

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Rules Committee

BILL: CS/CS/SB 408

INTRODUCER: Budget Subcommittee on General Government Appropriations, Banking and Insurance Committee, and Senator Richter

SUBJECT: Property Insurance

DATE: April 1, 2011                      REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Knudson, Emrich</u>	<u>Burgess</u>	<u>BI</u>	<u>Fav/CS</u>
2.	<u>Frederick</u>	<u>DeLoach</u>	<u>BGA</u>	<u>Fav/CS</u>
3.	<u>Frederick</u>	<u>Meyer, C.</u>	<u>BC</u>	<u>Fav/2 amendments</u>
4.	<u>Frederick</u>	<u>Phelps</u>	<u>RC</u>	<u>Pre-meeting</u>
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

**Please see Section VIII. for Additional Information:**

- |                              |                                     |   |
|------------------------------|-------------------------------------|---|
| A. COMMITTEE SUBSTITUTE..... | <input checked="" type="checkbox"/> | Statement of Substantial Changes        |
| B. AMENDMENTS.....           | <input type="checkbox"/>            | Technical amendments were recommended   |
|                              | <input checked="" type="checkbox"/> | Amendments were recommended             |
|                              | <input type="checkbox"/>            | Significant amendments were recommended |

**I. Summary:**

This bill makes numerous changes to laws related to property insurance, primarily residential property insurance. The bill addresses the following primary issues:

- Requires the Florida Hurricane Catastrophe Fund to provide reimbursement for “all incurred losses” including amounts paid as fees on behalf of the policyholder, with exclusions;
- Increases the minimum surplus requirements for residential property insurers to \$15 million;
- Allows insurers offering personal lines property insurance to provide written notice of policy changes to their policyholders without having to non-renew an entire insurance policy due to a change in policy terms;
- Reduces the insurer’s written notice of nonrenewal, cancellation, or termination of a personal lines or commercial residential property insurance policy to 90 days;
- Modifies current replacement cost coverage and actual cash value provisions relating to dwellings and personal property;
- Requires windstorm and hurricane property insurance claims to be brought within three years and sinkhole loss claims to be brought within two years;

- Modifies provisions related to windstorm damage mitigation discounts for residential property insurance and repeals the provision requiring the OIR to develop a method correlating mitigation discounts to the uniform home grading scale;
- Repeals the requirement that the Consumer Advocate prepare an annual report card for personal residential property insurers;
- Renames the Citizens High Risk Account the Coastal Account and repeals the requirement to reduce the boundaries of the Citizens' High Risk Account (wind-only coverages);
- Allows an insurer seeking to take policies out of Citizens to do so in 45 days;
- Clarifies the ethics requirements for specified board members of the Citizens Property Insurance Corp., and provides that Board members abstain from voting under certain circumstances;
- Allows an insurer to cancel or nonrenew a property insurance policy upon a minimum of 45 days' notice based on a finding that the insurer lacks adequate reinsurance coverage for hurricane risk and other financial factors;
- Revises the regulation of public adjusters by placing limits on public adjuster compensation, prohibiting certain statements in public adjuster advertising, and revising the contents of the public adjuster contract;
- Removes the requirement that a property insurer must offer sinkhole coverage and eliminates application of statutes governing catastrophic ground cover collapse and sinkhole loss coverage from commercial property insurance policies;
- Revises what constitutes a sinkhole loss;
- Limits the authority of the Office of Insurance Regulation (OIR) to disapprove rates for sinkhole insurance.
- Revises procedures for insurers and policyholders relating to standards for sinkhole insurance claim investigations and revises the neutral evaluation process for sinkhole disputes; and
- Provides changes to the procedures pertaining to sinkhole reports by professional engineers or professional geologists and repeals the sinkhole database.

This bill substantially amends the following sections of the Florida Statutes: 215.555, 624.407, 624.408, 624.4095, 624.424, 626.854, 626.8651, 626.8796, 627.0613, 627.062, 627.0629, 627.351, 627.3511, 627.4133, 627.7011, 627.70131, 627.706, 627.7061, 627.707, 627.7073, 627.7074, 627.712

This bill creates sections 626.70132 and 627.73141, Florida Statutes.

This bill repeals section 627.7065, Florida Statutes.

## II. Present Situation:

### Insurer Surplus Requirements

Florida law specifies certain minimum surplus and capital requirements for property and casualty insurers to transact insurance in the state. Under s. 624.407, F.S., the minimum surplus requirement for new property and casualty insurers in Florida, which includes residential property writers, is the greater of \$5 million or ten percent of the insurer's liabilities. The minimum surplus requirement for a residential property insurer, once it is licensed in Florida, is the greater of \$4 million or ten percent of the insurer's liabilities.

The current surplus and capital requirements for property and casualty insurers have not been changed since 1993.<sup>1</sup> Surplus is the reserves an insurer has available to pay claims and is a critical component in measuring the financial strength of a company.<sup>2</sup> It is the financial cushion that protects insurers in case of an unexpectedly high number of claims. According to OIR officials, in the past 17 years, circumstances have changed and costs have increased, particularly for residential property insurers, such that increased minimum surplus requirements are necessary. For example, in 2009, the rating agency A.M. Best downgraded nine insurers that sell homeowners insurance in Florida, and Demotech, a company that rates some of the smaller domestic Florida insurers, withdrew its rating from six insurers.<sup>3</sup> Two such insurers were ordered into receivership.<sup>4</sup>

The OIR has found that the current level of surplus is not sufficient to support the business plans of residential property insurers in Florida and has cited several reasons for this position.

- Reinsurance costs continue to rise. The rates charged by reinsurers have increased and the amount of reinsurance being purchased by most insurance companies has also increased. Reinsurance costs vary from insurer to insurer, but currently average at least 30 percent of an insurer's written premium, and in many cases reach 50 percent. The prices reinsurers charge Florida companies change yearly, based on general worldwide losses and capital costs, as well as Florida losses. Reinsurance rates are not regulated by the OIR.
- Changes to the Florida Hurricane Catastrophe Fund (FHCF) have resulted in increases in reinsurance costs to residential property insurers in Florida; therefore insurers will need to purchase more reinsurance from the private market. Since 2007, such insurers have had the option of purchasing coverage from the FHCF above its mandatory layer. This coverage is referred to as TICL coverage. However, the amount of such coverage available for insurers to purchase decreases each year and is currently scheduled to be phased out over the next five years.<sup>5</sup> Reinsurance purchased by insurers from the FHCF is considerably less expensive than private market reinsurance. As TICL coverage is replaced with coverage from the private market, reinsurance costs to insurers will increase. Also, the cost of coverage in the FHCF's mandatory layer is increasing by five percent per year under the "cash build-up" factor. This provision is intended to ensure that the FHCF will have the funds necessary to pay losses when they arise.
- Non-catastrophe losses are increasing. Even in years with no hurricanes in Florida, property writers are experiencing increased losses. This may be attributable to some extent to the current economy. Also, fraudulent or inflated claims are being filed and are expected to increase in times of stressed economic conditions.

In addition to the total surplus amount required by statute, an insurer must also meet specific requirements for its ratios of gross written premium to surplus and net written premiums to

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<sup>1</sup> Ch. 1993-410, L.O.F.

<sup>2</sup> An insurer's surplus is the remainder after a company's liabilities are subtracted from its assets.

<sup>3</sup> Windstorm Mitigation Discounts Report, February 1, 2010, Florida Commission on Hurricane Loss Projection Methodology.

<sup>4</sup> Coral Insurance Company and American Keystone Insurance Company are in receivership.

<sup>5</sup> The TICL or Temporary Increase in Coverage Limit Options.

surplus.<sup>6</sup> A company's calculated gross written premium is not allowed to exceed 10 times its surplus as to policyholders; the calculated net written premium may not exceed 4 times its surplus as to policyholders.<sup>7</sup> If a company's premiums exceed either of these ratios, the OIR shall either suspend the insurer's certificate or establish by order the insurer's gross or net written premiums, unless the insurer demonstrates to OIR's satisfaction that exceeding the statutory ratios does not endanger the financial condition of the insurer or the interests of the policyholders.

### **Florida's Rating Law**

Section 627.062, F.S., specifies the rate filing process for property and casualty insurers and provides rating standards for these insurers. The rating law applies to property, casualty and surety insurance and prohibits rates that are excessive, inadequate, or unfairly discriminatory. The rating law specifies what constitutes an excessive, inadequate, or unfairly discriminatory rate as follows.

- A rate is excessive if:
  - It is likely to produce a profit from Florida business that is unreasonably high in relation to the risk involved or if expenses are unreasonably high in relation to the services rendered.
  - The rate structure established by a stock insurance company provides for replenishment of surpluses from premiums, when the replacement is attributable to investment losses.
- A rate is inadequate if:
  - It is clearly insufficient, together with the investment income attributable to them to sustain projected losses and expenses in the class of business to which it applies.
  - If discounts or credits are allowed that exceed a reasonable reflection of expense savings and reasonably expected loss experience from the risk or group or risks.
- A rate is unfairly discriminatory if:
  - The rating plan, including discounts, credits, or surcharges fails to clearly and equitably reflect consideration of the policyholder's participation in a risk management program pursuant to s. 627.0625, F.S.
  - As to a risk or group of risks, the application of premium discounts, credits, or surcharges among the risks does not bear a reasonable relationship to the expected loss and expense experience among the various risks.

Legislation enacted in 2009 allows insurers to make a separate expedited rate filing with the OIR for residential property insurance, which is exempt from the rate filing requirements otherwise applicable under s. 627.062, F.S.<sup>8</sup> The provision (s. 627.062(2)(k), F.S.) is limited to allowing adjustments to rates for reinsurance or financing costs related to the purchase of reinsurance or financing products to replace or finance the payment of the amount covered by the Florida Hurricane Catastrophe Fund's temporary increase in coverage limit (TICL) layer. This includes replacement reinsurance for the TICL reductions, as well as the cash build-up factor and the

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<sup>6</sup> S. 624.4095, F.S.

<sup>7</sup> S. 624.4095, F.S., specifies that for property insurers, the calculated premium is the product of 0.90 times the actual or projected premium.

<sup>8</sup> Ch. 2009-87, L.O.F. The OIR has 45 days after the date of the filing to review it and determine if the rate is excessive, inadequate, or unfairly discriminatory.

increase in the price for the remaining TICL layers.<sup>9</sup> All costs contained in the filing are capped at ten percent per policyholder. However, financing products such as a liquidity instrument or line of credit cannot result in an overall premium increase exceeding three percent. The law also provides that insurers purchasing this reinsurance do so at a price no higher than would be paid in an arms-length transaction. An insurer may make only one filing under this provision in any 12-month period.

### **Change of Policy Terms in Insurance Policies**

Under the 5th District Court of Appeal's holding in the case of *U.S. Fire Insurance Co. and Hartford Insurance Company of the Southeast v. Southern Security Life Insurance Co.*, 710 So.2d 130 (Fla. 5th DCA 1998), when an insurance company changes a term or terms of a policy, the change constitutes a nonrenewal of the entire policy by the insurer and thus the insurer must send notice of the policy's nonrenewal to the policyholder in accordance with s. 627.4133, F.S. According to the court, providing the policyholder with a new policy that contains the changed policy term is not sufficient notice of the policy changes. The process of non-renewing an entire insurance policy due to a change in a policy term, and subsequently offering coverage to the policyholder, has caused confusion to policyholders.

### **Replacement Cost Insurance Coverage**

There are two basic ways that property insurance losses can be adjusted: replacement cost value (RCV) or actual cash value (ACV). Actual cash value is the depreciated value of the property being replaced or repaired. Current law requires that companies issuing homeowners' insurance policies must offer policyholders an option for replacement cost coverage.<sup>10</sup> The law provides that if a loss is insured for replacement cost, the insurer must pay the replacement costs without holdback of any depreciation in value, whether or not the insured replaces or repairs the dwelling or property.

Until 2005, under a replacement cost policy an insurer could make an initial payment based on an ACV basis and require the insured to complete the repair before the insurer paid the balance of the full replacement cost. Following the multiple hurricanes of 2004 and 2005, regulators received complaints from policyholders who were given the ACV, but could not afford to fund the balance necessary to make the repairs or replacements. As a result, these policyholders had paid premiums for replacement cost coverage, but were only being paid ACV. In 2005, the Legislature addressed this problem by requiring that for any loss sustained by a policyholder who has purchased replacement cost coverage, the insurer must pay the full replacement cost, whether or not the insured replaces or repairs the damaged property.<sup>11</sup>

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<sup>9</sup> The TICL or Temporary Increase in Coverage Limit Options allows residential property insurers to purchase additional reinsurance *above* the FHCF's mandatory coverage. The 2009 legislation also authorized the FHCF to implement a "cash build up" factor which would increase the reimbursement premiums that the Fund charges property insurers for the mandatory layer of coverage provided by the Fund. The cash build up factor is based on a five percent annual increase which will be phased in over a five-year period, at which time the increase will be 25 percent.

<sup>10</sup> S. 627.7011, F.S.

<sup>11</sup> Ch. 2005-111, L.O.F.

Insurance companies assert that the current replacement cost and holdback provisions allow some homeowners to file inflated or even fraudulent claims because they are not required to make needed repairs to their dwellings or replace their personal property if they sustain a loss. Many states require the insurer to pay initially only the actual cash value, and then provide the balance of the replacement cost once the insured has replaced or repaired the property.

### **Mitigation Credits, Discounts, or Other Rate Differentials**

Section 627.0629, F.S., requires rate filings for residential property insurance to include actuarially reasonable discounts, credits, or other rate differentials, or appropriate reductions in deductibles to consumers who implement windstorm damage mitigation techniques to their properties. The windstorm mitigation measures that must be evaluated for purposes of mitigation discounts include fixtures or construction techniques that enhance roof strength; roof covering performance; roof-to-wall strength; wall-to-floor foundation strength; opening protections; and window, door, and skylight strength.

### **Public Adjusters**

Public adjusters are defined as persons, other than licensed attorneys, who, for compensation, prepare or file an insurance claim form for an insured or third-party claimant in negotiating or settling an insurance claim on behalf of the insured or third party.<sup>12</sup> They are employed exclusively by a policyholder who has sustained an insured loss and their responsibilities include inspecting the loss site, analyzing damages, assembling claim support data, reviewing the insured's coverage, determining current replacement costs, and conferring with the insurer's representatives to adjust the claim.

Public adjusters are licensed by the Department of Financial Services (DFS) and must meet specified age, residency, examination, and surety bond requirements. As of September 2010, Florida had 2,511 licensed public adjusters. In 2008, the Legislature created a public adjuster apprentice license and mandated age, residency, examination, and bond requirements. The public adjuster apprentice must be under the supervision of a licensed public adjuster for a 12-month period in order to qualify for licensure as a property and casualty public adjuster.

Current law provides that a public adjuster may not charge a fee unless a written contract was executed prior to the payment of a claim. Such adjusters are prohibited from charging more than 20 percent of the insurance claims payment on non-hurricane claims and 10 percent of the insurance claims payment on hurricane claims for claims made during the first year after the declaration of the emergency. These fee caps apply only to residential property insurance policies and condominium association policies. There is no fee cap on re-opened or supplemental hurricane claims; however, the fee cannot be based on any payments made by the insurer to the insured prior to the time of the public adjuster contract.

Insureds or claimants have five business days after the date on which the contract is executed to cancel a public adjuster's contract during a state of emergency declared by the Governor. Insureds or claimants have 3 business days to cancel a contract as to claims involving non-

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<sup>12</sup> S. 626.854, F.S. See, Part VI (Insurance Adjusters) under ch. 626, F.S.

emergencies. Public adjuster contracts must be in writing and must display an anti-fraud statement.

Current statutes prohibit a public adjuster from directly or indirectly contacting any insured or claimant until 48 hours after an event that triggered a claim. However, that provision was recently struck down by the First District Court of Appeal which ruled that the restriction on soliciting customers within 48 hours of a disaster or other insurance claims event violated commercial speech protected by the state Constitution.<sup>13</sup> The law was challenged in a law suit by Frederick Kortum, a public adjuster in Oviedo. Kortum made the argument that the first 48 hours are of vital importance because policyholders may make decisions that affect how much they could receive from an insurer.

### **Citizens Property Insurance Corporation**

Citizens Property Insurance Corporation (Citizens) is a state-created, not-for-profit, tax-exempt governmental entity whose public purpose is to provide property insurance coverage to those unable to find coverage in the voluntary admitted market.<sup>14</sup> It is not a private insurance company.<sup>15</sup> Citizens is governed by an eight member board of Governors, two of whom are appointed by each of the following State leaders: Governor, Chief Financial Officer, Senate President, and Speaker of the House of Representatives. It operates pursuant to a plan of operation which is reviewed and approved by the Financial Services Commission and is subject to regulation by the Office of Insurance Regulation.

Citizens is currently the largest property insurer in Florida with almost 1.3 million policies extending approximately \$457 billion of property insurance coverage to Floridians which represents approximately 18 percent of the residential exposure in the State covered by the admitted market.<sup>16</sup> Beginning January 1, 2010, Citizens must implement a rate increase each year which does not exceed 10 percent for any single policy issued by the corporation, excluding coverage changes and surcharges, until rates are actuarially sound.

Citizens was created by the Legislature in 2002 by the merger of two existing property insurance associations: The Florida Residential Property and Casualty Joint Underwriting Association (FRPCJUA) and the Florida Windstorm Underwriting Association (FWUA). The FRPCJUA provided full-coverage personal and commercial residential property policies in all counties of Florida while the FWUA provided personal and commercial residential property wind-only coverage in designated territories.

Citizens' book of business is divided into three separate accounts:<sup>17</sup>

- **Personal Lines Account (PLA):** Personal residential multi-peril policies including homeowners, mobile homes, dwelling fire, tenants, condominium unit owners.

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<sup>13</sup> *Kortum v. Sink*, Case No. 1D10-2459, First District Court of Appeal. Opinion rendered on December 29, 2010.

<sup>14</sup> Admitted market means insurance companies licensed to transact insurance in Florida.

<sup>15</sup> s. 627.351(6)(a)1., F.S.

<sup>16</sup> As of January 2011.

<sup>17</sup> s. 627.351(6)(b)2., F.S.

- Commercial Lines Account (CLA): Commercial residential multi-peril policies including condominium associations, apartment buildings and homeowners association policies as well as commercial non-residential multi-peril (required to include wind coverage) policies (e.g., office buildings, retail, etc.) located outside of the coastal HRA eligible areas.
- High-Risk Account (HRA): Wind-only and multi-peril policies for personal residential, commercial residential, and commercial non-residential risks located in eligible coastal high risk areas.

Under current law, an applicant for coverage with Citizens is eligible even if the applicant has an offer of coverage from an insurer in the private market at its approved rates if the premium for that offer of coverage is over 15 percent more than the premium Citizens would charge for comparable coverage.<sup>18</sup>

Under current law,<sup>19</sup> beginning December 1, 2010, if Citizens' 100 year probable maximum loss<sup>20</sup> (PML) in its wind-only zones is not reduced by 25 percent from what it was in February 2001, the wind-only zones must be reduced by an amount that allows Citizens to reduce its PML by 25 percent. Indications are that Citizens has not been able to reduce its 100 year PML by 25 percent by December 1, 2010 in accordance with this statute. One reason is because Citizens has grown, in part, due to the reluctance of private insurers to expand their writings in Florida because of the significant losses sustained in the 2004 and 2005 hurricane seasons. Therefore, because the required PML reduction will not be accomplished by the statutory deadline, private insurers writing the other peril/non-wind coverage face the choice of either dropping that coverage or writing the windstorm coverage for policies.

### Sinkhole Insurance Issues

In December 2010, the Senate Banking and Insurance Committee published its interim report on sinkhole insurance (*Issues Relating to Sinkhole Insurance*, Interim Report 2011-104).<sup>21</sup> The report contained findings, many of which are outlined below, along with policy options for lawmakers and stakeholders to consider.<sup>22</sup> Senate Bill 408 contains many of the policy options suggested in the report.

Under current law, insurers offering property insurance must make available to policyholders, for an appropriate additional premium, sinkhole coverage for losses on any structure, including personal property contents.<sup>23</sup> Sinkhole coverage includes repairing the home, stabilizing the

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<sup>18</sup> s. 627.351(6)(c)5.a., F.S.

<sup>19</sup> s. 627.351(6)(y), F.S. This law was enacted in 2002.

<sup>20</sup> Probable maximum loss is an estimate of maximum dollar value that can be lost under realistic situations.

<sup>21</sup> The sources for the report included sinkhole policy and claims information collected from 211 insurers for the period 2006 to 2010, pursuant to a data call by the Office of Insurance Regulation. The report also utilized policy and claims data submitted by Citizens Property Insurance Corporation, individual insurers as well as background and research information collected by committee staff. See Senate Interim Report at:

[http://www.flsenate.gov/data/Publications/2011/Senate/reports/interim\\_reports/pdf/2011-104bi.pdf](http://www.flsenate.gov/data/Publications/2011/Senate/reports/interim_reports/pdf/2011-104bi.pdf)

<sup>22</sup> The report presented a series of "options" that would hopefully aid decision makers as they consider various public policy choices related to sinkholes. The report outlined two basic directions the legislature could take in addressing sinkhole coverage: (1) establish a sinkhole repair program; or (2) leave sinkhole coverage in the private insurance market and make substantial changes directed at removing the current cost drivers.

<sup>23</sup> S. 627.706, F.S.



underlying land, and foundation repairs. Insurance companies must also provide coverage for catastrophic ground cover collapse.<sup>24</sup>

Sinkhole insurance claims have increased substantially both in number and cost over the past two decades and most dramatically over the last several years,<sup>25</sup> despite the fact that licensed geologists in Florida state there is no geological explanation for the significant increase in sinkhole claims being reported to insurers.<sup>26</sup> The drastic increase in sinkhole claims is harming the financial stability of Citizens Property Insurance Corporation (Citizens) and private market insurers and making residential property insurance increasingly unaffordable or unavailable for consumers. The Citizens' sinkhole claims frequency ratio more than doubled between 2006 and 2009. In 2009, Citizens incurred over \$84 million in sinkhole losses plus adjustment expenses, yet obtained only \$19.6 million in earned premium to cover those costs. Private insurers have also seen their sinkhole claims and costs rise by double and triple digit percentages over the past several years. According to data submitted by 211 property insurers to the Office of Insurance Regulation (OIR), their total reported claims increased from 2,360 in 2006 to 6,694 in 2010, totaling 24,671 claims throughout that period. Total sinkhole claim costs for these insurers amounted to approximately \$1.4 billion for the same period.

Representatives from OIR, as well as insurers, believe that a major driving force for the significant increase in sinkhole claims is the fact that many policyholders are incentivized to file such claims because they can keep the cash proceeds from the claim instead of effectuating repairs to their home or remediating the land. The failure of sinkhole claimants to make repairs or stabilize land has concerned property appraisers in several counties, particularly in Hernando and Pasco counties. For example, the Hernando Property Appraiser has estimated that since 2005, the county has lost \$173 million in total market value as a result of value adjustments to sinkholes homes. Both appraisers believe that this dilemma has had a damaging effect on the market values of affected homes which could lead to financial instability of local governments.

### **Current Sinkhole Insurance Law Provisions**

Nationally, property insurance policies typically exclude coverage for "earth movement." In contrast, Florida requires every authorized insurer to make coverage for "sinkhole loss" available, for an additional premium, and also to provide coverage for catastrophic ground cover collapse. "Sinkhole loss," is defined by statute as "structural damage to the building, including the foundation, caused by sinkhole activity." In summary, under current law, for a policyholder to have a sinkhole loss, there must be actual structural damage to her or his home, including the foundation, which is "caused by" sinkhole activity. However, while "sinkhole activity" is defined in statute, "structural damage" is not, which has led to the term not being used in a uniform manner and has spawned debate in litigation over the meaning of the term.

The law provides that once the insurance company is notified of the pending claim, it must inspect the insured's premises to determine if there has been physical damage to the structure

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<sup>24</sup> Catastrophic ground cover collapse refers to extreme damage in which a property is essentially destroyed and uninhabitable.

<sup>25</sup> The increase in claims frequency and severity is based on data collected from 211 insurers by the Office of Insurance Regulation (OIR) in the Fall of 2010, (*Report on Review of the 2010 Sinkhole Data Call* (OIR Report),

<sup>26</sup> Jon Arthur, Director, Office of the Florida Geological Survey.

which may be the result of sinkhole activity. If the insurer concludes the damage may be the result of such activity, the carrier will then request a professional engineer or a professional geologist to perform the testing to determine the cause of the loss, within a reasonable professional probability, and to issue a report. The tests performed typically include floor evaluations, ground penetration radar (GPR) and standard penetration test (SPT) borings. Insurers use a variety of testing procedures and according to the OIR Report, the average number of testing procedures has increased for both paid and denied claims. The OIR Report found that the average cost among insurers to provide sinkhole tests was \$9,466, while the average cost for Citizens ranged from \$8,061 to \$10,116.

After the testing is performed, the homeowner is notified of the test results, provided a copy of the report, and given notice of the right to participate in the neutral evaluation program. The test report contains the findings and recommendations of the engineer or geologist as to the cause of loss, a description of the tests performed, and a recommendation as to methods for stabilization and repair. These findings and recommendations are “presumed correct.”<sup>27</sup> An insurer may deny a claim if it determines that there is no sinkhole loss; however, if the claim is denied without tests being performed, the policyholder may demand testing and the carrier must comply. If a sinkhole loss is verified, the insurer must pay to stabilize the land and building and repair the foundation in accordance with the report’s recommendations, and “in consultation with” the policyholder.<sup>28</sup>

The two most commonly recommended stabilization techniques are grouting and underpinning. Under the grouting procedure, a grout mixture (composed of cement, sand, fly ash, and water) is injected into the ground to stabilize the subsurface soils to minimize further subsidence damage by densifying the soils beneath the building as well as sealing the top of the limestone surface to minimize future raveling. Underpinning consists of steel pipes drilled or pushed into the ground to stabilize the building’s foundation. Both of these procedures are expensive. According to geologists and engineers, to stabilize an average \$150,000 home, grouting would cost an estimated \$75,000, while underpinning would be approximately \$35,000; for an average \$300,000 home, grouting is estimated to cost \$90,000, and underpinning would be \$45,000.

The insurer may limit its payment to the insured to the actual cash value of the structure, excluding the underpinning or grouting or other repair technique performed below the foundation, until the policyholder enters into a contract to perform the building stabilization and foundation repairs. The insurer must pay for the repairs after the contract is executed, but may not require the policyholder to advance payment, and may make payments directly to the contractor if written approval is obtained from the policyholder. However, if the repairs have begun and the engineer selected by the insurer determines that such repairs cannot be completed within policy limits, the insurer must either complete the repairs or give policy limits to the policyholder without a reduction for the repair expenses incurred.

Insurers who have paid a claim for sinkhole loss must file a copy of the engineer/geologist report and a certification, including the legal description of the property with the county clerk, who

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<sup>27</sup> S. 627.7073, F.S. The issue pertaining to the presumption of correctness of an engineer or geologist report is on appeal to the Florida Supreme Court, *Warfel v. Universal Ins. Co. of North America*, App. 2 Dist., 2010 WL 1874367 (2010).

<sup>28</sup> S. 627.707, F.S. The meaning of the term “in consultation with the policyholder” has caused confusion as to its meaning which has resulted in litigation.

must record the report and certification. The seller of real property upon which a sinkhole claim has been made by the seller and paid by the insurer must disclose to the buyer that a claim has been paid and whether or not the full amount of proceeds were used to repair the sinkhole damage.

### **Frequency and Severity of Sinkhole Claims, and Affordability and Availability of Sinkhole Insurance Coverage**

In the OIR Report of insurer sinkhole claims data (2006 and 2010), the agency received information on 8,959 open claims and 15,712 closed claims, totaling 24,671. Specifically, the data shows:

- Total sinkhole claims increased from 2,360 in 2006 to 7,245 in 2009.
- Total sinkhole losses for closed and open claims combined increased from \$209 million in 2006 to \$406 million in 2009.
- Total losses for open and closed claims exceeded \$1.4 billion over the 4-year period.

The statutory requirement for sinkhole testing consists of an inspection and the geologist/engineering report. In 2006, the sum of the two testing components totaled \$20.4 million in expenses. By 2009, however, that total nearly tripled to almost \$58 million, attributable to the increase in the number of claims. The data indicate companies must routinely incur extensive and costly testing procedures to adjust a sinkhole claim.

The data indicates a wide variation in the frequency of claims, depending on the geographic region. For example, for the period 2006-2009 over 88 percent of the claims occurred in eleven counties: Hernando, Pasco, Hillsborough, Pinellas, Marion, Polk, Orange, Alachua, Citrus, Miami-Dade, and Broward. Over 66 percent (11,872) of the claims are concentrated in just three counties—Hernando, Pasco and Hillsborough, with Citizens accounting for 36 percent of the total claims (4,261). Miami-Dade and Broward are showing a recent increase in sinkhole claims as those counties represented 2.9 percent of total claims from 2006-2009, but have increased to 4.2 percent for the year to date in 2010. This is statistically significant due to the fact that this area is generally not subject to sinkhole activity.

### **Citizens Property Insurance Corporation Provision of Sinkhole Coverage**

- The largest writer of sinkhole coverage in Florida is Citizens, particularly in the three counties of greatest activity (Hernando, Pasco and Hillsborough). Citizens' claims data for the years 2005 through 2009 shows the large deficiency in the premium Citizens' collects to cover sinkhole claims, particularly in the most active areas. For example, in 2009, for Citizens:
- The statewide pure premium<sup>29</sup> for sinkhole coverage was \$295, quadruple the \$73 premium that Citizens was allowed to charge for sinkhole coverage.

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<sup>29</sup> Pure premium is the amount that all policyholders with sinkhole coverage would need to pay to cover the sinkhole losses (with no profit or indirect costs added).

- The total premium collected statewide for the sinkhole endorsement (\$22.2 million) was exceeded by sinkhole losses<sup>30</sup> from Hernando (\$40.5 million) and Pasco (\$24.9 Million) counties.
- Sinkhole losses from Hernando (\$40.5 million) were almost seven times the \$5.9 million premium that was collected to cover those losses. Sinkhole losses in Pasco (\$24.9 million) were three times the total sinkhole premium of \$8.3 million.

### **Citizens' Sinkhole Claims Frequency & Severity**

The dramatic increase in sinkhole claims is the primary cost driver for Citizens' significant sinkhole losses. Statewide, the number of sinkhole claims more than doubled between 2005 and 2009, rising from 660 in 2005 to 1404 in 2009. The increase in sinkhole claims has occurred in spite of the fact that significant numbers of policyholders have dropped sinkhole coverage since it became an optional endorsement in 2007. The percent of Citizens' statewide policies with sinkhole coverage fell from 100 percent in 2006 (when it was mandatory) to 61 percent in 2009. In 2009, only 37 percent of policyholders in Hernando County and 22 percent of policyholders in Pasco County purchased Citizens' policies with sinkhole coverage. As a result of the substantial reduction in the number of people choosing to pay for sinkhole coverage, there are fewer policyholders (and less collected premium) over which to spread the increasing losses. Notwithstanding the substantial reduction in the number of policyholders choosing sinkhole coverage, there has still been an increase in the number of sinkhole claims being filed.

Average claims severity is the average amount of cost that Citizens incurred (indemnity plus loss adjustment expenses) for all claims for which a payment was made. The coverage A limit is the amount for which the main structure (house) is insured. In 2005, the statewide average severity of \$123,412 actually exceeded the average coverage A limit of \$115,540. In 2006 through 2009, the average severity was lower than the coverage A limit, but remained extremely high relative to other covered perils. In 2009, the average severity dropped significantly, but the data is based on a lower percentage of closed claims than the data for earlier years. Even with the drop in average severity in 2009, total overall losses for sinkholes increased due to the large increases in claim frequency.

### **Effect of Sinkholes on the Affordability and Availability of Citizens Coverage**

There is a great variation in the cost of Citizens' sinkhole coverage, depending on the geographic region of the state. In 2009, the statewide average sinkhole premium was \$73, the average premium was \$944 in Pasco County, \$775 in Hernando County, and \$98 in Hillsborough County. The average sinkhole premium for the remainder of the state (excluding Pasco, Hernando and Hillsborough) was only \$22. This deficiency in premiums is worsening because Florida law prohibits Citizens from increasing the rate of any policyholder by more than approximately 10 percent, even as losses continue to rise at a much faster pace. Thus, Citizens' already deficient sinkhole premiums will fall even further behind its sinkhole losses and Citizens' surplus will continue to erode.

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<sup>30</sup> "Losses" refers to indemnity costs for both open and closed claims, plus loss adjustment expenses (LAE). A loss adjustment expense (LAE) is the direct cost associated with investigating, administering, defending, or paying an insurance claim.

Most private insurers and Citizens have implemented, or are implementing, some form of property (including home) inspection program in which the property must meet specified criteria to qualify for sinkhole coverage. As more companies adopt pre-coverage inspection requirements, sinkhole coverage will continue to become less available. It has been reported to committee staff that many private insurers have ceased writing new business in the areas of greatest sinkhole claims activity. In Hernando and Pasco counties, Citizens' share of the homeowners' insurance market has increased substantially in each of the last two years.

### **Areas of Concern Regarding Sinkhole Claims Process**

The following topics have been identified by committee staff as areas of concern regarding the sinkhole claims process based on interviews and data collected from stakeholders.

#### **Failure of Sinkhole Claimants to Repair Property or Stabilize Land**

Representatives with the OIR, Citizens, as well as insurers, believe that the significant increase in sinkhole claims is driven by the ability of policyholders to often keep the cash proceeds from the claim instead of effectuating repairs to their home or remediating the land. The failure of sinkhole claimants to make repairs or stabilize land has concerned many property appraisers, most notably in Hernando and Pasco counties. Both property appraisers have indicated that this problem has had a damaging effect on the market values of affected homes which could lead to financial instability of local governments. Hernando County Property Appraiser, Alvin Mazourek, has estimated that since 2005, the county has lost \$173 million in total market value as a result of value adjustments to sinkhole homes while Pasco County Property Appraiser, Mike Wells, has cited a reduction in property values in his county of over \$50 million.

#### **Requiring Policyholders to Remediate or Repair**

The state has a public policy interest in ensuring that policyholders use insurance proceeds to remediate sinkhole activity. The failure of one policyholder to remediate sinkhole conditions underlying his or her property can subsequently affect their neighbor whose property may also experience sinkhole loss. Additionally, property values of nearby homes may be negatively affected. The statutory provisions requiring the policyholder to enter into a contract before receiving insurance proceeds are designed to ensure that insurance proceeds from a sinkhole loss are used to remediate sinkhole conditions. However, these statutory provisions have little relevance when the policyholder contests the claim. When the insurer and the policyholder settle a claim, the settlement agreement is highly unlikely to contain any condition that settlement proceeds be used to remediate the property. Any statutory attempt to require settlement proceeds to be used to remediate sinkhole conditions may well be interpreted to be an unconstitutional impairment of contract that impermissibly limits the right of the parties to the insurance contract to discharge their respective rights and liabilities via a settlement contract agreement. The only way to ensure that sinkhole proceeds are used to remediate sinkhole conditions is to create an environment where insurance proceeds are paid under the policy of insurance and fewer claims are contested by policyholders.

## Sinkhole Statutory Provisions

Various provisions of the statutes governing insurance for sinkhole loss are the subject of ongoing litigation between policyholders and insurers. The provisions noted below appear to be fostering litigation between the parties, are creating uncertainty as to the meaning of the statutory language, or have inefficiencies that can be remedied through amendment.

*Presumption of Correctness* - Section 627.7073(1)(c), F.S., states that a sinkhole report is “presumed correct” if it conforms to statutory standards. Currently on appeal before the Florida Supreme Court is *Warfel v. Universal Ins. Co. of N.A.*, in which the Court will determine whether the presumption of correctness shifts the burden of proof to the insured or merely requires the insured to produce evidence regarding the facts at issue, at which point the presumption disappears. The statutory requirements for the handling and investigation of sinkhole claims give deference to the findings and recommendations of the engineering and geological professionals retained by an insurer to investigate a sinkhole claim. The provisions are designed to improve the availability and affordability of sinkhole coverage by reducing litigation. When a sinkhole loss is verified in the sinkhole report, s. 627.707(5)(a), F.S., requires the insurer “to pay to stabilize the land and building and repair the foundation” of the policyholder “in accordance with the recommendations of the professional engineer as provided under s. 627.7073....” The Second DCA’s decision in *Warfel* eliminates the presumption in favor of the insurer when the report is challenged in a court of law. Regardless of the result of the Florida Supreme Court decision in *Warfel*, the Legislature should consider clarifying the applicability of the presumption of correctness in s. 627.7073, F.S.

*In Consultation With the Policyholder* – Section 627.707(5), states that when a sinkhole loss is verified, the insurer must pay for repairs recommended by the engineers and geologists retained by the insurer “in consultation with the policyholder.” The statute is arguably ambiguous as to what the statute is requiring when it directs the insurer to conduct repairs “in consultation with the policyholder.” Insurers assert that the phrase means providing notice to the policyholder regarding payment of claim proceeds to conduct repairs. Some insureds and their representatives assert that the phrase requires the insurance company to essentially reach an agreement with the policyholder regarding the method of repair to be used to remediate the confirmed sinkhole. The issue has become the subject of litigation in sinkhole claims. Clarification of the “in consultation with the policyholder” language may serve to remove the differing interpretations by the parties to the insurance contract.

*Structural Damage* – Section 627.706, F.S., defines a sinkhole loss as “structural damage to the building, including the foundation, caused by sinkhole activity.” Pursuant to the statutory definition of “sinkhole loss,” insurers are required to provide coverage for “structural damage to the building, including the foundation, caused by sinkhole activity.” The statute does not define the term “structural damage.” The result is uncertainty as to how the Florida Statutes define sinkhole loss and precisely what coverage Florida Statutes mandate insurers make available. The term “structural damage” is currently being defined in one of two ways. Some parties state that the term means simply “damage to a structure.” The second definition asserts that structural damage is damage that affects the load bearing capacity of the structure.<sup>31</sup>

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<sup>31</sup> The 2007 Florida Building Code (FBC): Existing Building (1st Printing) defines “structural” to mean “any part, material or

*Statute of Limitations* – Under current law, there is no Florida statute of limitations for making a property insurance claim. The statute of limitations for bringing a breach of contract claim is five years. In sinkhole claims, the insured has five years from the date of the insurer’s alleged breach to bring a breach of contract suit. Setting an actual date of loss for a sinkhole claim is difficult and often depends on the truthfulness of the insured in stating when possible sinkhole-related damage first appeared. Unfortunately, this allows some insureds to engage in questionable practices in an effort to maximize recovery. One such practice is backdating the date of loss to pre-June 1, 2005, to avoid the statutory requirement to perform repairs. Insureds seeking maximum policy limits may choose a date of loss under the policy term with the greatest limits. Policyholders with Citizens may attempt to circumvent Citizens’ bad faith immunity by alleging a sinkhole date of loss under the prior insurer's policy.

*Disputed Sinkhole Claims/Neutral Evaluation Program* – In 2006, the Legislature established an alternative process for resolving sinkhole disputes called “neutral evaluation.” The Department of Financial Services (DFS) certifies engineers and geologists to serve as “neutral evaluators” of sinkhole claims disputes. If the parties do not reach a settlement, the neutral evaluator renders an opinion whether a sinkhole loss has been verified and, if so, the estimated cost of repairs. Neutral evaluation is mandatory if requested by either party, but nonbinding, and the costs are paid by the insurer. The neutral evaluator’s written recommendation is admissible in any subsequent action or proceeding relating to the claim. Individuals involved in the neutral evaluation process have expressed the following concerns.

- Neutral evaluators may not be truly neutral, and may be biased because there are no conflict of interest standards.
- Neutral evaluators are sometimes asked to render opinions outside of their area of expertise.
- The scope of duties of a neutral evaluator are not clear and the issues to be determined by the neutral evaluator are not clearly specified in statute.
- Neutral evaluation makes it difficult to utilize the appraisal clause of the insurance policy.
- Time frames imposed by statute need to be revised pursuant to recommendations by DFS staff so that the evaluation procedure is conducive to settling claims.
- The funding for DFS to operate the neutral evaluation program does not cover its administrative costs.

*Public Adjuster Participation and Solicitation in Sinkhole Claims* - Under current law, a public adjuster is defined as any person, other than a licensed attorney, who, for compensation, prepares or files an insurance claim form for an insured or third party claimant in negotiating or settling an insurance claim on behalf of the insured or third party. During the 2005 – 2009 period in which the number of sinkhole claims has risen sharply, the percentage of sinkhole claimants who are represented by public adjusters has increased significantly. Citizens reports that in 2005, only three percent of all sinkhole claims had public adjuster involvement, but by 2009, 25 percent of

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assembly of a building or structure which affects the safety of such building or structure and/or which supports any dead or designed live load and the removal of which part, material or assembly could cause, or be expected to cause, all or any portion to collapse or fail.” The FBC for existing buildings also defines a condition called “substantial structural damage” which essentially constitutes damage that reduces the load-bearing capacity of the structure beyond a certain level. The FBC definitions of “structural” and “severe structural damage” indicate that the when the term “structural” is used in an engineering context, the term refers to the load bearing capacity of a building.

its statewide sinkhole claimants were represented by public adjusters. Many insurers believe that the increase in public adjuster involvement with sinkhole claims is a result of the aggressive advertising and solicitation campaigns used by public adjusting firms in the regions where the greatest number of sinkhole claims are filed.

### **Florida Hurricane Catastrophe Fund**

The FHCF is a tax-exempt fund created in 1993 after Hurricane Andrew as a form of mandatory reinsurance for residential property insurers. All insurers that write residential property insurance in Florida are required to buy reimbursement coverage (reinsurance) on their residential property exposure through the FHCF. The FHCF is administered by the State Board of Administration (SBA) and is a tax-exempt source of reimbursement to property insurers for a selected percentage (45, 75, or 90 percent) of hurricane losses above the insurer's retention (deductible).

The FHCF provides insurers an additional source of reinsurance that is significantly less expensive than what is available in the private market, enabling insurers to generally write more residential property insurance in the state than would otherwise be written. Because of the low cost of coverage from the FHCF, the fund acts to lower residential property insurance premiums for consumers. The FHCF must charge insurers the "actuarially indicated" premium for the coverage provided, based on hurricane loss projection models found acceptable by the Florida Commission on Hurricane Loss Projection Methodology.

The FHCF provides reimbursement to insurers for "losses" caused by a hurricane. Section 215.555(2)(d), F.S., defines "losses" as a "direct incurred losses" under covered policies. A direct incurred loss is a loss in which the insured peril is the proximate cause of damage. Sunshine State Insurance Company is challenging the SBA's interpretation of the statute that attorney's fees paid by an insurer to insureds pursuant to a negotiated or court-ordered settlement are not direct incurred losses and thus are not reimbursable under the FHCF contract. The Division of Administrative Hearings has scheduled a hearing on the dispute for April 4-5, 2011.

### **III. Effect of Proposed Changes:**

**Section 1** amends s. 215.555(2)(d), F.S., defining what constitutes "losses" under the Florida Hurricane Catastrophe Fund. The bill expands the definition of "losses" to include "all incurred losses" under covered policies, rather than "direct incurred losses." The bill also specifies that losses include amounts paid as fees on behalf of the policyholder. This change specifies that the FHCF must provide reimbursement for attorney's fees and public adjuster fees. The bill also specifies items that are not considered losses and thus are not reimbursable, which is designed to prevent FHCF reimbursement for losses that historically have not been covered by the fund because they were not "direct incurred losses." The statute currently excludes losses for fair rental value, rental income, or business interruption losses. The bill specifies that the following are also not reimbursable losses.

- Liability coverage losses.
- Property losses that are not primarily caused by a hurricane.
- Amounts paid because the insurer voluntarily expanded coverage, such as the waiver of a deductible.



- Reimbursement to the policyholder for an assessment levied by a condominium association or homeowners' association.
- Bad faith awards, punitive damage awards, and court-imposed fines, sanctions, or penalties.
- Amounts paid in excess of the insurance policy coverage limit.
- Allocated and unallocated loss adjustment expenses.

**Section 2** specifies that the amendment to s. 215.555, F.S., will apply to the FHCF reimbursement contract that is effective June 1, 2011. The 2011 FHCF reimbursement contracts will be executed on March 1, 2011, effective June 1, 2011. Application of the new definition of "losses" likely will be applied to the 2011 contract through an amendment executed by the SBA and the insurer.

**Section 3** amends 624.407, F.S., relating to surplus fund requirements for new insurers, to require that, to receive a certificate of authority to transact insurance in Florida, a new domestic residential property insurer that is not a wholly-owned subsidiary of an insurer domiciled in another state have a \$15 million surplus. The current surplus requirements for new residential property insurers is \$5 million, unless it is a wholly-owned subsidiary of an insurer domiciled in another state, in which case the minimum requirement is \$50 million.

**Section 4** amends 624.408, F.S., relating to the surplus fund requirements for current insurers, to require that a residential property insurer holding a certificate of authority before July 1, 2011, have a surplus of: \$5 million until June 30, 2016; \$10 million from July 1, 2016, until June 30, 2021; and \$15 million thereafter. If the residential property insurer does not hold a certificate of authority before July 1, 2011, it must have a surplus of \$15 million. The current surplus requirement for a residential property insurer to maintain its certificate is \$4 million.

**Section 5** creates s. 624.4095(7), F.S., regarding liabilities related to federal multi-peril crop insurance. Some insurers that provide multi-peril crop insurance cede the entire risk to the Federal Crop Insurance Corporation or to a private reinsurer. Insurers that provide crop insurance coverage in this way encounter two special problems that this bill is intended to address.

Current law limits the ratio of gross written premiums for property insurers to nine times the surplus as to policyholders, and requires surplus to be at least ten percent of total liabilities. When a primary insurer cedes all of the crop risk to a reinsurer, it is not underwriting any of the loss, so it is not necessary to limit its gross written premiums directly to a ratio of its surplus. The bill provides that gross written premiums that are ceded to the Federal Crop Insurance Corporation or to an authorized reinsurer will not be included in the calculation of an insurer's gross writing ratio.

The second problem for these insurers is that it is unrealistic to limit the total liabilities to 10 times the surplus. This is because the primary insurer cedes the entire risk, so it carries a very large balance of reinsurance premiums payable (a liability). This payable balance is almost entirely offset by recoverables (an asset) from the reinsurers, but that does not reduce the "gross" liability that cannot exceed 10 times the surplus. The bill provides that the liabilities for the ceded reinsurance premiums payable for coverage ceded to the Federal Crop Insurance Corporation or an authorized private reinsurer will be netted against the asset for the amounts

recoverable from those reinsurers. It will then be this “netted” amount that would be compared to the insurer’s surplus.

**Section 6** amends s. 624.424, F.S., regarding use of accountants to prepare annual audits and audited financial reports. The bill enacts prohibitions recommended by the National Association of Insurance Commissioners that prohibit an insurer from using the same accountant or partner of an accounting firm to prepare its annual audit and audited financial report for more than five consecutive years, and to require a five year waiting period before the accountant or partner can be retained by the insurer for that purpose. Current law permits use of the same accountant or partner for 7 straight years followed by a two-year waiting period.

**Section 7** amends s. 626.854, F.S., effective June 1, 2011, to limit public adjuster compensation to 20 percent of the reopened or supplemental claim payment for residential property insurance or condominium association policy claims. The public adjuster’s compensation must solely be based on the claim payments or settlement obtained through the public adjuster’s work after contracting with the insured or claimant.

The bill also clarifies the application of the limit on public adjuster compensation for claims paid within one year of a state of emergency. A public adjuster’s compensation is limited to 10 percent of insurance claims payments made within one year of an event declared by the Governor to be a state of emergency. The limit is raised to 20 percent for claims payments for such events that are made more than one year after the declaration of emergency.

**Section 8** amends s. 626.854, F.S., effective January 1, 2012.

### **Unfair and Deceptive Statements in Public Adjuster Advertisements**

The bill specifies statements by a public adjuster in an advertisement or solicitation that constitute an unfair or deceptive insurance trade practice pursuant to s. 626.9541, F.S.:

- Inviting the policyholder to file a claim when there is no covered damage to insured property.
- Offering the policyholder monetary or valuable inducement to file a claim.
- Inviting a policyholder to file a claim by stating there is “no risk” to the policyholder.
- Making a statement or representation or using a logo that implies or mistakenly could be construed to imply that the solicitation is made or sanctioned by a governmental entity.

### **Requires Disclaimer on Public Adjuster Advertisements**

The bill requires the following disclaimer on public adjuster advertisements in newspapers, magazines, flyers, and bulk mailers: “This is a solicitation for business. If you have had a claim for an insured property loss or damage and you are satisfied with the payment by your insurer, you may disregard the advertisement.”

### **Insurer Claims Investigations**

The bill requires that the insurance company adjuster, independent adjuster, investigator, or attorney provide at least 48 hours notice to the insured or insured’s representative before

scheduling a meeting with the claimant or on-site investigation of the insured property. The insured or claimant may waive the notice requirement. A public adjuster is required to give prompt notice of a property insurance claim to the insurer. The public adjuster must ensure that notice of the claim is given, that the insurer receives a copy of the public adjuster's contract, that the property is available for the insurer's inspection, and that the insurer may interview the insured directly about the loss. The public adjuster may be present during the insurer's inspection of the property, but the public adjuster's unavailability may not delay the insurer's timely inspection.

### **Prohibition on Contractors Adjusting Claims**

A licensed contractor or subcontractor is prohibited from adjusting a claim on the insured's behalf unless licensed as a public adjuster.

**Section 9** amends s. 626.8651(6), F.S., to require a public adjuster apprentice to meet continuing education requirements (minimum 8 hours, including 2 hours of ethics) in order to obtain licensure as a public adjuster. The provision is effective January 1, 2012.

**Section 10** amends s. 626.8796, F.S., regarding public adjuster contracts, effective January 1, 2012, to require that the public adjuster contract include the adjuster's name, business address, license number, and public adjusting firm's name. The contract must also include the insured's name and street address. A brief description of the loss and the type of claim involved (emergency, non-emergency, supplemental) and the percentage of the public adjuster's compensation must also be included. The contract must be signed and dated by the public adjuster and all named insureds. If all named insureds cannot sign the contract, the public adjuster must submit a signed affidavit that the signatories have authority to enter the contract and settle all claims issues on behalf of all named insureds. The public adjuster must provide a copy of the executed contract to the insurer within 30 days of its execution.

Current law also requires the public adjuster contract to provide notice that any person who injures, defrauds, or deceives an insurer or insured commits a third degree felony.

**Section 11** creates s. 626.70132, F.S., regarding notice of a hurricane or windstorm claim, to require that notice of a new, reopened, or supplemental hurricane or windstorm property insurance claim be provided within three years of the hurricane first making landfall or the windstorm causing the covered damage. A supplemental or reopened claim is defined in this section as an additional claim for recovery made from the same hurricane or windstorm that the insurer previously adjusted. The section does not affect any applicable statute of limitations provided in s. 95.11, F.S.

**Section 12** repeals s. 627.0613(4), F.S., to eliminate the requirement that the Insurance Consumer Advocate annually prepare a report card for each authorized personal residential property insurer.

**Section 13** amends s. 627.062, F.S., regarding the rate standards applicable to property, casualty and surety insurance. The bill makes multiple substantive and clarifying changes regarding the

submission of rates by insurers and their approval or denial by the Office of Insurance Regulation. This section:

- Requires the office to issue an approval or notice of intent to disapprove of a “file and use” rate filing within 90 days of the filing’s submission. Currently the Office is required to issue a “notice of intent to approve” instead of an approval.
- Prohibits the OIR from impeding an insurer’s right to acquire policyholders, advertise, or appoint agents, including agent commissions.
- No longer prohibits the following acts in order for an insurer to make a separate filing related to reinsurance or financing products that replace Florida Hurricane Catastrophe Fund Temporary Increase in Coverage Limits (TICL) coverage.
  - Including expenses or profit for the insurer.
  - Including other changes in its rate in the filing.
  - Having implemented a rate increase in the past 6 months.
  - Filing for a rate increase within 6 months of approval.
- Deletes language related to the development of a standard rating territory plan for use by all insurers for residential property insurance.
- Deletes obsolete language related to implementation of the presumed factor for medical malpractice insurance pursuant to the 2003 medical malpractice reforms.
- Deletes obsolete language prohibiting property insurance filings from being made on a “use and file” basis. The language only applies to filings made before December 31, 2010.
- Limits the OIR’s authority to disapprove rate filings for sinkhole insurance. Under the bill, the OIR may only deny the rate filing if the rate is inadequate, or charges the policyholder or applicant a higher premium based on race, religion, sex, national origin, or marital status.

**Section 14** amends s. 627.0629, F.S., regarding windstorm damage mitigation discounts for residential property insurance.

### **Mitigation Discounts**

Current law requires rate filings for residential property insurance to take the presence of mitigation techniques into account and provide actuarially reasonable credits, discounts, and reduced deductibles for mitigation techniques. The bill specifies that the rate filing must also consider the absence of mitigation techniques and include actuarially reasonable debits or increases in deductibles that recognize the absence of mitigation techniques.

The bill specifies that the aggregate amount of mitigation discounts granted by an insurer should not exceed the aggregate expected reduction in losses resulting from the mitigation techniques. An insurer that demonstrates that its aggregate mitigation discounts exceed the expected reduction in aggregate loss created by the mitigation may recover the lost revenue through an increase in its base rates. The bill deletes the requirement that the OIR develop a method of calculating mitigation discounts that directly correlates to the uniform home grading scale.

### **Implementation of Approved Rates Over Multiple Years**

Current law allows an insurer to implement an approved rate filing over multiple years in order to provide an appropriate transition period for policyholders. Insurers are permitted to include the

actual cost of private market reinsurance that replaces Florida Hurricane Catastrophe Fund TICL coverage within the rate. The bill allows the portion of the rate that corresponds to the cost of reinsurance to replace TICL coverage to include an expense or profit load.

**Section 15** amends s. 627.351(6), F.S., regarding Citizens Property Insurance Corporation.

### **Renames the High Risk Account**

The bill renames the Citizens “High Risk Account” the “Coastal Account.” The account is being renamed to improve Citizens’ bargaining position when dealing with outside investors, as the current name “High Risk Account” has a negative connotation.

### **Citizens Policyholder Surcharge**

The bill specifies that the Citizens policyholder surcharge is payable upon cancellation, termination, renewal, or issuance of a new policy within 12 months after imposition of the surcharge or the period of time necessary to collect the surcharge. Citizens cannot levy a regular assessment until it has levied the full amount of the Citizens policyholder surcharge. Current law is less specific regarding when the surcharge is due, only stating that it is to be collected when the insurance policy is issued or renewed.

### **Repeals Requirement to Reduce High Risk Area**

Citizens is authorized to offer policies that that provide coverage only for the peril of wind for risks located within the high risk/coastal account. The high risk area of the high risk/coastal account consists of areas that were eligible for coverage in the Florida Windstorm Underwriting Association, essentially coastal areas at high risk for a hurricane. The bill repeals the requirement to reduce the high-risk area after December 1, 2010, if necessary to reduce the probable maximum loss attributable to wind-only coverages to 25 percent below the “benchmark” for the high-risk area, which is defined in statute as the 100-year probable maximum loss for the Florida Windstorm Underwriting Association based on its November 30, 2000, exposures. The bill also repeals a requirement to reduce the high-risk area after February 1, 2015, by 50 percent below the benchmark.

Repeal of the requirement to reduce the high risk area prevents the reduction of Citizens exposure to losses due to hurricane loss under wind-only policies in coastal areas. However, reduction of the high risk area might also reduce the number of private market carriers providing coverage in coastal areas. Currently private market insurers are able to provide coverage to risks in the coastal area that exclude wind. If such insurers are required to cover wind, they may choose not to write the policy with the eventual result perhaps being that the entire risk is insured by Citizens.

### **Citizens Board of Governors**

Members of the board with insurance experience are deemed to be within the exception in s. 112.313(7)(b), F.S., that allows a public officer to practice a particular profession or occupation when required or permitted by law or ordinance.

The bill provides procedures for board members who have a conflict of interest regarding a particular matter. A Citizens board member may not vote on any measure that would inure to the gain or loss of the board member; the board member's corporate principal or the parent or subsidiary of the corporate principal; or the relative or business associate of the board member. A board member with a conflict must state his or her interest in the matter prior to the vote being taken. The board member must also provide written disclosure of the conflict within 15 days after the vote, and the disclosure must be included in the minutes of the board meeting and available as a public record.

**Section 16** amends s. 627.3511(5)(a), F.S., to provide conforming changes regarding the name change of the Citizens coastal account.

**Section 17** amends s. 627.4133, F.S., regarding the written notice requirements for nonrenewal of a policy.

### **Notice of Nonrenewal for Personal or Commercial Residential Property Insurance Policies**

The bill creates a uniform 90-day written notice requirement for the nonrenewal, cancellation, or termination of a personal lines or commercial residential property insurance policy. Under current law, an insurer must provide 100 days written notice. However, if the insurer has covered the insured's property for the last five years or more then 180 days written notice is required. If the insured has been with the insurer for less than five years but the nonrenewal, cancellation, or termination is effective between June 1 and November 30, then the insurer must give the greater of 100 days written notice or notice by June 1.

### **Notice of Nonrenewal for Citizens "Take-out" Policies**

The bill requires Citizens to provide 45 days notice of nonrenewal to the policyholder for a policy that has been assumed by an authorized insurer. For such policies, Citizens is exempt from the notice requirements of paragraph (2)(a) and (2)(b) apply to policies for personal lines and commercial residential property insurance. Paragraph (2)(a) requires the insurer to provide 45 days written notice of the renewal premium. Paragraph (2)(b) contains a number of notice requirements pertaining to the nonrenewal, cancellation, or termination of the policy.

### **45-Day Notice of Cancellation or Non-Renewal of Property Insurance Policies**

An insurer may cancel or nonrenew a property insurance policy after 45 days notice if the OIR finds that the early cancellation of policies is necessary to protect the best interests of the public or policyholders and the office approves the insurer's plan for early cancellation or nonrenewal. Acceptable grounds for early cancellation or nonrenewal may include the insurer's financial condition, the lack of adequate reinsurance for hurricane risks, or other relevant factors. The office may condition its findings on the consent of the insurer to be placed under administrative supervision pursuant to s. 624.81, F.S., or the appointment of a receiver under ch. 631, F.S.

**Section 18** creates s. 627.73141, F.S., which allows insurers to change policy terms for a renewal policy of personal lines property insurance without cancelling the policy and providing a notice of cancellation.

### **Notice of Change in Policy Terms**

The bill authorizes insurers to renew a personal lines property and casualty insurance policy under different terms by providing to the policyholder a written “Notice of Change in Policy Terms” instead of a written “Notice of Non-Renewal.” The Notice must be titled “Notice of Change in Policy Terms,” give the insured written notice of the change, and be enclosed with the written notice of renewal premium. The insured is deemed to have accepted the change in policy terms upon the insurer’s receipt of the premium payment for the renewal policy. If the insurer fails to provide the Notice of Change in Policy Terms the original policy terms remain in effect. The bill also provides Legislative intent language stating that the section is designed to allow insurers to change policy terms without nonrenewing policyholders, alleviate policyholder confusion caused by the required policy nonrenewal when an insurer intends to renew the policy under different terms, and encourage policyholders to discuss their coverages with insurance agents. Currently, when an insurer wants to change the terms of the insurance contract by which it provides coverage to the insured at renewal, it must provide the insured with a written Notice of Non-Renewal in compliance with the time frames for notice requirements provided for in statute.

**Section 19** amends s. 627.7011, F.S., regarding insurer payment of losses insured on a replacement cost basis.

### **Payment of Losses to Dwellings Insured on Replacement Cost Basis**

The insurer must initially apply the deductible and pay the actual cash value of the insured loss. The policyholder must then contract for the performance of building and structural repairs, which triggers the insurer’s obligation to pay any remaining amounts incurred to perform the repairs as the work is performed. The insurer may waive the requirement that the policyholder contract for repairs. The insurer, contractor, or subcontractor may not require the policyholder to advance payment for repairs except for incidental expenses to mitigate further damage. The insurer must pay replacement cost coverage without reservation or holdback of any depreciation if a total loss occurs in accordance with s. 627.702, F.S., the valued policy law.

### **Payment of Personal Property Losses on Replacement Cost Basis**

The insurer may limit its initial payment to the actual cash value of the personal property. The insurer must pay the reservation or holdback upon the insured’s providing a receipt for the replaced property. The insurer must provide clear notice of the payment process in the insurance contract. The insurer is prohibited from requiring the policyholder to advance payment to replace property.

**Section 20** amends s. 627.70131(5)(a), F.S., regarding payment of property insurance claims, to require that an initial, reopened, or supplemental property insurance claim be paid or denied by the insurer the later of:

- 90 days after receiving notice of the claim unless there are factors beyond the insurer's control that reasonably prevent payment; or
- 15 days after there are no longer factors beyond the control of the insurer that reasonably prevented payment.

Current law contains the timeframes for payment of a claim described above, but simply says they apply to a property insurance claim. This has resulted in disputes regarding the time frame the insurer has to make a payment for a reopened or supplemental property insurance claim.

**Section 21** provides a statement of Legislative findings regarding sinkhole loss insurance coverage. The findings include the following declarations.

- There is a compelling state interest in maintaining a viable and orderly property insurance market.
- The 2005 legislative revisions to the sinkhole statutes (ss. 627.706-627.7074, F.S.) are designed to increase reliance on objective, scientific testing requirements and reduce the number of sinkhole claims and disputes arising under the prior law.
- The Legislature finds that losses associated with sinkhole claims adversely affect the public health, safety, and welfare of this state and its citizens. The Legislature determined that since the 2005 statutory revisions, both private-sector insurers and Citizens have experienced high claims frequency and severity for sinkhole insurance claims. Additionally, many properties remain unrepaired even after loss payments, which reduce the local property tax base and adversely affect the real estate market.
- Sections 19 through 24 of the act clarify technical or scientific definitions adopted in the 2005 legislation in order to reduce sinkhole claims and disputes.
- The legal presumption intended by the Legislature is clarified to reduce disputes and litigation associated with technical reviews associated with sinkhole claims.
- Other statutory revisions advance legislative intent to rely on scientific or technical determinations relating to sinkholes and sinkhole claims, reduce the number and cost of sinkhole claim disputes, and ensure that repairs are made pursuant to scientific and technical determinations and insurance claims payments.

**Section 22** amends s. 627.706, F.S., which currently requires property insurers to offer sinkhole coverage to each policyholder for an additional premium and requires that coverage for catastrophic ground cover collapse be included in every property insurance policy. The bill makes the following changes:

### **Removes the Requirement that Insurers Offer Sinkhole Coverage**

Insurers no longer must make sinkhole coverage available. Instead, insurers are authorized to make the coverage available but are not required to do so. Insurers are also allowed to restrict sinkhole coverage to the principal building.



## **Sinkhole and Catastrophic Ground Cover Collapse Insurance Only Applies to Residential Property Insurance**

Property insurers covering commercial risks will no longer be bound by the requirement to include coverage for catastrophic ground cover collapse coverage and the provisions of the section regarding sinkhole coverage. Only insurers transacting *residential* property insurance as described in s. 627.4025, F.S., will be required to include catastrophic ground cover collapse and will be governed by the provisions of the bill authorizing sinkhole coverage. Section 627.4025, F.S., defines residential coverage as follows.

- Personal lines coverage which consists of homeowner's, mobile homeowner's, dwelling, tenant's, condominium unit owner's, cooperative unit owner's, and similar policies.
- Commercial lines residential coverage which consists of condominium association, cooperative association, apartment building, and similar policies, including policies covering the common elements of a homeowner's association.

## **Applies the Sinkhole Deductible to the Sinkhole Investigation**

The sinkhole deductible will apply to any expenses incurred by the insurer in investigating a sinkhole claim. Separate deductibles for sinkhole coverage are currently authorized to be equal to one, two, five, or ten percent of the policy dwelling limits.

## **Redefines Sinkhole Loss Coverage**

The bill changes the definition of "sinkhole loss," primarily by creating a statutory definition of "structural damage." Sinkhole loss is currently defined as "structural damage to the building, including the foundation, caused by sinkhole activity." However, "structural damage" is not defined by statute. The bill defines structural damage as the occurrence of all of the following.

- A covered building suffers foundation movement outside an acceptable variance under the applicable building code; and
- Damage to a covered building, including the foundation, that prevents the primary structural members and/or primary structural systems from supporting the loads and forces they are designed to support; and
- The loss meets any additional conditions contained in the insurance policy.

Accordingly, in order for the policyholder to obtain policy benefits for sinkhole loss, the insured structure must sustain structural damage as defined by the bill that is caused by sinkhole activity and any additional conditions contained in the insurance policy. Contents coverage and additional living expense coverage is only available if there is *structural* damage to the covered building caused by sinkhole activity. The bill also specifies that "sinkhole loss" means structural damage to the *covered* building.

The definition of sinkhole loss is also modified by the bill's amendment of the definition of sinkhole activity. The bill specifies that *contemporary* movement or raveling of soils is necessary for sinkhole activity to occur. Merriam-Webster's defines "contemporary" in two different ways, and either definition arguably could apply. The term can either refer to something that exists or

occurs within the current modern time period or can mean simultaneous or within the same time period. The first definition would require the movement or raveling of soils to have occurred recently. The second definition would require it to have occurred within the same time period as another event, which could mean that the weakening of the earth supporting the property would result from soil movement that occurred at roughly the same time, but would not necessarily require both events to have occurred recently.

### **Two Year Sinkhole Claim Deadline**

The bill requires a policyholder to provide notice to the insurer of a new, supplemental, or reopened claim for sinkhole loss within 2 years after the policyholder knew or should have known about the sinkhole loss.

### **Changes the Requirements for Professional Engineers and Professional Geologists**

In order to qualify as a professional engineer under the sinkhole statutes, a professional engineer must have successfully completed five or more courses in geotechnical engineering, structural engineering, soil mechanics, foundations, or geology. The bill deletes the requirement that the engineering degree include a specialty in geotechnical engineering. The bill also deletes the requirement that the geology degree include expertise in Florida geology.

### **Alters Provisions Related to Catastrophic Ground Cover Collapse**

The bill amends the definition of catastrophic ground cover collapse to specify that the coverage only applies if there is structural damage to the *covered* building. The bill also deletes a reference to “structural damage” that the current statute implies can consist of “merely the settling or cracking of a foundation, structure, or building....”

Currently, when a policyholder chooses coverage only for catastrophic ground cover collapse, the insurer must give notice that sinkhole losses are not covered, but that sinkhole coverage can be purchased for an additional premium. Under the bill, insurers no longer must offer sinkhole coverage to policyholders. Accordingly, the notice to policyholders will no longer state that the insured may purchase sinkhole loss coverage for an addition premium.

### **Nonrenewal of Policies That Include Sinkhole Coverage**

The bill allows an insurer to nonrenew a policy that provides sinkhole coverage and instead offer coverage that includes catastrophic ground cover collapse and excludes sinkhole coverage. The insurer is not required to provide the policyholder with the opportunity to purchase a sinkhole endorsement. The insurer may require an inspection of the property prior to issuing a sinkhole coverage endorsement. Currently the nonrenewal process detailed in this paragraph is limited to Pasco County and Hernando County and requires the insurer to make an offer of sinkhole coverage for an additional appropriate premium, subject to the underwriting or insurability guidelines of the insurer.

**Section 23** makes a technical change to s. 627.7061, F.S., substituting policyholder for insured.

**Section 24** repeals s. 627.7065, F.S., eliminating the database of information relating to sinkholes developed by the Department of Financial Services and the Department of Environmental Protection.

**Section 25** amends s. 627.707, F.S., containing the standards for the investigation of sinkhole claims by insurers, the payment of such claims, and the nonrenewal of policies covering sinkhole loss under specified circumstances. The bill substantially modifies the process for an insurer's investigation of a sinkhole claim.

### **Investigation of Sinkhole Claims**

The bill creates a substantially new process for an insurer's investigation of a sinkhole claim. The process requires the insurer to determine whether: (1) the building has incurred structural damage that (2) has been caused by sinkhole activity. Coverage for sinkhole loss will not be available if structural damage is not present or sinkhole activity is not the cause of structural damage. The new process is as follows:

- 1) *Initial Inspection & Structural Damage Determination*: Upon receipt of a claim for sinkhole loss, the insurer must inspect the policyholder's premises to determine if there has been structural damage which may be the result of sinkhole activity. This inspection will often require the insurer to retain a professional engineer to evaluate whether the insured building has incurred structural damage as defined by statute.
- 2) *Sinkhole Testing Initiated by the Insurer*: The insurer is required to engage a professional engineer or professional geologist to conduct sinkhole testing pursuant to s. 627.7072, F.S., if the insurer confirms that structural damage exists and is either unable to identify a valid cause of the structural damage or discovers that the structural damage is consistent with sinkhole loss. If coverage is excluded under the policy even if sinkhole loss is confirmed, then the insurer is not required to conduct sinkhole testing. The bill deletes the requirement that the insurer conduct sinkhole testing upon the demand of the policyholder.
- 3) *Notice to the Policyholder*: The bill maintains the requirement that the insurer must provide written notice to the policyholder detailing what the insurer has determined to be the cause of damage (if the determination has been made) and a statement of the circumstances under which the insurer must conduct sinkhole testing. Notice of the right of the policyholder to demand sinkhole testing is deleted.
- 4) *Authorization to Deny Sinkhole Claim*: Insurers may continue to deny the claim upon a determination that there is no sinkhole loss.
- 5) *Policyholder Demand for Sinkhole Testing*: The bill specifies that the policyholder may demand sinkhole testing in writing within 60 days after receiving a claim denial if the insurer denies the claim for lack of sinkhole loss without performing sinkhole testing and if coverage would be available if a sinkhole loss is confirmed (i.e. the claim denial was not issued due to policy conditions or exclusions of coverage and instead was based the failure of the loss to meet the definition of sinkhole loss). However, if sinkhole testing certifies pursuant to s. 627.7073, F.S., that there is no sinkhole loss (structural damage caused by sinkhole activity), then the policyholder must pay the insurer up to 50 percent of the sinkhole testing costs up to the greater of the sinkhole deductible or \$2,500.

- 6) *Payment of a Claim for Sinkhole Loss*: The insurer continues to be required to pay to stabilize the land and building and repair the foundation upon the verification of a sinkhole loss. The bill specifies that payment shall be made to conduct such repairs in accordance with the recommendations of the professional engineer retained by the insurer under s. 627.707(2), F.S. The bill also clarifies that the insurer is required to give notice to the policyholder regarding payment of the claim. Current law states that the claim payment must be made “in consultation with the policyholder,” which has created disagreement between insurers and some policyholders whether the statute requires only notice to the policyholder or whether the insurer and policyholder must reach an agreement regarding the methods of sinkhole repairs to be used and their estimated costs.

### **Payment of Sinkhole Loss Claims**

Under current law an insurer may limit payment to the actual cash value of the sinkhole loss not including below-ground repair techniques until the policyholder enters into a contract for the performance of building stabilization repairs. The bill requires the contract for below-ground repairs to be made in accordance with the recommendations set forth in the insurer’s sinkhole report issued pursuant to 627.7073, F.S.. and entered into within 90 days after the policyholder receives notice that the insurer has confirmed coverage for sinkhole loss. The time period is tolled if either party invokes neutral evaluation. Stabilization and all other repairs to the structure and contents must be completed within 12 months after the policyholder enters into the contract for repairs unless the insurer and policyholder mutually agree otherwise, the claim is in neutral evaluation, the claim is in litigation, or the claim is under appraisal.

Under current law, the insurer may make payment directly to persons selected by the policyholder to perform land and building stabilization and foundation repairs if the policyholder and any lien holder grant written approval. The bill deletes the requirement of policyholder approval in order for the insurer to make direct payment to the persons performing repairs.

### **Prohibition of Rebates for Sinkhole Repairs**

The bill prohibits a policyholder from accepting a rebate from a person performing sinkhole repairs. If the policyholder does receive a rebate, coverage under the insurance policy is rendered void and the policyholder must refund the amount of the rebate to the insurer. Furthermore, a policyholder that accepts a rebate or a person who offers a rebate commits insurance fraud punishable as a third degree felony as provided in s. 775.082, F.S. (up to five years imprisonment), s. 775.083, F.S. (up to a \$5,000 fine), and s. 775.084, F.S. (for a habitual felony offender up to 10 years imprisonment with no eligibility for release for five years).

### **Requirement to Pay Costs of Sinkhole Testing**

If the policyholder requests that the insurer conduct sinkhole testing and the sinkhole testing report certifies there is no sinkhole loss, the policyholder must reimburse 50 percent of the insurer’s sinkhole testing costs up to the greater of the deductible or \$2,500. The policyholder is not responsible for testing costs if sinkhole testing is initiated by the insurer (due to a determination that structural damage is present).

### **Nonrenewal of Policies**

Current law allows the insurer to nonrenew a policy on the basis of a sinkhole loss claim if the insurer makes payments that exceed the current policy limit for property damage coverage. The bill instead provides that the policy may be nonrenewed if the payments equal or exceed the policy limit in effect on the date of loss to the covered building as set forth on the declarations page. However, the policy cannot be nonrenewed if the insured has repaired the structure in accordance with the engineering recommendations provided in the sinkhole report obtained by the insurer.

**Section 26** amends s. 627.7073, F.S., containing the statutory requirements regarding sinkhole testing reports.

### **Sinkhole Testing Reports**

The bill alters the findings that must be contained within a certified sinkhole testing report, primarily to require the report to determine if structural damage is present that has been caused by sinkhole activity.

If the sinkhole report verifies the existence of a sinkhole loss, the bill requires the report to certify that structural damage to the covered building has been identified within a reasonable professional probability. The report must verify causation by certifying that the cause of structural damage is sinkhole activity. The report must also certify that the analyses were sufficient to identify sinkhole activity as the cause of structural damage. The bill maintains the requirement that the report provide recommendations for stabilizing the land and building and repairing the foundation.

In the event that a sinkhole loss is not verified, the report must state that there is no structural damage or that the cause of structural damage is not sinkhole activity within a reasonable professional probability. The report must also state the cause of structural damage when certifying that a sinkhole loss has not occurred.

### **Presumption of Correctness**

Current law states that the findings, opinions, and recommendations contained in a statutorily compliant sinkhole testing report are presumed correct. The bill also states that the presumption of correctness shifts the burden of proof in court to the Plaintiff. The bill will reverse the holding of *Warfel v. Universal Ins. Co. of N.A.*, which found that the presumption of correctness does not shift the burden of proof. The bill specifies that the presumption of correctness only applies to a report prepared by the insurer's professional engineer with regard to land and building recommendations. The presumption of correctness is based upon public policy concerns regarding the affordability of sinkhole coverage, to provide consistency in claims handling, and to reduce the number of disputed sinkhole claims.

### **Filing of Sinkhole-Related Reports with Clerk of Court**

The bill expands current law, which requires the insurer to file a sinkhole report with the county Clerk of Court when paying a claim for sinkhole loss. Insurers must also file a neutral evaluator's report that verifies a sinkhole loss, a copy of the certification that stabilization has been completed (if any), and the amount of the payment. The bill also requires the policyholder to file with the county Clerk of Court a copy of any sinkhole report regarding the insured property prepared at the request of the policyholder. Filing the policyholder's sinkhole report is a precondition to accepting payment for a sinkhole loss.

### **Notice to Property Buyers of Sinkhole Claims**

The bill strengthens the requirement that sellers notify the buyers of real property of any sinkhole claims payments regarding the property and whether all proceeds were used to repair sinkhole damage. The bill requires the disclosure to be made before closing and to include the amount of the payment received. The seller must also provide to the buyer prior to closing the statutory sinkhole report, all other reports regarding the property, the neutral evaluation report, and the certification indicating that stabilization of the property is completed.

**Section 27** amends, s. 627.7074, F.S., which provides the procedure for the neutral evaluation of sinkhole claims administered through the Department of Financial Services (DFS). The bill specifies that neutral evaluation is available to either party if a sinkhole report has been issued pursuant to s. 627.7073, F.S. Currently, the statute does not state when neutral evaluation can be requested, which has resulted in requests for neutral evaluation before sinkhole testing has been conducted. In addition, the bill requires neutral evaluation to determine the following.

- Causation.
- All Methods of stabilization and repair both above and below ground.
- The costs for stabilization and all repairs.
- Information necessary to determine whether sinkhole loss has been verified, causation, and estimated repair costs.

The neutral evaluator's report must describe all matters that are the subject of the neutral evaluation, including the following.

- Whether sinkhole loss has been verified or eliminated within a reasonable degree of professional probability.
- Whether sinkhole activity caused structural damage to the building.
- If sinkhole loss is present, the estimated cost of stabilizing the land and covered structures and other appropriate remediation and necessary building repairs due to sinkhole loss.

### **Availability of Appraisal**

Neutral evaluation does not invalidate an appraisal clause in an insurance policy, which either party may select to resolve a dispute regarding the amount of loss.

### **Neutral Evaluator Access to Information**

The neutral evaluator must have reasonable access to the interior and exterior of insured structures that are the subject of a claim. The policyholder must provide the neutral evaluator with any reports initiated by the policyholder or the policyholder's agent that confirm sinkhole loss or dispute another sinkhole report.

### **Criteria for Disqualification of a Neutral Evaluator**

The parties may disqualify up to two neutral evaluators proposed by the DFS without cause. The parties may also submit requests to disqualify evaluators for cause. The proposed neutral evaluator may only be disqualified for cause because of a specified familial relationship, a conflict of interest based on prior representation of either party or adverse to the parties' interests in a substantially related matter, or a prior employment relationship with either party. Under current law, each party may disqualify up to three proposed neutral evaluators for any reason, but there are no disqualifications for cause.

### **Time-Frames for Conducting Neutral Evaluation**

The bill generally expands the time frames for conducting neutral evaluation. The parties are directed to agree to the appointment of a qualified neutral evaluator, but if they cannot do so within 14 days, the Department of Financial Services is directed to select the neutral evaluator. The neutral evaluator that is selected must notify the parties of the schedule for the neutral evaluation conference within 14 days of receiving the assignment. The neutral evaluator is directed to make reasonable efforts to hold the conference within 90 days after the DFS has received the neutral evaluation request, but failure to do so does not invalidate either party's right to neutral evaluation. The neutral evaluation report must be sent to all parties and the DFS within 14 days after completing the neutral evaluation conference. The mandatory stay of court proceedings pending completion of neutral evaluation is automatically lifted five days after the filing of the neutral evaluator's report with the court.

### **Permits Additional Experts and Testing to Assist the Neutral Evaluator**

The neutral evaluator that lacks the training and credentials to provide an opinion regarding a disputed issue may enlist another professional neutral evaluator, a professional engineer or professional geologist, or a licensed building contractor who has the training and credentials to provide that opinion.

The neutral evaluator may also request the entity that performed the sinkhole investigation pursuant to s. 627.7072, F.S., perform additional and reasonable testing that is deemed necessary by the neutral evaluator.

### **Admissibility of Neutral Evaluator's Testimony and Report**

The neutral evaluator's full report and testimony must be admitted in any action, litigation or proceeding giving rise to the claim or related to the claim. However, oral or written statements or nonverbal conduct other than those required to be admitted are confidential and may not be disclosed to a person other than a party to neutral evaluation or a party's counsel.

**Other Provisions**

The bill includes the following provisions.

- The actions of the insurer are not a confession of judgment or admission of liability if an insurer timely complies with the neutral evaluator's recommendations but the policyholder declines to resolve the matter in accordance with those recommendations.
- Payments shall be made pursuant to the insurance policy and s. 627.707(5), F.S., if the insurer agrees to comply with the neutral evaluator's report.
- Neutral evaluators are agents of the DFS and have immunity from suit.
- The DFS must adopt procedural rules for neutral evaluation.

**Section 28** amends s. 627.712(1), F.S., to provide conforming changes regarding the name change of the Citizens coastal account.

**Section 29** provides that act is generally effective July 1, 2011, except as otherwise expressly provided. This provision is effective June 1, 2011.

**IV. Constitutional Issues:****A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**V. Fiscal Impact Statement:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Consumers should benefit because the bill strengthens insurer solvency by increasing the minimum surplus requirements for "new" or "current" residential property insurers which increases the likelihood that insurers can pay policyholder claims and that fewer insurers will enter rehabilitation or liquidation proceedings. The bill also safeguards insurer solvency by permitting insurers to cancel or nonrenew insurance policies within 45 days if the OIR finds the early cancellations are necessary to protect the best interests of the policyholders and the public.



Insurance agents should benefit under this legislation because the OIR is precluded from directly or indirectly impeding or compromising an insurer's right to acquire policyholders, advertise, or appoint agents, including the amount of agent commissions during a rate filing procedure.

Revising the adjustment and holdback procedures for homeowners' insurance policies which offer replacement cost coverage should help ensure that policyholders make necessary repairs to their dwellings. The revisions should also discourage inflated estimates for personal property claims that are insured on a replacement basis.

The revisions to the statutes governing sinkhole coverage should reduce the number of sinkhole claims and disputes, ultimately reducing the losses associated with such claims. The reforms should reduce premium costs for policyholders purchasing residential property insurance and increase the availability of coverage within the private market. However, claim costs associated with sinkhole loss may increase in the short term with the passage of this bill, as a number of policyholders may file sinkhole damage claims alleging damage that occurred before the effective date of the reforms contained in this bill.

Insurers no longer must offer sinkhole coverage for an additional premium. Also, commercial property insurance will no longer contain catastrophic ground cover collapse or sinkhole coverage. This likely will reduce the availability of sinkhole coverage from the private market or Citizens Property Insurance Corporation. Representatives from the Florida Surplus Lines Service Office indicated to committee staff that sinkhole coverage is not generally available from the surplus lines market at the present time.

The bill requires the Florida Hurricane Catastrophe Fund to provide reimbursement for fees (such as attorney's fees) paid on behalf of the policyholder and requires reimbursement for all incurred losses, with exceptions. To the extent this results in additional monies paid by the FHCF, it could increase the likelihood that the fund will have to issue revenue bonds. If the fund does not provide reimbursement for fees, it may incentivize insurance carriers to pay claims prior to the Plaintiff retaining an attorney.

#### C. Government Sector Impact:

Citizens Property Insurance Corporation is sustaining large losses related to sinkhole losses that are far greater than the sinkhole premium that Citizens is permitted to accept. The reforms to the sinkhole coverage insurance market in the bill are designed to reduce the costs associated with sinkhole claims.

Eliminating the database of information relating to sinkholes developed by the Department of Financial Services and the Department of Environmental Protection will remove all costs associated with its maintenance.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Additional Information:**

- A. **Committee Substitute – Statement of Substantial Changes:**  
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS/CS by Budget Subcommittee on General Government Appropriations on March 11, 2011**

The committee substitute makes the following substantial changes:

- Requires that all windstorm and hurricane property insurance claims be made within three years of the actual occurrence.
- Reinstates current language related to the collection of assessments that was inadvertently deleted (technical).
- Deletes the provision which specifies that the certification of a rate filing is not rendered false if the insurer provides additional or supplementary information requested by the Office of Insurance Regulation and reinstates current law.
- Deregulates sinkhole insurance rates with the goal of restoring a competitive market for sinkhole insurance in Florida.

**CS by Banking and Insurance on February 22, 2011**

The Committee Substitute makes the following substantial changes:

- Requires the Florida Hurricane Catastrophe Fund to provide reimbursement for all incurred losses, including fees, with exceptions.
- Deletes the requirement that the Insurance Consumer Advocate issue yearly report cards for personal residential property insurers.
- Deletes the requirement to reduce the Citizens high-risk area that is eligible to purchase wind-only coverage from Citizens.
- Reduces to 90 days the written notice of nonrenewal, cancellation, or termination for personal or residential property insurance policies.
- Creates requirements for the payment of a loss to a dwelling or personal property insured on a replacement cost basis. The insurer must pay the actual cash value of the loss. Payment for the replacement cost is available once the insured has contracted to perform dwelling repairs or has provided a receipt to the insurer for the purchase of personal property financed by the payment of insurance proceeds.
- Specifies that if an insurer cancels a policy providing sinkhole coverage and instead offers a policy that provides catastrophic ground cover collapse, the insurer is not required to offer a sinkhole coverage endorsement.

- Requires a policyholder to refund to the insurer the amount of a refund accepted from any person performing sinkhole repairs and voids coverage.
- Specifies that a policyholder is liable for part of the cost of sinkhole testing conducted by the insurer if the policyholder requested the testing and a sinkhole loss is not verified.

B. Amendments:

**Barcode 749848 by Budget on March 15, 2011:**

The amendment requires an insurer to obtain the prior approval of the Office of Insurance Regulation (OIR) before implementing a rate increase for property insurance (the “file and use” method). Current law permits the insurer to use the “file and use” method or the “use and file method,” in which the insurer implements the rate increase and then seeks OIR approval no later than 30 days of the effective date of the new rate. Insurers that make a “use and file” rate filing must return any premium that the OIR finds excessive.  
(WITH TITLE AMENDMENT)

**Barcode 901222 by Budget on March 22, 2011:**

The amendment reinstates current law requiring the insurer to pay the full replacement cost of a loss to real or personal property insured on a replacement cost basis without reservation or holdback of any depreciation, whether or not the insured replaces or repairs the dwelling or property.  
(WITH TITLE AMENDMENT)