Mediation) in accordance to Section 627.7015, Florida Statutes and Chapter 69J-166.031 Florida Administrative Code. In addition, DCS administers the Sinkhole Neutral Evaluation Program (Neutral Evaluation) in accordance to Section 627.7074, Florida Statutes and Chapter 69J-8, Florida Administrative Code.

These alternative dispute resolution programs were established by the Florida Legislature to provide an informal, nonthreatening forum to help policyholders and insurance companies resolve claim disputes and avoid the costly and time-consuming adversarial appraisal process prior to litigation. In addition, Neutral Evaluation requires a professional engineer or geologist to serve as an objective third party to determine the existence of a sinkhole loss and the method of repair and remediation.

There are differences between the two programs, but for the most part the required professionalism, and ethics should be consistent. Mediators and neutral evaluators must be qualified, maintain required certification or licensure and be approved by the Department of Financial Services' Division of Insurance Agent and Agency Services.

DCS selects mediators on a rotating basis. Neutral Evaluators are selected and agreed upon by both parties; however, if the parties cannot agree on the selection, DCS will select a neutral evaluator by rotating sequentially through the list. Mediation and Neutral Evaluation are options that are provided to policyholders and are non-binding; however, both are mandatory if requested by either party. The number of reported mediation and neutral evaluation requests for the last three fiscal years is as follows:

Mediations	Neutral Evaluations
FY 2012/2013 – 3,966	FY 2012/2013 – 1,867
FY 2011/2012 – 3,323	FY 2011/2012 – 2,681
FY 2010/2011 – 3,499	FY 2010/2011 – 2,245

There are still improvements needed with regard to these programs to correct some of the deficiencies identified by the Working Group. While mediations are required to be conducted within 45 days of the request, many are not completed within the time limit. There is no administrative remedy for mediators who fail to adhere to the rules and procedures or who fail to disclose conflicts of interest.

The mediation conferences are often held at inappropriate locations and the insurance company's representatives are not prepared to negotiate settlements. The named policyholders are required to be at the mediation conferences, but often surrogates attend on behalf of the named policyholder. These programs depend on the strength of the rules and laws implementing them, and it is clear reforms are necessary to make them more fair and effective tools to resolve claim disputes.

Likewise, neutral evaluations are often not completed within the required 90 days and there is no requirement that a neutral evaluator disclose a conflict of interest, nor is there any administrative remedy if the department learns that a neutral evaluator no longer qualifies to be a neutral evaluator. Even if the Department knows of a conflict or that a person is not qualified to serve, it has no authority to disqualify such an individual.

Recommendations:

1) Extend authority to the Department of Financial Services (DFS) to regulate mediators, neutral evaluators and the mediation and neutral evaluation processes through legislation or administrative rule.

2) Amend the Department of Financial Services administrative rules to establish fair standards for mediation locations.

3) Allow insurers the right to request policyholders to provide photo identification to attend mediation or neutral evaluation conferences.

4) Amend mediator qualification standards to comply with the Supreme Court of Florida decisions and incorporate regulatory and disciplinary procedures.

5) Require insurer's mediation representatives to be certified under the mediation training standards and procedures adopted by the Supreme Court of Florida.

6) Revise form DFS-I5-1971, Disposition of Property Insurance Mediation Conference Form, (Appendix I) to include the following additional information:
   a. Date the Mediation Conference was held;
   b. Date DFS-I5-1971 was submitted to DFS;
   c. List of all insurer representatives attending the mediation conference;
   d. List of all policyholder representatives attending the mediation conference; and,
   e. A satisfaction rating of the mediator obtained independently by DFS from the policyholder.

7) Require entry of all data on the following forms into separate databases for the purpose of facilitating research into the fairness and effectiveness of the mediation and neutral evaluation processes:
   a. DFS-I5-1971 Disposition of Property Insurance Mediation Conference Form; and,
   b. DFS-I4-1785 (Rev.07/2011) Disposition of Neutral Evaluation – Sinkhole Insurance Form. (Appendix II)

POST-CLAIM UNDERWRITING

In October 2012 the Office of the Florida Insurance Consumer Advocate requested the Office of Insurance Regulation to investigate the practice known as "post-claim underwriting" by one of the state's largest homeowners insurance companies. Post-claim underwriting occurs when the company reviews a consumer's application for insurance after a claim has been filed, which may be months or years after the application was submitted. An insurance company is expect to complete an underwriting review during the first ninety (90) days of coverage and Florida law allows the company to cancel the policy within that time frame if it is discovered that the property fails to meet the company's underwriting critera. When a company does a post-claim review of the application and finds even a minor discrepancy, the company may refuse the claim and cancel or void coverage alleging the insured has made a "material misrepresentation" on the application.

This is especially troubling because the company voids the policy from inception (ab initio), and the consumer is left with no coverage after faithfully paying premiums for several months or years in some cases. It appears that most mistakes on applications for insurance are neither material to the claim nor intentionally fraudulent or misleading and are usually in regards to credit history. However, the insurance company can assert the misrepresentation was material to the acceptance of the risk and completely void coverage. Frequently with regard to credit, consumers report that they did not know about a small tax lien or credit card judgment, or forgot about a satisfied tax lien or judgment.

The general rule in Florida is that a misstatement in, or omission from, an application for insurance need not be intentional before a claim may be denied pursuant to Section 627.409, Florida Statutes, which states an insured's misrepresentation, omission, concealment of fact, or incorrect statement may prevent recovery under the policy if the misrepresentation, omission, concealment, or statement is fraudulent **or is material either to the acceptance of the risk or to the hazard assumed by the insurer.**

There are serious repercussions for consumers when a claim goes unpaid or coverage is cancelled from inception. The mortgage company is allowed to retroactively purchase force-placed coverage for the entire policy period of the cancelled policy and add the cost to the mortgage payments. In one case reviewed by the Insurance Consumer Advocate, the force-placed coverage for the 3 years of retroactive cancellation resulted in $45,000 being added to the consumers mortgage balance.

The home may be uninhabitable and the homeowner may not be able to afford to make the necessary repairs. As long as the home is in disrepair, the homeowner is not eligible for standard coverage with another insurance company and may subsequently be forcibly insured by their mortgage company with extremely expensive insurance. Ultimately, some consumers may face foreclosure and lose their home as a result. Homeowners will also always have this significant blemish on their record and will have to report to other insurance providers that coverage was voided by another carrier in the past. Asking if a homeowner has ever been canceled is a common question on a homeowners application for insurance.

Recommendation:
Limit the use of a credit deficiency for the purpose of cancelling an insurance policy to the initial 90 day underwriting period as currently defined in Florida law. An insurance company has an obligation to verify the accuracy of information on an application from readily available sources and has an obligation to not engage in a "gotcha" technique years after the insurance was purchased.

REPAIR VS. INDEMNITY

Traditionally, a claim is adjusted and a partial payment to the homeowner is made on an actual cash value basis so that the homeowner can hire a contractor to begin repairs. As repairs are completed, the insurer releases the remaining estimated replacement cost insurance proceeds to the homeowner. Under this traditional claim settlement method, the insurance company has no contractual or direct involvement with the contractor.

Preferred Vendor List

As an alternative to the traditional method, some insurance companies choose as standard business practice to provide a list of preferred vendors to protect policyholders from unscrupulous or incompetent contractors, because at the time of a loss, homeowners usually do not have sufficient experience to select a qualified contractor. A preferred vendor list should only list contractors that are licensed and insured, follow permitting laws and maintain a record of quality workmanship and consumer satisfaction.

Under this business model, the insurer always provides the homeowner with the option to choose another contractor not on the preferred vendors list. In this way the contractual relationship between the homeowner and the contractor is always preserved, and the insurance company may not be held responsible for the quality of workmanship, errors or omissions of the contractor.

Election to Repair and/or Managed Repair/ Contractual Repair

Most homeowners insurance policies give the insurer the option to hire a contractor to repair the damaged property, however under this option the limits of the policy no longer apply and the company must continue with the repairs until complete. Traditionally, this provision was seldom used, because it required the insurer to complete the repairs, even if the cost exceeded policy limits. For this reason, insurers usually did not exercise this option, except as a way to control the cost of small claims such as chipped floor tiles or minor roof repairs.

As homeowner insurance rates have continued to increase, policyholders have been left with few cost saving options. Installing hurricane mitigation features provides homeowners with substantial cost savings over time and is a preferred method for reducing insurance costs. Many homeowners are also cutting their premium costs by selecting higher deductibles or limitations on optional coverages, such as personal property, additional living expenses or liability coverage.

Additionally, for a reduced premium, some insurance companies require that all repairs are "managed" or repaired by the insurer. Under this business model, the homeowner is limited to a single or in some cases, multiple vendor options selected by the insurance company. While this may provide a policy at a cheaper price, the consumer may not understand the financial implications of this alternative. One of the most significant problems is the consumer may be asked to sign the contract with the repair company or contractor. Under an election of the right to repair or a managed repair program, the contract for repairs should not be a contract between the consumer and the contractor but rather a contract between **the insurance company and the contractor.**

The consensus of the Working Group is that consumer choice should always be the main objective, balanced with limited and necessary regulation. However, the Working Group expressed concerns about the introduction of contractual managed repair programs, because they eliminate the beneficial checks and balances between the insurance company, the vendor and the homeowner that can prevent fraud and abuse.

In addition, it is unclear, especially for the election to repair, whether the consumer must still pay the deductible when the insurance company accepts responsibility for repairs. In such a situation, the insurance contract has been transformed into an agreement to repair and the consumer has lost control of the repair process. Consequently, the imposition of a deductible as a pre-requisite to beginning work could be abused to delay repairs and performance under the repair contract.

Recommendations:

1) When an insurance company wants to elect the right to repair or rely upon a managed care endorsement limiting the selection of the contractor or repair company designated by the company, the company (NOT THE

CONSUMER) must sign the contract with the contractor. The consumer must allow the contractor access to the property, but the work of the contractor is now managed by the insurance company and payments must be made directly to the contractor by the insurance company and the insured has no contractual relationship with the contractor.

2) The Office of Insurance Regulation should develop rules that clearly define the limits and requirements for companies that operate managed repair or right to repair programs as standard business practice including rules concerning deductible payment requirements as a prerequisite to beginning repairs.

3) The rules should include but are not limited to the following:
   a. The company must have established protocols and appropriate auditable safeguards for consumers including a complaint resolution protocol;
   b. Companies that have managed repair programs should offer or ensure the vendor selected by the company offers a three year warranty for the work performed;
   c. All vendors must maintain appropriate licensure and permits must be obtained as required for all work performed; and,
   d. Companies must maintain a database of all claims under such programs.

4) The Office of Insurance Regulation should establish a limited scope market review every three years for companies implementing such programs as standard business practice.

MORTGAGE COMPANIES WITHHOLDING FUNDS

When a home is purchased and there is a mortgage on the property, claim payments are made payable jointly to the homeowner and mortgage company. The mortgage company holds the insurance proceeds and issues payments to the homeowner as the repairs are completed and an inspection is performed to verify completion of repairs. The mortgage company has the right to hold the insurance funds in order to protect its interest in the property. However, Florida law prohibits mortgage companies from withholding insurance funds for personal property, additional living expenses, and other covered items that are not subject to the dual interest provision of the policy.

Since most mortgage companies and other financial institutions are federally regulated, the Office of Financial Regulation (OFR) has no authority to regulate the disbursement of insurance proceeds or the inspection process. Therefore, mortgage companies may disburse insurance proceeds in increments of 25, 33 or 50 percent as provided under federal rules.

In addition, mortgage companies may under federal rules bill homeowners for conducting visual inspections to ensure that proper repairs are being made, but the amount of compensation and number of inspections performed is not specified under federal rules. Inspection fees may also be deducted from the insurance proceeds. Mortgage companies may also apply insurance proceeds to the mortgage, but the mortgage must be several months in arrears and this process is carefully supervised[3].

Recommendations:

1) Federally chartered banks should develop rules consistent with the requirements for FannieMae and FreddieMac with respect to mortgages in arrears.

2) Standards should be implemented to ensure uniform inspection plans and reasonable compensation.

[3] FannieMae, Servicing Guide Part III: Section 1101, Evaluating the Damage and Section 1103, Insurance Claim Settlements (Announcement 05-06, August 24, 2005)
Freddie Mac Single-Family Seller/Servicer Guide, Volume 2/Chs. 58-63: 58.10: Insurance Loss Settlements (08/21/06)

Appendix I

STATE OF FLORIDA
Florida Department of Financial Services

MEDIATION DISPOSITION FORM **To be completed by the mediator for Automobile, Personal Residential, or Commercial Residential Mediations**			
Insurance Company:			
Insured Name:			
Claim Number:		DFS File Number:	
Mediation Conference Information			
Conference Date:		Time:	
Address:			
Mediator Name:			
Name of Party Requesting Mediation:			
Resolution:			
☐ Settled in Mediation – Amount of Settlement:			
☐ Not Eligible for Mediation – Reason:			
☐ Settled Prior to Conference			
☐ One Party Did Not Show	☐ Insured/Consumer	☐ Insurer	
☐ Impasse			
☐ Cancelled by Insured/Consumer			
Key Agreements (Note: If commercial residential mediation, include hours worked):			

Complete this form and return it to:

DEPARTMENT OF FINANCIAL SERVICES
Mediation Section
200 E. Gaines Street
Tallahassee, Florida 32399-4212
Fax 850-488-6372

DEPARTMENT OF FINANCIAL SERVICES
Division of Consumer Services – Bureau of Education, Advocacy & Research

NEUTRAL EVALUATOR'S REPORT
DISPOSITION OF NEUTRAL EVALUATION – SINKHOLE INSURANCE

DFS Service Request #: _____

Policyholder(s) Name: _____

Property Address:

Street _____

City _____ **State** _____ **Zip** _____ – _____

Mailing Address (if different):

Street _____

City _____ **State** _____ **Zip** _____ – _____

Insurance Company Name: _____

Claim Number: _____

Evaluation of this dispute was held: **Date:** _____ **Time:** _____ : _____

Location: _____

Evaluator's Name: _____

DFS Evaluator ID#: _____

Description of matters subject to neutral evaluation: _____

Evaluator's Opinion: **Sinkhole Loss verified** ☐ **Sinkhole Loss eliminated** ☐

NOTE: A sinkhole loss means structural damage to the covered building caused by sinkhole activity.

If sinkhole loss is verified:

Method(s) of stabilization & repair above &below ground: _____

Estimated cost(s) of land /covered building stabilization &remediation repair **$** _____

Complete this form and return it to all parties in attendance at the Neutral Evaluation & send a copy to:

Department of Financial Services
Mediation Section
Bureau of Education Advocacy and Research
200 East Gaines Street
Tallahassee, FL 32399-4212
Facsimile: 850-488-6372
Email: neutralevaluation@MyFloridaCFO.com