

Florida Property Losses – Five Things to Know for Hurricane Matthew



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Hurricane Matthew was the strongest hurricane to threaten the U.S. in over a decade. While Florida was spared many of the worst-case scenarios forecasted, Hurricane Matthew still brought to Florida's coastline winds over 100 mph with even higher gusts; a storm surge that peaked at almost 10 feet above normal high tide at Fernandina Beach, Florida; and areas along the northeastern Florida coastline that suffered storm surge flooding and other significant damage.

As the insurance industry prepares for Florida property loss claims due to Hurricane Matthew, we highlight five claims-handling areas of concern based on the primary Florida statutory and administrative code provisions most relevant to first-party property loss claims,^[1] as well as on Florida's statutory framework for a first-party bad faith claim.^[2]

(1) Proof of loss Requirements

Florida Unlikely to Require Strict Compliance

While there are states that require a policyholder's strict compliance with a policy's proof of loss provision, Florida is not one of them. Florida aligns itself with those states that only require that a policyholder **substantially complies** with proof of loss policy provisions.

Under Florida law, a policyholder is responsible for notifying the insurer of the loss and providing proof that the loss took place, along with values for items allegedly damaged or destroyed.^[3] However, no particular form of proof of loss is required. If the proof submitted provides sufficient information to enable the insurer to determine its liability and is sworn to, the proof is usually deemed sufficient to satisfy the policyholder's obligation to provide a sworn proof of loss.^[4] Sufficiently detailed notices of loss may also be considered "proofs of loss," satisfying both of the policyholder's post-loss responsibilities – *i.e.*, notice of loss and proof of loss. Where proofs of loss are sufficient to give an insurer the notice of loss required by another provision in the policy, the same document will be sufficient as a notice of loss, as well as proof of loss.^[5]

An insurer is required to furnish a proof of loss form upon receiving a written request from the policyholder, or any person claiming to have a loss under the insurance contract issued by the insurer, pursuant to Fla. Stat. Ann. § 627.425.^[6] This requirement, however, does not impose a responsibility upon the insurer with respect to the completion, or the manner of the completion, of the proof of loss by the person who requested the form.^[7]

Waiver

Further, insurers, and third-parties acting on their behalf, should be mindful of the potential to waive a policy's proof of loss requirement. In Florida, as in most jurisdictions, an adjuster authorized to investigate and adjust a loss has the authority to waive proofs of loss.^[8] When an insurer makes an offer of settlement on a claim (or admits liability for an undetermined amount) without or before receiving a formal proof of loss, the insurer will likely be deemed to have waived the formal proof of loss requirement for the claim.^[9] Additionally, where an insurer admits liability and the formal proof of loss requirement are thereby waived, the time in which the insurer is required to demand appraisal under the policy may begin to run.^[10] In certain cases, depending on the facts, even "the retention of proofs of loss without objection may amount to a waiver and estoppel."^[11]

Where an insurer intends to require strict compliance with a specific proof of loss form in a "substantial compliance" state like Florida, the insurer should consider providing the specific proof of loss forms as soon as possible after receiving notice of loss, along with correspondence

advising the policyholder of the obligation to complete the forms as required under the policy provisions. Where the returned proof of loss lacks information or is otherwise non-compliant with the form, the insurer should notify the policyholder immediately, and in writing, of the deficiencies. If the policyholder still does not rectify the deficiency, the insurer may have a stronger argument under Florida law that the policyholder has breached its obligation to provide proof of loss as required under the policy, absent a subsequent act of waiver.

A policyholder's failure to provide the required information or proof of loss within the stated timeframe, as requested by the insurer, permits the insurer to delay paying the claim until it receives the necessary information.^[12] A delay in or failure to submit proofs of loss, as required by the standard insurance policy within the time stipulated, will not invalidate the policy or forfeit coverage for an otherwise covered claim in the absence of a policy stipulation to that effect. However, it will postpone the deadline for payment of the claim and/or when suit may be brought, so long as the requirement was not waived.

In more egregious circumstances, however – where the policyholder disregards numerous requests by the insurer for a proof of loss, or otherwise exhibits a complete failure to comply with the proof of loss requirement for months, or until after suit is filed – such conduct may be deemed a material breach of the contract relieving the insurer of its contractual obligations.^[13]

The proof of loss language in the subject insurance policy must be closely reviewed to determine the policyholder's obligation in relation to a sworn proof of loss. For example, some policies require that the insurer formally requests a sworn proof of loss in order to trigger the obligation to provide a proof of loss. In the absence of such request, a policyholder's failure to submit a proof of loss will not bar recovery or a suit on the policy.^[14]

(2) Claims-handling time limits

14 Calendar Days to Acknowledge

Fla. Admin. Code Ann. r. 690-166.024 requires that upon receipt of a communication with respect to a claim, the insurer^[15] acknowledge receipt of the communication within 14 calendar days. This requirement does not apply if the claim is paid within the 14 days or if the failure to acknowledge the claim is caused by factors beyond the insurer's control. In addition, if the communication constitutes notification of a claim, the insurer's acknowledgment must provide the necessary claim forms and instructions (including an appropriate telephone number that the policyholder can call to discuss the claim) unless the acknowledgment reasonably advises that the claim appears to be a non-covered claim.

20 Days to Tender Payment

Pursuant to Fla. Stat. Ann. § 627.4265, where a claimant and an insurer have agreed in writing to settle a claim, the insurer must tender payment of the agreed upon amount no later than 20 days after such a settlement is reached. Where "the payment is not tendered within 20 days or such other date as the agreement may provide, it shall bear interest at a rate of 12 percent per year from the date of the agreement[.]"^[16] However, tender of the payment may be conditioned upon the execution of a release mutually agreeable to the claimant and the insurer. Where tender of payment is conditioned upon the execution of a release, "the interest shall not begin to accrue until the executed release is tendered to the insurer."^[17]

Where there is concern that payment cannot be made within the required 20 days, the insurer(s) and policyholder may consider including a specific date by which payment of the agreed upon amount must be made, rather than relying on the default statutory 20 day period.

(3) Florida's valued policy law

Pursuant to Fla. Stat. Ann. § 627.702(1)(a), where there is a total loss of any building, structure, mobile home or manufactured building, located in Florida, "the insurer's liability under the policy for such total loss, if caused by a covered peril, shall be in the amount of money for which such property was so insured as specified in the policy and for which a premium has been charged and paid."^[18] Florida's valued policy statute, however, does not apply where a loss was caused in part by a covered peril and in part by a non-covered peril (unless the covered peril alone would have

caused the total loss).[19] The valued policy law also does not apply to personal property, except in the case of mobile home damage.[20]

Insurers, however, should carefully analyze this statute in relation to the particular facts of a claim, because there are various exceptions to the statute's application to a loss. For example, the statute does not require payment of the policy limits where two or more insurers provide coverage for the same building or structure; where two or more risks to which the valued policy statute would otherwise apply are insured under a blanket form for a single amount of insurance; or when the completed value of the risk is insured under a builder's risk policy.[21]

(4) Additional considerations for homeowners policies and residential property insurers

Florida statutes and its administrative code, also include additional provisions that only apply to a "homeowners policy" or a "residential property insurer," as those terms are defined in the relevant code section. The principal provisions applicable to "homeowners policies" and "residential insurers" are discussed below.

Homeowners Policies – Replacement Cost, Law and Ordinance Coverages.

Pursuant to Fla. Stat. § 627.7011(1)(a)-(b), before issuing a homeowners policy, a homeowners insurer must offer a policy or endorsement that provides (1) replacement cost based valuation (RCV) coverage, which **does not** include costs necessary to comply with laws and ordinances regulating the construction and repair of the property in the aftermath of a loss; and (2) RCV coverage that **does** include such costs.

If the insurer does not obtain the policyholder's written rejection of both coverage options (1) and (2), "any policy covering the dwelling is deemed to include the law and ordinance coverage limited to 25 percent of the dwelling limit." [22] Where a dwelling is insured on a replacement cost basis, an insurer must initially pay at least the actual cash value (ACV) of the insured loss, less any applicable deductible. The insurer must pay any remaining amounts necessary to repair or restore the damaged property as work is performed and expenses are incurred above the ACV payment. Insurers should be mindful, however, that the application of this statute is subject to Florida's valued policy statute discussed above, when and where applicable.

Under Florida law, where the policy provides RCV coverage, the insurer is required to include contractor overhead and profit in a pre-repair payment, in circumstances where it is reasonably likely that the policyholder will need a contractor for the repairs.[23]

Residential and Hurricane Coverage Defined.

Pursuant to Fla. Stat. Ann. § 627.4025, residential and hurricane coverage are defined as follows:

(1) Residential coverage includes both personal lines residential coverage, which consists of the type of coverage provided by homeowner, mobile homeowner, dwelling, tenant, condominium unit owner, cooperative unit owner, and similar policies, and commercial lines residential coverage, which consists of the type of coverage provided by condominium association, cooperative association, apartment building, and similar policies, including policies covering the common elements of a homeowners association. Residential coverage for personal lines and commercial lines as set forth in this section includes policies that provide coverage for particular perils such as windstorm and hurricane or coverage for insurer insolvency or deductibles.

(2) As used in policies providing residential coverage:

(a) "Hurricane coverage" is coverage for loss or damage caused by the peril of windstorm during a hurricane. The term includes ensuing damage to the interior of a building, or to property inside a building, caused by rain, snow, sleet, hail, sand, or dust if the direct force of the windstorm first damages the building, causing an opening through which rain, snow, sleet, hail, sand, or dust enters and causes damage.

(b) “Windstorm” for purposes of paragraph (a) means the wind, wind gusts, hail, rain, tornadoes, or cyclones caused by or resulting from a hurricane which results in direct physical loss or damage to property.

(c) “Hurricane” for purposes of paragraphs (a) and (b) means a storm system that has been declared to be a hurricane by the National Hurricane Center of the National Weather Service. The duration of the hurricane includes the time period, in Florida:

1. Beginning at the time a hurricane watch or hurricane warning is issued for any part of Florida by the National Hurricane Center of the National Weather Service;
2. Continuing for the time period during which the hurricane conditions exist anywhere in Florida; and
3. Ending 72 hours following the termination of the last hurricane watch or hurricane warning issued for any part of Florida by the National Hurricane Center of the National Weather Service.^[24]

14 Calendar Days to Acknowledge & 90 Days to Pay or Deny

Similar to the time limits generally imposed on insurers under Fla. Admin. Code Ann. r. 69O-166.024, Fla. Stat. Ann. § 627.70131(1)(a) requires that residential property insurers in receipt of a residential coverage claim,^[25] acknowledge receipt of any communication related to the claim within **14 calendar days** unless payment is made within that time or unless it is unable to do so because of factors beyond its control. If the claim communication received by the insurer constitutes a notification of a claim, the insurer’s acknowledgment must provide necessary claim forms and instructions, including an appropriate phone number.^[26] Under § 627.70131, and unless otherwise provided by the policy of insurance or by law, a residential property insurer must also begin its investigation as is reasonably necessary within **10 working days** after it receives proof of loss statements.^[27]

Within 90 days after its receipt of a notice of an initial, reopened, or supplemental property insurance claim from a policyholder, the insurer shall pay or deny such claim or a portion of the claim unless the failure to pay is caused by factors beyond the control of the insurer which reasonably prevent such payment. Fla. Stat. Ann. § 627.70131(5)(a) assesses a penalty for non-compliance, as follows:

Any payment of an initial or supplemental claim or portion of such claim made 90 days after the insurer receives notice of the claim, or made more than 15 days after there are no longer factors beyond the control of the insurer which reasonably prevented such payment, whichever is later, ***bears interest at the rate set forth in [Fla. Stat. Ann. § 55.03]. Interest begins to accrue from the date the insurer receives notice of the claim. The provisions of this subsection may not be waived, voided, or nullified by the terms of the insurance policy.*** If there is a right to prejudgment interest, the [policyholder] shall select whether to receive prejudgment interest or interest under this subsection. Interest is payable when the claim or portion of the claim is paid. Failure to comply with this subsection constitutes a violation of this code. However, failure to comply with this subsection does not form the sole basis for a private cause of action.”^[28]

Right to Mediate

Pursuant to Fla. Stat. § 627.7015, as implemented by Fla. Admin. r. 69B-166.031, insurers issuing personal lines and commercial residential policies must notify policyholders within 5 days of receiving the first-party claim of their right to mediate insurance disputes under § 627.7015(2). An insurer’s failure to do so may relieve the insured of its obligation to participate in a contractual appraisal process prior to litigation.^[29]

(5) Potential penalties & bad faith exposure

Insurer’s Payment of Policyholder’s Attorney’s Fees

Pursuant to Fla. Stat. Ann. § 627.428,^[30] if a policyholder or beneficiary prevails under an

insurance policy or contract, the trial court (or appellate court in which the insured prevails) must issue an award “against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured’s or beneficiary’s attorney prosecuting the suit in which the recovery is had.”^[31] “When so awarded, compensation or fees of the attorney shall be included in the judgment or decree rendered in the case.”^[32]

The Florida Supreme Court has held that “[b]ecause the statute applies in virtually all suits arising under insurance contracts, ... the terms of section 627.428 are an implicit part of every insurance policy issued in Florida.”^[33]

Critically, the Florida Supreme Court stated that “it is well settled that the payment of a previously denied claim following the initiation of an action for recovery, but prior to the issuance of a final judgment, constitutes the functional equivalent of a confession of judgment” or a verdict in favor of the insured.^[34] Accordingly, the settlement of a claim that is already in suit triggers the insured’s entitlement to attorney’s fees under section 627.428.

Bad Faith Exposure

Florida does not recognize a first-party bad faith claim at common law. Florida only recognizes a statutory bad faith claim in the first-party context pursuant to Fla. Stat. § 624.155. A statutory first-party bad faith action in Florida may be based upon, among other things, unfair claim settlement practices in violation of Florida’s Unfair Insurance Trade Practices Act, Fla. Stat. § 626.9541(1)(i), (o), or (x); not attempting in good faith to settle a claim when, under the circumstances, an insurer could have done so if it had acted fairly toward its policyholder and with due regard for the policyholder’s interests;^[35] and making claim payments to policyholders or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made.

A claim for the bad faith failure to settle is “founded upon the obligation of the insurer to pay when all conditions under the policy would require an insurer exercising good faith and fair dealing towards its [assured] to pay.”^[36] The Florida Supreme Court explained:

What is owed on the contract is in turn governed by whether all conditions precedent for payment contained within the policy has been met. An insurer, however, must evaluate a claim based upon proof of loss required by the policy and its expertise in advance of a determination by a court or arbitration.^[37]

Accordingly, an insurer cannot be deemed to have engaged in a bad faith failure to settle a claim unless and until the policyholder submits a sworn statement in proof of loss, which, consequently, means that a proof of loss requirement must be satisfied before an insurer can ever be held in bad faith.^[38]

Moreover, § 624.155 provides that an insured must file a Civil Remedy Notice of insurer violation with the Office of Insurance Regulation as a condition precedent to bringing a statutory bad faith cause of action. The Civil Remedy Notice requirement includes a 60 day “safe harbor” period for insurers. “No action shall lie if, within 60 days after filing notice, the damages are paid or the circumstances giving rise to the violation are corrected.”^[39] As a result, where the insurer is placed on notice of an alleged violation, the insurer has time to address and correct the misstep, if any, further limiting actual exposure.^[40] Importantly, the carrier must at least respond to the Civil Remedy Notice allegations or risk a presumption of bad faith.^[41]

The more critical and more likely bad faith scenario arises where a policyholder has not submitted a *formal* proof of loss, but where the insurer has been provided information that enables it to determine an undisputed amount owed to the policyholder for the loss. Because Florida is a substantial compliance jurisdiction, delaying payment of the undisputed amount because of the failure or delay in submitting a formal proof of loss may constitute an unfair claim settlement practice under Florida’s Unfair Insurance Trade Practices Act, Fla. Stat. § 626.9541(1)(i)(4).^[42] Under these circumstances, an insurer may increase its bad faith exposure if it delays payment of the undisputed amount while awaiting the formally sworn proof of loss.

Conclusion

Hurricane Matthew caused substantial damage in Florida, particularly along the north and central

east coast. This Alert has identified key areas of concern when handling hurricane-related property loss claims in Florida. However, it is intended only to provide a brief summary of Florida law governing claims handling and should only be used as a reference tool. This summary should not be relied upon as a substitution for legal counsel with respect to particular issues as they may relate to and impact a specific claim.

[1] The primary Florida statutory provisions are found under Title XXXVII, Chapter 627, Parts II and X; and the primary administrative code provisions relevant to property insurers are found at Florida Administrative Code Annotated Chapter Nos. 69O-166, 167, 170 and 171. We also note that, except as may be specifically stated in Chapter 627 to apply to surplus lines insurers, the provisions of Chapter 627 do not apply to surplus lines insurance authorized under Fla. Stat. Ann. §§ 626.913-626.937, the Surplus Lines Law. See Fla. Stat. Ann. § 626.913(4).

[2] See Fla. Stat. Ann. § 624.155, for various claims-handling violations, including certain conduct prohibited by Florida's Unfair Insurance Practices Act, codified at Fla. Stat. Ann. § 626.954.

[3] See *National Union Fire Ins. Co. of Pittsburg, Pa., v. Cone*, 80 Fla. 265, 267, 85 So. 913, 914 (Fla. 1920).

[4] See *General Motors Acceptance Corp. v. American Ins. Co.*, 50 F.2d 803, 805 (5th Cir. 1931).

[5] See generally *Hartford Fire Ins. Co. v. Redding*, 47 Fla. 228, 37 So. 62 (Fla. 1904).

[6] See Fla. Stat. Ann. § 627.425.

[7] See *id.*

[8] See *Employer's Liability Assur. Corp. v. Royals Farm Supply, Inc.*, 186 So.2d 317 (Fla. 2d DCA 1966) ("[W]aiver may be made by any officer or agent who has the power to accept proof of loss and to deal with the insured in settlement of a claim[.]"); *General Motors Accept. Corp. v. Amer. Ins. Co.*, 50 F.2d 803, 806 (5th Cir. 1931) (internal citations omitted).

[9] See *Bear v. New Jersey Ins. Co.*, 138 Fla. 298, 189 So. 252 (Fla. 1939); *Llerena v. Lumbermens Mut. Cas. Co.*, 379 So.2d 166, 167 (Fla. 3rd DCA 1980); *American Bankers Ins. Co. of Florida v. Terry*, 277 So.2d 563, 564 (Fla. 3rd DCA 1973), discussing *Bear v. New Jersey Ins. Co.*, 138 Fla. 298, 189 So. 252 (Fla. 1939); but see *Bednarz v. Castle Key Indem. Co.*, No. 812-CV-2827-T-35EAJ, 2014 WL 4635707, at *11 (M.D. Fla. Sept. 15, 2014) (finding the *Llerena* decision inapposite where the insurer's payment of certain damages does not include an offer of settlement or other insurer admission of liability).

[10] *Llerena v. Lumbermens Mut. Cas. Co.*, 379 So.2d 166, 167 (Fla. 3rd DCA 1980); *American Bankers Ins. Co. of Florida v. Terry*, 277 So.2d 563, 564 (Fla. Dist. Ct. App. 1973); but see *Bednarz v. Castle Key Indem. Co.*, No. 812-CV-2827-T-35EAJ, 2014 WL 4635707, at *11 (M.D. Fla. Sept. 15, 2014) (finding the *Llerena* decision inapposite where the insurer's payment of certain damages does not include an offer of settlement or other insurer admission of liability).

[11] *Gen. Motors Accept. Corp.*, 50 F.2d 803 at 806. (internal citations omitted).

[12] See *Hartford Fire Ins. Co. v. Redding*, 47 Fla. 228, 238-39, 37 So. 62, 66-67 (Fla. 1904).

[13] See e.g., *Stirling v. Allstate Floridian Ins. Co.*, 956 So.2d 511, 513 (Fla. 5th DCA 2007) (finding that a policyholder's complete failure to provide a proof of loss until after 3 months passed and after she filed suit against the insurer "a material breach of a [policyholder's] duty to comply with an insurance policy's condition precedent relieves the insurer of its obligations under the contract."); *Haiman v. Federal Insurance Co.*, 798 So.2d 811, 812 (Fla. 4th DCA 2001) (finding that "a total failure to comply with policy provisions made a prerequisite to suit under the policy may constitute a breach precluding recovery from the insurer as a matter of law." (internal citations omitted).

[14] See *First Home Ins. Co. v. Fleurimond*, 36 So.3d 172, 174 (Fla. 3rd DCA 2010).

[15] For purposes of this part, the term "insurer" expressly excludes surplus lines brokers. *See id.*, at 69O-166.021(5).

[16] *Id.*, § 627.4265.

[17] *Id.*

[18] *Id.*

[19] *See id.*, at § 627.702(2).

[20] § 627.702(5).

[21] *See* § 627.702(3).

[22] *See* § 627.7011(2).

[23] *See Juvonen v. United Prop. and Cas. Ins. Co.*, 124 So.3d 976, 977 (Fla. 4th DCA 2013), quoting *Trinidad v. Fla. Peninsula Ins. Co. (Trinidad II)*, 121 So.3d 433 (Fla. 2013); *see also* Sections 627.7011(3) and 627.7011(6).

[24] Fla. Stat. Ann. § 627.4025.

[25] For purposes of § 627.70131, the term "insurer" means any residential property insurer. *See id.*, at § 627.70131 (4); *see also e.g., Great Lakes Reinsurance (U.K.) PLC v. Branam*, 126 So.3d 297 (Fla. 3rd DCA 2013). The term "claim" as used in 627.70131 means either: a claim for coverage under an insurance policy providing residential coverage as defined in 627.4025(1); a claim for structural or contents coverage under a commercial property insurance policy if the insured structure is 10,000 square feet or less; or a claim for contents coverage under a commercial tenant policy if the insured premises is 10,000 square feet or less. *See id.*, at § 627.70131 (b)(1)-(3).

[26] *See id.*, § 627.70131 (2). Note, however, this particular requirement does not apply where the acknowledgment reasonably advises the claimant that the claim appears to be a non-covered claim. *See id.*

[27] Fla. Stat. Ann. § 627.70131(3).

[28] *See id.*, § 627.70131(5)(a) (emphasis added).

[29] *QBE Ins. Corp. v. Dome Condominium Ass'n, Inc.*, 577 F. Supp. 2d 1256, 1258 (S.D. Fla. 2008). *See also Florida Ins. Guar. Ass'n, Inc. v. Shadow Wood Condominium Ass'n*, 26 So. 3d 610, 614 (Fla. 4th DCA 2009) (*holding* that insured was not required to participate in a contractual loss appraisal process where the insurer's predecessor had failed to provide written notice as required by § 627.7015(2)).

[30] The corresponding statute applicable to unauthorized insurers and surplus lines is Fla. Stat. Ann. § 626.9373.

[31] *Id.*, at § 627.428(1).

[32] *Id.*, at § 627.428(3).

[33] *State Farm Fire & Cas. Co. v. Palma*, 629 So.2d 830, 832 (Fla. 1993) (internal citations omitted).

[34] See *Johnson v. Omega Ins. Co.*, No. SC14-2124, 2016 Fla. LEXIS 2148* (Fla., Sept. 29, 2016) citing *Ivey v. Allstate Ins. Co.*, 774 So. 2d 679, 683-85 (Fla. 2000); *Wollard v. Lloyd's & Cos. of Lloyd's*, 439 So. 2d 217, 218 (Fla. 1983).

[35] See § 624. 155(1)(b); see also *QBE Ins. Corp. v. Chalfonte Condo. Apt. Assoc.*, 94 So.2d 541 (Fla. 2012).

[36] See *Vest v. Travelers Ins. Co.*, 753 So. 2d 1270, 1275 (Fla. 2000); see also *316, Inc. v. Maryland Cas. Co.*, 625 F. Supp.2d 1187, 1191-92 (N.D. Fla. 2008).

[37] *Vest*, 753 So. 2d at 1275-76.

[38] See *Vest*, 753 So. 2d at 1275.

[39] Fla. Stat. Ann. § 624.155 (3)(d).

[40] See *QBE Ins. Corp. v. Chalfonte Condominium Apartment Ass'n, Inc.*, 94 So. 3d 541, 547 (Fla. 2012).

[41] *Imhof v. Nationwide Mut. Ins. Co.*, 643 So.2d 617, 619 (Fla.1994).

[42] Fla. Stat. § 626.9541(1)(i)(4) provides that an insurer's failure "to pay undisputed amounts of partial or full benefits owed under first-party property insurance policies within 90 days after an insurer receives notice of a residential property insurance claim, determines the amounts of partial or full benefits, and agrees to coverage..." is an unfair trade practice.