

**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.)

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Prepared By: The Professional Staff of the Committee on Appropriations

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BILL: SB 2-D

INTRODUCER: Senator Boyd

SUBJECT: Property Insurance

DATE: May 22, 2022

REVISED: \_\_\_\_\_

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	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Johnson/Schrader/ Knudson	Shettle	AP	<b>Pre-meeting</b>

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**I. Summary:**

SB 2-D provides the following changes to address access and affordability of property insurance, and to mitigate insurance fraud in Florida’s property insurance market.

**Reinsurance to Assist Policyholders (RAP) Program**

- Authorizes a \$2 billion dollar reimbursement layer of reinsurance for hurricane losses directly below the mandatory layer of the Florida Hurricane Catastrophe Fund (FHCF). All eligible insurers must participate in the program.
  - The FHCF mandatory retention is \$8.5 billion for the 2022-2023 contract year.
- The RAP program coverage reimburses 90 percent of each insurer’s covered losses and 10 percent of their loss adjustment expenses up to each individual insurer’s limit of coverage for the two hurricanes causing the largest losses for that insurer during the contract year.
- Each insurer’s limit of the \$2 billion in RAP coverage is their pro-rata market share among all insurers that participate in the RAP program. Thus, an insurer with five percent of the risk reinsured by RAP coverage would have a limit of coverage of \$100 million.
- All eligible insurers will participate in the RAP program for one year. Insurers that do not have private reinsurance within the RAP layer of coverage for the 2022-2023 contract year must participate during the 2022-2023 contract year. Insurers that have private reinsurance at the RAP layer for the 2022-2023 contract year must defer using RAP program coverage until the 2023-2024 contract year.
- An insurer may not obtain RAP coverage if the Insurance Commissioner certifies it is in “unsound financial condition.”
- Insurers do not pay premiums for RAP program coverage, but must reduce rates to reflect savings. Insurers that participate in the RAP program for 2022-2023 must reduce their rates by June 30, 2022, to reflect the savings from RAP coverage. Insurers that defer using the RAP program until 2023-2024 must reduce rates to reflect savings by May 1, 2023.

- The RAP coverage is funded through a \$2 billion dollar appropriation from the General Revenue Fund. Monies are only transferred to the State Board of Administration (the program administrator) if the RAP program coverage must be paid because of a hurricane.
- If funds are transferred to the State Board of Administration (SBA) because of a hurricane, the SBA may request funds for the administration of the program from the General Revenue Fund, not to exceed \$5 million.
- The RAP program expires July 1, 2025, if no General Revenue funds have been transferred to fund the RAP program. If such funds were transferred, the statute expires July 1, 2029, and all unencumbered RAP Program funds must be transferred back to the General Revenue Fund.

### **My Safe Florida Home Program**

- Appropriates \$150 million from the General Revenue Fund to the Department of Financial Services' My Safe Florida Home Program to provide hurricane mitigation inspections and matching grants for the performance of hurricane retrofitting on homestead single family homes with a value of \$500,000 or less located in the wind-borne debris region set forth in the Florida Building Code. The My Safe Florida Home Program, which is administered by the Department of Financial Services, will provide financial incentives for Florida residential property owners to obtain free home inspections that would identify mitigation measures and provide grants to retrofit such properties, thereby reducing their vulnerability to hurricane damage and helping decrease the cost of residential property insurance.
- Establishes additional eligibility criteria:
  - Requires applicants of the program to make their home available for inspection after the mitigation project is complete.
  - Requires that a building permit for initial construction of the home must have been made before January 1, 2008.
  - Requires the home to have undergone an acceptable hurricane mitigation inspection after July 1, 2008.
- Requires that grants awarded under the program provide \$2 in grant funds for every \$1 provided by the homeowner. Exceptions are provided for low-income homeowners. Applicants may receive up to \$10,000 in program money.
- Requires the Department of Financial Services to include in the annual report of program activities the average annual amount of insurance premium discounts and the total of such discounts received from insurers.
- Allocates appropriated funds as follows:
  - \$25 million for hurricane mitigation inspections.
  - \$115 million for hurricane mitigation grants.
  - \$4 million for education and consumer awareness.
  - \$1 million for public outreach to contractors, real estate brokers, and sales associates.
  - \$5 million for administrative costs.
- Provides that any unexpended balance of appropriated funds remaining on June 30, 2023, reverts and is appropriated to the Department of Financial Services for the 2023-2024 fiscal year for the My Safe Florida Home program.

### **Contractor Solicitation of Roof Claims**

- Prohibits contractors from making written or electronic communications that encourage or induce a consumer to contact a contractor or public adjuster for the purposes of making a property insurance claim for roof damage unless such solicitation provides notice that:
  - The consumer is responsible for the payment of any deductible.
  - It is insurance fraud punishable as a third-degree felony for a contractor to pay or waive an insurance deductible.
  - It is insurance fraud punishable as a third-degree felony to intentionally file an insurance claim containing false, fraudulent, or misleading information.

### **Separate Roof Deductibles**

- Allows property insurers to include in the policy a separate roof deductible of up to 2 percent of the Coverage A limit of the policy or 50 percent of the cost to replace the roof. The policyholder must also be offered the option to decline the roof deductible by signing a form approved by OIR. If a roof deductible is added to the policy at renewal, the insurer must provide a notice of change in policy terms and allow the policyholder to decline the separate roof deductible.
- Requires that policyholders that select a roof deductible must receive an actuarially sound premium credit or discount.
- Provides that the roof deductible does not apply to:
  - A total loss to the primary structure in accordance with the valued policy law under s. 627.702, F.S., which is caused by a covered peril.
  - A loss caused by a hurricane.
  - A roof loss resulting from a tree fall or other hazard that damages the roof and punctures the roof deck.
  - A roof loss requiring the repair of less than 50 percent of the roof.
- Specifies that when a roof deductible is applied, no other deductibles under the policy may be applied.
- Requires a roof deductible provision to be clear and unambiguous.
- Requires the inclusion of the following disclosures:
  - On the page immediately behind the declarations page, notice that a roof deductible may result in high out-of-pocket expenses to the policyholder.
- On the policy declarations page, prominent display of the actual dollar value of the roof deductible at issuance and renewal. Allows an insurer to limit payment on a roof claim to actual cash value until the policyholder pays the roof deductible.

### **Roofs – Insurer Underwriting**

- Prohibits an insurer from refusing to issue or refusing to renew a homeowner's insurance policy insuring a residential structure with a roof that is less than 15 years old solely because of the age of the roof.
- If the roof is at least 15 years old, an insurer must allow a homeowner to have a roof inspection performed by an authorized inspector at the homeowner's expense before requiring the replacement of the roof as a condition of issuing or renewing a homeowner's

insurance policy. The insurer may not refuse to issue or refuse to renew a homeowner's insurance policy solely because of roof age if an inspection of the roof of the residential structure performed by an authorized inspector indicates that the roof has five years or more of useful life.

### **Insurer Claims Handling**

- Requires property insurers to conduct any physical inspection of the property related to a claim within 45 days of receiving proof of loss statements. Does not apply to hurricane claims.
- Requires insurers to notify policyholders of their right to receive any detailed report generated by an insurer's adjuster that estimates the amount of the loss. The report must be provided to the requesting policyholder within the later of seven days after the policyholder requests the report or the completion of the report.
- Specifies insurers must provide a reasonable explanation of the claim decision in relation to the insurance policy, facts, and law. If the insurer makes a claim payment that is less than contained in the insurer's adjuster estimate of the loss, the insurer must explain the discrepancy.

### **Civil Remedy**

- Requires a claimant to establish a property insurer breached the insurance contract in order for the claimant to prevail in a bad faith claim for extracontractual damages under s. 624.155(1)(b), F.S. Will apply to civil remedy actions based upon a property insurer:
  - Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his or her interests;
  - Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or
  - Except as to liability coverages, failing to settle claims promptly, when the obligation to settle a claim has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy.

### **Attorney Fees – Assignment of Benefits (AOB)**

- Prohibits assignment of the right to obtain attorney fees in suits arising out of a property insurance policy to persons other than a named or omnibus insured or a named beneficiary under the policy. Result is that assignment agreements may occur, but the assignee vendor will no longer be able to recover attorney fees in suits against an insurer. Applies to property insurance lawsuits brought by vendor assignees against authorized insurers and surplus lines insurers.
- Eliminates statutory language detailing the methodology for awarding attorney fees to plaintiffs or defendants in litigation brought by an assignee of benefits under a property insurance policy. The language is no longer necessary because the bill prohibits assignment of the right to recover attorney fees in suits arising out of a property insurance policy.

**Attorney Fees – Fee Multipliers**

- Creates a new standard for the award of an attorney fee multiplier in property insurance litigation. The bill creates a presumption that in property insurance cases, attorney fee awards based on the Lodestar methodology are sufficient and reasonable. Attorney fee multipliers may only be awarded under rare and exceptional circumstances with evidence that competent counsel could not be hired in a reasonable manner.
- Allows a court to award attorney fees when a first-party claimant's property insurance suit is dismissed without prejudice for failure to provide a Notice of Intent to Initiate Litigation.

**Attorney Fees – Dismissal for Failure to Provide Notice**

- Provides that a defendant insurer may obtain attorney fees and costs associated with securing a dismissal without prejudice for failure to provide the required Notice of Intent to Initiate Litigation at least 10 days before filing a suit against a property insurer.

**Assignment of Benefits (AOB)**

- Revises the definition of "assignment agreement" to include assignments executed by a party that inspects the property, clarifies that public adjuster fees are not an assignment agreement, and clarifies the requirement to provide a Notice of Intent to Initiate Litigation before filing suit.
- Requires that a valid AOB must specify that the assignee will hold harmless the assignor from all liabilities, including attorney fees.

**Regulation of Insurers and Insurer Transparency**

- Requires the Office of Insurance Regulation (OIR) to publish all orders, specified insurance industry data, and reports issued by the newly created Property Insurance Stability Unit.
- Specifies that publication of the annual statistical report must be done by July 1 of each year and requires the OIR to include within that report an analysis of the availability of reinsurance to domestic insurers selling homeowners' and condominium unit owners' insurance in Florida.
- Requires that the OIR include within its annual report additional data regarding insurers against which delinquency or similar proceedings were instituted, a concise statement of the circumstances that led to each insurer's delinquency, a summary of actions taken by the insurer and the OIR to avoid delinquency, and that results or status of each delinquency proceeding.
- Requires the OIR to maintain and make available upon request reports relating to the health of the homeowners' and condominium unit owners' insurance market that include specified information regarding market trends and the percentage of policies written by voluntary carriers and Citizens Property Insurance Corporation.
- Directs the OIR to make data publicly available detailing the statewide number of policies, amount of premium, number of cancellations, and other data for each property insurer. Specifies such information is not a trade secret.
- Creates a Property Insurance Stability Unit within the OIR to aid in the detection and prevention of insurer insolvencies in the homeowners' and condominium unit owners'

insurance market. Insurers must be referred to the unit for enhanced monitoring upon the occurrence of specified events. The unit must:

- Provide enhanced monitoring when the OIR identifies significant concerns about various aspects of the insurer.
- Conduct a target market conduct exam when there is reason to believe the insurer may be in an unsound financial condition.
- Closely monitor insurer financial data.
- Conduct annual catastrophe stress tests of domestic insurers.
- Update mind mitigation credits.
- Review the causes of insolvency and business practices of insurers referred to the Division of Rehabilitation and Liquidation within the Department of Financial Services.
- Twice annually, provide a report on the status of the homeowners' and condominium unit owners' insurance market.
- Requires the OIR to execute an affidavit identifying the grounds for initiating delinquency proceedings against an insurer.
- For an insolvency involving a domestic property insurer, the Department of Financial Services must:
  - Begin an analysis of the history and causes of the insolvency no later than the initiation of delinquency proceedings against the insurer;
  - Review the OIR's regulatory oversight of the insurer.
  - Submit an initial report analyzing the history and causes of the insolvency no later than two months after the initiation of the delinquency proceeding;
  - Provide a special report within ten days of identifying any condition or practice that may lead to insolvency in the property insurance marketplace; and
  - Submit a final report analyzing the history and causes of the insolvency and the OIR's regulatory oversight within 30 days of the conclusion of the insolvency proceeding.

### **Conflict with Laws Passed During the 2022 Regular Session**

- Provides that if any law amended by this act was also amended by a law enacted during the 2022 Regular Session of the Legislature, such laws shall be construed as if enacted during the same session of the Legislature, and full effect shall be given to each if possible.

### **Effective Date**

Except as otherwise provided, the act becomes effective upon becoming a law.

## **II. Present Situation:**

### **Property Insurance Market in Florida**

#### ***Rating Agencies Outlooks and Downgrades***

Recently, A.M. Best Company released a commentary on Florida's property insurance market. According to the report, hurricane losses were not the primary cause of Florida's troubled property market. The deterioration in the performance was characterized as a by-product of the greater frequency of secondary hazards (severe thunderstorms, wind, hail), higher reinsurance costs, escalating litigation costs, and building codes and laws that have been ignored by parties

looking for profit.<sup>1</sup> In response, insurers are requesting significant rate increases, underwriting changes, and targeted non-renewals.<sup>2</sup>

The report noted that the Florida market has led to some downgrades to both outlooks and ratings as higher losses and loss adjustment expenses have eroded performance and hurt balance sheet strength.<sup>3</sup> Currently, the property insurers rated by the agency have credit ratings of “Good” or better.<sup>4</sup>

On March 29, 2022, Demotech withdrew the rating previously assigned to Lighthouse Property Insurance Corporation and Lighthouse Excalibur Insurance Company.<sup>5</sup> Despite a substantial capital contribution in the fourth quarter of 2021, the operating loss in 2021, which reflected the evaluation of losses and loss adjustment expenses associated with Hurricane Ida, resulted in a level of capitalization below what was needed to sustain financial stability ratings at the A level.<sup>6</sup> On April 15, 2022, Demotech downgraded FedNat<sup>7</sup> from “A exceptional” to “S Substantial.”<sup>8</sup> The rating indicates that the insurer still has substantial resources and stability and is not in imminent danger of collapsing.<sup>9</sup> Further, Demotech noted that FedNat had adequate reserves in only one of the last five years.<sup>10</sup> Many mortgage lenders may not accept less than an exceptional rating for homeowners insurance coverage.<sup>11</sup> Demotech attributed the downgrade partly due to losses in Louisiana and Texas, after a massive winter storm and Hurricane Ida in 2021.<sup>12</sup>

### ***Fannie Mae and Freddie Mac Minimum Insurance Requirements***

The Federal National Mortgage Association (Fannie Mae) and the Federal Home Loan Mortgage Corporation (Freddie Mac) provide liquidity, stability, and affordability to the mortgage market by buying mortgages from lenders and either holding the mortgages in their own portfolios or packaging the mortgages into mortgage-based securities for purposes of selling in the secondary

<sup>1</sup> A.M. Best Company, Troubled Florida Property Market Participants under Immense Pressure, (May 2, 2022) on file with Senate Banking and Insurance Committee.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Demotech, [Demotech Withdraws Financial Stability Ratings® Assigned to Lighthouse Property Insurance Corporation and Lighthouse Excalibur Insurance Company - Demotech](#) (last visited May 14, 2022).

<sup>6</sup> Demotech, [Demotech Withdraws Financial Stability Ratings® Assigned to Lighthouse Property Insurance Corporation and Lighthouse Excalibur Insurance Company - Demotech](#) (last visited May 14, 2022).

<sup>7</sup> Demotech, Financial Stability Rating of FedNat Insurance Company (April 15, 2022) [FEDNAT INSURANCE COMPANY - Demotech](#) (Last visited May 15, 2022).

<sup>8</sup> Demotech, [Definitions for Financial Stability Ratings® Terminology \(demotech.com\)](#) (last visited May 14, 2022)

According to Demotech, S Substantial: Regardless of the severity of a general economic downturn or deterioration in the insurance cycle, insurers earning a Financial Stability Rating® of S possess substantial financial stability related to maintaining surplus as regards policyholders at an acceptable level. Regardless of the severity of a general economic downturn or deterioration in the insurance cycle, at least ninety-five percent of all the insurers countrywide receiving a Financial Stability Rating® of S are expected to have positive surplus as regards policyholders as of eighteen months from the initial date of rating assignment.

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> FedNat Holding Company 8K filing with the Securities and Exchange Commission, (April 21, 2022) [Fednat Holding Co 2022 Current Report 8-K \(sec.report\)](#) (last visited May 18, 2022).

<sup>12</sup> *Id.*

mortgage market.<sup>13</sup> Fannie Mae and Freddie Mac, in turn, protect their interest in each mortgage by requiring minimum insurance coverages and settlement on the basis of replacement cost.<sup>14</sup> Fannie Mae does not accept a property insurance policy that limits or excludes coverage, in whole or in part, for windstorm, hurricane, hail damages, or any other perils that normally are included under an extended coverage endorsement.<sup>15</sup> The borrower may not obtain a property insurance policy that includes such limitation or exclusion unless the borrower is able to obtain a separate policy or endorsement from another insurer that provides adequate coverage for the limited or excluded peril, or from an insurance pool that the state has established to cover the limitation or exclusions.<sup>16</sup> For first-lien residential mortgages, Fannie Mae requires coverage equal to the lesser of the following:

- 100 percent of the insurable value of the improvements, as established by the property insurer; or
- The unpaid principal balance of the mortgage, as long as it at least equals the minimum amount (80 percent of the insurable value of the improvements) required for compensating damage or loss on a replacement cost basis.<sup>17</sup>

Freddie Mac does not accept a property insurance policy that excludes coverage for loss or damage from fire, lightning, and other perils, including windstorm, hail, explosion, riot, civil commotion, damage by aircraft, damage by vehicles, and damage by smoke, covered within the scope standard extended coverage.<sup>18</sup> The borrower may not obtain a property insurance policy that includes such exclusion unless the borrower is able to obtain a separate policy or endorsement from another insurer that provides adequate coverage for the limited or excluded peril, or from an insurance pool the state has established to cover the limitation or exclusions.<sup>19</sup> For one-to-four unit residential properties, Freddie Mac requires coverage at least equal to the higher of the following, not to exceed the replacement cost of the insurable improvements:

- The unpaid principal balance of the mortgage; or
- Eighty percent of the full replacement cost of the insurable improvements.

### ***Recent Regulatory Actions by the OIR***

In recent years, the OIR has approved the cancellation of policies to protect the best interest of the public and policyholders. The OIR regulates specified insurance products, insurers and other

<sup>13</sup> Federal House Finance Agency, *About Fannie Mae and Freddie Mac*, <https://www.fhfa.gov/about-fannie-mae-freddie-mac> (last visited May 18, 2022).

<sup>14</sup> Fannie Mae, *Selling Guide: Fannie Mae Single Family* (Dec. 15, 2021), <https://singlefamily.fanniemae.com/media/30286/display#page=905> (last visited May 17, 2022); Freddie Mac, *Minimum Property Insurance Types and Amounts* (Mar. 2, 2022), <https://guide.freddiemac.com/app/guide/section/4703.2> (last visited May 17, 2022).

<sup>15</sup> See Fannie Mae, *Selling Guide: Fannie Mae Single Family* (Dec. 15, 2021), <https://singlefamily.fanniemae.com/media/30286/display#page=905> (last visited May 17, 2022); Extended coverage must include, at minimum, wind, hurricane, civil commotion (including riots), smoke, hail, and damages caused by aircraft, vehicle, or explosion. Typhoon coverage is required for security properties located in Guam.

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> Freddie Mac, *Minimum Property Insurance Types and Amounts* (Mar. 2 2022), <https://guide.freddiemac.com/app/guide/section/4703.2> (last visited May 17, 2022).

<sup>19</sup> *Id.*



risk bearing entities.<sup>20</sup> Due to the market conditions in Florida, many insurers have reduced their exposure in Florida or requested significant rate increase, as described below:<sup>21</sup>  
 2020 – OIR authorized Capital Preferred Insurance Company to cancel about 27,500 policies.<sup>22</sup>  
 2021 – OIR approved the cancellation of more than 50,000 total policies from Universal Insurance Company of North America,<sup>23</sup> South Fidelity Insurance Company,<sup>24</sup> and Gulfstream Property and Casualty Company (prior to receivership),<sup>25</sup> and Westin Insurance Company.<sup>26</sup>  
 2022 – Lexington Insurance Company announced it would no longer write in Florida.<sup>27</sup>  
 Progressive also notified the OIR it would nonrenew about 60,000 policies.<sup>28</sup>

On April 21, 2022, FedNat Holding Company (company) and its wholly owned insurance carriers, FedNat Insurance Company (FNIC), Maison Insurance Company (MIC) and Monarch National Insurance Company (MNIC,” and together with FNIC and MIC, the carriers), entered into a consent order (order) with the OIR. In a subsequent consent order filed May 13, 2022, the OIR authorized the cancellation of 56,000 of FedNat’s residential policies, 8,400 of MNIC’s residential policies, and all of MIC’s personal residential policies (about 3,300 policies).<sup>29</sup> The OIR recently held three hearings on May 17, 2022,<sup>30</sup> to consider requests for statewide average rate increases for Kin Interinsurance Network (25.1 percent), First Floridian Auto and Home Insurance Co. (23 percent), and Florida Farm Bureau General Insurance Co., and Florida Farm Bureau Casualty Insurance Co. (48.7 percent).<sup>31</sup>

### ***Recent Insolvencies of Property Insurers***

Federal law specifies that insurance companies cannot file for bankruptcy and are instead subject to state laws regarding receivership.<sup>32</sup> Typically, insurers that are insolvent or about to become

<sup>20</sup> Section 20.121(3)(a), F.S. The Financial Services Commission, composed of the Governor, the Attorney General, the Chief Financial Officer, and the Commissioner of Agriculture, serves as agency head of the Office of Insurance Regulation for purposes of rulemaking. Further, the Financial Services Commission appoints the commissioner of the Office of Insurance Regulation.

<sup>21</sup> *Id.*

<sup>22</sup> OIR Capital Preferred Consent Order, Case No. 263348-20-CO, (May 12, 2020) [SKM\\_80820051216110 \(floir.com\)](https://www.floir.com/SKM_80820051216110) (last visited May 17, 2022).

<sup>23</sup> OIR Universal Insurance Company of North America, Case No. 280396-21-CO (May 6, 2021) [SKM\\_80820051216110 \(floir.com\)](https://www.floir.com/SKM_80820051216110) (last visited May 14, 2022)

<sup>24</sup> Southern Fidelity Insurance Company Consent Order, Case No. 280009-21-CO (April 28, 2021) [SKM\\_80821042816140 \(floir.com\)](https://www.floir.com/SKM_80821042816140)

<sup>25</sup> Gulfstream Property and Casualty Insurance Company, Consent Order, Case No. 280398-21-CO (May 6, 2021), to cancel 20,311 policies. [SKM\\_80821042816140 \(floir.com\)](https://www.floir.com/SKM_80821042816140), Consent Order for Public Administrative Supervision, Case No. 282917-21-CO (June 25, 2021)

<sup>26</sup> Westin Insurance Company Consent Order, Case No. 275858-21-CO (Feb. 10, 2021). [SKM\\_80821021013390 \(floir.com\)](https://www.floir.com/SKM_80821021013390)

<sup>27</sup> [Lexington Insurance Pulling Out of Florida, Other Markets for High-End Homes \(insurancejournal.com\)](https://www.insurancejournal.com/news-florida/2022/03/29/lexington-insurance-pulling-out-of-florida-other-markets-for-high-end-homes/) (Mar. 29, 2022). In Florida, the company specialized in homes with replacement values of \$1 million or more. The article noted that the company appears to be discontinuing its personal lines division nationwide.

<sup>28</sup> [Progressive CEO: Focus Is on De-Risking Florida Book as Loss Costs Keep Rising \(ambest.com\)](https://www.ambest.com/news/2022/05/03/progressive-ceo-focus-is-on-de-risking-florida-book-as-loss-costs-keep-rising/) (May 3, 2022). Florida Farm Bureau requested 48.7 percent rate increase for property insurance policies.

<sup>29</sup> FedNat Insurance Company, Maison Insurance Company, and Monarch National Insurance Company Consent Order with OIR Case No. 295625-22-CO (May 13, 2022).

<sup>30</sup> OIR Public Rate Hearings (May 17, 2022) (last visited May 17, 2022).

<sup>31</sup> Saunders, Jim, Property insurers seek hefty rate hikes (May 17, 2022) The News Service of Florida.

<sup>32</sup> The U.S. Bankruptcy Code expressly provides that "a domestic insurance company" may not be the subject of a federal bankruptcy proceeding. 11 U.S.C. § 109(b)(2). The exclusion of insurers from the federal bankruptcy court process is

insolvent are put into liquidation to liquidate the business of the insurer and use the proceeds to pay off the company's debts and outstanding insurance claims;<sup>33</sup> whereas, the goal of rehabilitation<sup>34</sup> is to return the company to solvency. The Division of Rehabilitation and Liquidation within the Department of Financial Services (DFS) is the court appointed receiver that administers insurance companies that are placed into receivership in Florida. Rehabilitation is a mechanism that can be used to remedy an insurer's problems, to resolve its liabilities in order to avoid liquidation, or to prepare the insurer for liquidation.<sup>35</sup>

**2019 Liquidation.** On October 2, 2019, Florida Specialty Insurance Company (FSIC) was ordered into receivership for purposes of liquidation by the Second Judicial Circuit Court in Leon County, Florida. The FSIC was a property and casualty insurance company located in Sarasota, Florida. The company, licensed in 1997, wrote personal property insurance policies for homeowners, condominiums, renters, and manufactured homes.<sup>36</sup>

**2021 Liquidations.** On April 14, 2021, American Capital Assurance Corporation (AmCap) was ordered into receivership for purposes of liquidation by the Second Judicial Circuit Court in Leon County, Florida.<sup>37</sup> AmCap was a property and casualty insurance company located in St. Petersburg, Florida. The company was licensed in Florida in 2011, and authorized to write homeowners multiple peril, commercial multiple peril, inland marine, allied lines, fire, and other liability coverage in Florida, Georgia, Louisiana, North Carolina, South Carolina and Texas. The company had approximately 2,300 in-force policies at the time of receivership.<sup>38</sup>

On July 28, 2021, Gulfstream Property and Casualty Insurance Company, was ordered liquidated by the Second Judicial Circuit Court in Leon County, Florida.<sup>39</sup> Gulfstream Property and Casualty Insurance Company and its wholly-owned subsidiary, Gulfstream Select Insurance Company, were merged into one entity. Gulfstream Property and Casualty Insurance Company is the surviving entity after the merger and will hereinafter be referred to as (Gulfstream). The company was licensed in Florida in 2004, and authorized to write homeowners multiple peril, mobile home multiple peril, inland marine, allied lines, fire, mobile home physical damage and other liability coverage in Alabama, Florida, Louisiana, Mississippi, South Carolina and Texas. The company had approximately 45,000 in-force policies at the time of receivership.<sup>40</sup>

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consistent with federal policy generally allowing states to regulate the business of insurance. See 15 U.S.C. § 1012 (McCarran-Ferguson Act).

<sup>33</sup> Section 631.061, F.S.

<sup>34</sup> Section 631.051, F.S.

<sup>35</sup> Part I, ch. 631, F.S.

<sup>36</sup> [Florida Specialty Insurance Company – Florida Insurance Guaranty Association \(figafacts.com\)](https://figafacts.com) (last visited May 14, 2022).

<sup>37</sup> [American Capital Assurance Corporation – Florida Insurance Guaranty Association \(figafacts.com\)](https://figafacts.com) (last visited May 17, 2022).

<sup>38</sup> [AMERICAN CAPITAL ASSURANCE CORPORATION \(myfloridacfo.com\)](https://myfloridacfo.com) (last visited May 17, 2022).

<sup>39</sup> [Gulfstream Property & Casualty Insurance – Florida Insurance Guaranty Association \(figafacts.com\)](https://figafacts.com) (last visited May 17, 2022).

<sup>40</sup> [GULFSTREAM PROPERTY AND CASUALTY INSURANCE COMPANY \(myfloridacfo.com\)](https://myfloridacfo.com) (last visited May 17, 2022).

**2022 Liquidations.** On April 28, 2022, Lighthouse Property Insurance Corporation was ordered into liquidation by the 19th Judicial Circuit Court in the parish of East Baton Rouge, Louisiana.<sup>41</sup> The Louisiana Department of Insurance is the court appointed receiver for the Company. The company also wrote policies in Florida, South Carolina, and Texas.<sup>42</sup>

On March 14, 2022 Avatar Property and Casualty was ordered into receivership for purposes of liquidation by the Second Judicial Circuit Court in Leon County, Florida.<sup>43</sup>

On February 25, 2022, St. Johns Insurance Company was ordered into receivership for purposes of liquidation by the Second Judicial Circuit Court in Leon County, Florida. The Florida Department of Financial Services is the court appointed Receiver of St. Johns Insurance Company.<sup>44</sup> The company was licensed in Florida in 2004, and authorized to write homeowners multi-peril, commercial multi-peril, fire, allied lines, and inland marine coverage in Florida and South Carolina.<sup>45</sup>

### ***OIR Reports on Florida's Property Insurance Market***

In a presentation to the Florida Senate Committee on Banking and Insurance on January 12, 2021, the Florida Insurance Commissioner attributed the property insurance net underwriting losses, combined ratios, and resulting rate increases to several related trends and behaviors present in Florida's domestic property insurance market:

- Claims with litigation;
- Claims solicitation; and
- Adverse loss reserve development.<sup>46</sup>

In 2020, the OIR conducted a data call of Florida's domestic property insurers.<sup>47</sup> The data call revealed that the severity of non-weather water claims with litigation was nearly double the claims that were closed without litigation.<sup>48</sup> Further, increased severity of claims with litigation was driving adverse loss reserve development, leading to higher rate filings.<sup>49</sup> Loss reserve development is the difference between the original loss as initially reserved by the insurer and its subsequent evaluation later or at the time of its final disposal.<sup>50</sup> When adverse loss reserve development occurs, the cost of the claim was more than its reserve as originally estimated by

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<sup>41</sup> [Lighthouse Property Insurance Corporation – Florida Insurance Guaranty Association \(figafacts.com\)](https://figafacts.com) (last visited May 17, 2022).

<sup>42</sup> Lighthouse Property Insurance FAQ (May 3, 2022), [LHPIC-LEX-FAQ.pdf \(lighthouse.insurance\)](https://www.lighthouseinsurance.com/LHPIC-LEX-FAQ.pdf) (last visited May 17, 2017).

<sup>43</sup> [Avatar Property & Casualty Insurance Company – Florida Insurance Guaranty Association \(figafacts.com\)](https://figafacts.com) (last visited May 16, 2017).

<sup>44</sup> [St. Johns Insurance Company – Florida Insurance Guaranty Association \(figafacts.com\)](https://figafacts.com) (last visited May 14, 2022).

<sup>45</sup> [ST. JOHNS INSURANCE COMPANY, INC. \(myfloridacfo.com\)](https://www.myfloridacfo.com) (last visited May 14, 2022).

<sup>46</sup> Florida Senate, *Meeting of the Florida Senate Committee on Banking and Insurance* (January 12, 2021)(statements of David Altmaier, Commissioner, Florida Office of Insurance Regulation)

<sup>47</sup> <https://www.florir.com/Sections/PandC/AssignmentofBenefits.aspx> (last visited May 17, 2022).

<sup>48</sup> Florida Senate, *Meeting of the Committee on Banking and Insurance* (January 12, 2021) (statement of David Altmaier, Commissioner, Florida Office of Insurance Regulation)

<sup>49</sup> Florida Senate, *Meeting of the Committee on Banking and Insurance* (January 12, 2021)(statement of David Altmaier, Commissioner, Florida Office of Insurance Regulation)

<sup>50</sup> International Risk Management Institute, *Glossary*, <https://www.irmi.com/term/insurance-definitions/loss-development> (last visited May 17, 2022).

the insurer. The one-year and two-year look-backs periods for calendar years 2018 and 2019 show claims costing \$241-\$682 million more than their corresponding loss reserves. In April 2021, the OIR provided information relating to litigation in the Florida property insurance market. Based on 2019 information obtained from the National Association of Insurance Commissioners (NAIC) Market Conduct Annual Statement (MCAS)<sup>51</sup> for homeowners insurance, Florida accounted for 8.16 percent of all homeowners' claims opened by insurance companies in the United States;<sup>52</sup> however, Florida accounted for 76.45 percent of all homeowners' lawsuits opened against insurance companies in the United States.<sup>53</sup> The OIR notes that Florida is experiencing far more claims-related litigation than other reporting states.<sup>54</sup>

### ***Impact of Fraud on Catastrophic and Severe Weather Claims***

According to the National Insurance Crime Bureau (NICB), property and casualty insurers in the United States paid between \$4.6 billion and \$9.2 billion extra in disaster claims because of insurance fraud in 2021.<sup>55</sup> As a result, the NICB estimates that disaster fraud adds between 5-to-10 percent to the total insurance claims paid following a disaster event.<sup>56</sup>

In regards to Florida, the NICB notes that contractor fraud is one element contributing to increasing premiums, insurer insolvency, and consumers scrambling under deadlines to find an insurer to meet mortgage lender requirements.<sup>57</sup> The NCIB suggested that one method to help reduce insurance fraud is through consumer awareness. Consumers and contractors following disasters are inextricably linked. NCIB argues that if consumers are armed with the understanding of the claims process and contractor hiring, they will be able to identify potential fraud, and, in the process, protect themselves and their wallet.<sup>58</sup>

### **Regulation of Insurance in Florida**

The OIR regulates specified insurance products, insurers and other risk bearing entities in Florida.<sup>59</sup>

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<sup>51</sup> NAIC, MCAS Data Dashboard, [MCAS Data Dashboard - Market Conduct Annual Statements \(naic.org\)](https://www.naic.org/mcas-data-dashboard) (last visited May 14, 2022). In 2009, the NAIC approved the Market Conduct Annual Statement (MCAS) collection tool to provide regulators with a uniform system of collecting uniform market-related metrics and to assist states monitor the market conduct of companies. This tool also public access to state scorecards that allow trending and comparison of standardized state metric results.

<sup>52</sup> Office of Insurance Regulation, memorandum from Commissioner Altmaier to Rep. Ingoglia (April 2, 2021) on file with Senate Banking and Insurance Committee.

<sup>53</sup> NAIC MCAS Annual Statement-2021 Reporting Changes. The reporting element, "Number of lawsuits closed with consideration for the consumer," will be required for the 2021 state data call. On file with Senate Banking and Committee.

<sup>54</sup> Supra at note 23. .

<sup>55</sup> [Fraudulent disaster claims cost P&C insurers extra \\$4.6bn to \\$9.2bn - Artemis.bm](https://www.artemis.com/news/fraudulent-disaster-claims-cost-p-c-insurers-extra-4.6bn-to-9.2bn) (May 18, 2022) (last visited May 18, 2022).

<sup>56</sup> *Id.*

<sup>57</sup> NCIB, Recognizing Fraud Scams Can Help Disaster Survivors Recover (May 17, 2022) [NICB: Insurance Fraud Adds Billions of Dollars to Insurer Payouts After Disasters | National Insurance Crime Bureau](https://www.nicb.org/news/recognizing-fraud-scams-can-help-disaster-survivors-recover) (last visited May 17, 2022).

<sup>58</sup> *Id.*

<sup>59</sup> Section 20.121(3)(a), F.S. The Financial Services Commission, composed of the Governor, the Attorney General, the Chief Financial Officer, and the Commissioner of Agriculture, serves as agency head of the Office of Insurance Regulation for purposes of rulemaking. Further, the Financial Services Commission appoints the commissioner of the Office of Insurance Regulation.

### ***Rate Regulation***

Part I of ch. 627, F.S., is the Rating Law, which governs property, casualty, and surety insurance. The rating law provides that rates may not be excessive, inadequate, or discriminatory.<sup>60</sup> All insurers must file rates with the OIR either 90 days before the proposed effective date of a new rate, which is considered “file and use” rate filing, or 30 days after the effective date of a new rate, which is considered a “use and file” rate filing. Upon receipt of a rate filing, the OIR reviews the filing to determine if the rate is excessive, inadequate, or unfairly discriminatory. The OIR makes this determination in accordance with generally acceptable actuarial techniques and, in property insurance, considers the following factors:

- Past and prospective loss experience;
- Past and prospective expenses;
- The degree of competition among insurers for the risk insured;
- Investment income reasonably expected by the insurer;
- The reasonableness of the judgment reflected in the rate filing;
- Dividends, savings, or unabsorbed premium deposits returned to policyholders;
- The adequacy of loss reserves;
- The cost of reinsurance;
- Trend factors, including trends in actual losses per insured unit for the insurer;
- Conflagration and catastrophe hazards;
- Projected hurricane losses;
- Projected flood losses, if the policy covers the risk of flood;
- A reasonable margin for underwriting profit and contingencies; and
- Other relevant factors that affect the frequency or severity of claims or expenses.

### ***Residential Property Insurance Mitigation Credits, Discounts, or Other Rate Differentials***

Residential property insurance rate filings must account for mitigation measures undertaken by policyholders to reduce hurricane losses.<sup>61</sup> Specifically, the rate filings must include actuarially reasonable discounts, credits, or other rate differentials or appropriate reductions in deductibles to consumers who implement mitigation techniques for windstorm loss to their properties.<sup>62</sup> Further, any credits, discounts, or other rate differentials, or appropriate reductions in deductibles, for fixtures and construction techniques that meet the minimum requirements of the Florida Building Code must be included in the rate filing.<sup>63</sup> Upon their filing by an insurer, the OIR determines the discounts, credits, other rate differentials and appropriate reductions in deductibles that reflect the full actuarial value of such revaluation,<sup>64</sup> which in turn may be used in rate filings under the Rating Law. 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.<sup>65</sup>

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<sup>60</sup> Section 627.062(1), F.S.

<sup>61</sup> Section 627.062(2)(j), F.S.

<sup>62</sup> Section 627.0629(1), F.S.

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

### ***Examination of Insurers***

The OIR is responsible for examining the affairs, transactions, accounts, records, and assets of each insurer that holds a certificate of authority to transact insurance business in Florida.<sup>66</sup> With certain exceptions, OIR must examine domestic insurers<sup>67</sup> at least once every five years and the scope of the examination must cover the preceding five fiscal years.<sup>68</sup> As part of the examination process, all persons being examined must make available to OIR the accounts, records, documents, files, information, assets, and matters in their possession or control that relate to the subject of the examination.<sup>69</sup> The OIR is also authorized to conduct market conduct examinations to determine compliance with applicable provisions of the Insurance Code and ch. 440, F.S., if applicable.<sup>70</sup>

### ***Replacement Cost and Actual Cash Value Loss Settlement Provisions***

There are two primary settlement options available when purchasing a homeowner's property insurance policy: *replacement cost* and *actual cash value*. Replacement cost is usually defined in the policy as the cost to repair or replace the damaged property with materials of like kind and quality, without any deduction for depreciation.<sup>71</sup> Replacement cost is designed to cover the difference between what the property is actually worth and what it would cost to rebuild or repair that property.<sup>72</sup> Following a covered loss, the insurer assumes the full cost of repairing or replacing the damaged property.<sup>73</sup>

By contrast, actual cash value is the repayment value for indemnification due to loss or damage of property, in most cases it is replacement cost minus depreciation.<sup>74</sup> Following a covered loss, the insured assumes the cost to cover the difference between the depreciated value of the damaged property and the cost of repairing or replacing it.

Florida law currently requires insurers writing homeowner's property insurance policies to offer adjustment to the dwelling, including the roof, on the basis of replacement cost.<sup>75</sup> The OIR will approve policy forms that adjust roof losses on the basis of actual cash value, or the depreciated value of the roof. The insurer must, however, also offer replacement cost adjustment on the roof before issuing the policy.

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<sup>66</sup> Section 624.316(1)(a), F.S.

<sup>67</sup> A domestic insurer is one formed under the laws of Florida. Section 624.06(1), F.S.

<sup>68</sup> Section. 624.316(2)(a), F.S.

<sup>69</sup> Section 624.318(2), F.S.

<sup>70</sup> Section 624.3161, F.S.

<sup>71</sup> National Association of Insurance Commissioners, *Glossary of Insurance Terms*, [https://content.naic.org/consumer\\_glossary.htm](https://content.naic.org/consumer_glossary.htm) (last visited May 19, 2022).

<sup>72</sup> See *Trinidad v. Florida Peninsula Ins. Co.*, 121 So.3d 433, 438 (Fla. 2013) (quoting *State Farm Fire & Cas. Co. v. Patrick*, 647 So.2d 983 (Fla. 3d DCA 1994))

<sup>73</sup> Insureds that elect for adjustment on the basis of replacement cost receive greater coverage than adjustment on the basis of actual cash value because depreciation is not excluded from replacement cost, whereas it is generally excluded from actual cash value. See *Trinidad* at 438 (quoting *Goff v. State Farm Florida Ins. Co.*, 999 So.2d 684, 689 (Fla. 2d DCA 2008))

<sup>74</sup> National Association of Insurance Commissioner, *Glossary of Insurance Terms*, [https://content.naic.org/consumer\\_glossary.htm](https://content.naic.org/consumer_glossary.htm) (last visited May 19, 2022).

<sup>75</sup> Section 627.7011(1), F.S.

### ***Valued Policy Law***

Florida's Valued Policy Law (VPL)<sup>76</sup> has been in effect since 1899,<sup>77</sup> and requires the insurer to set the value of the insured property in the event of a total loss.<sup>78</sup> The VPL originally applied to damages caused by fire and lightning; however, in 1982, the Legislature extended VPL to all covered perils.<sup>79</sup> In the event of a total loss caused by a covered peril, where the covered peril alone would have caused the loss, an insurer's liability under a property insurance policy equals the total coverage limit for which a premium was paid.<sup>80</sup> However, in the event of total loss caused in part by a covered peril and in part by a noncovered peril, the insurer's liability is limited to the amount of the loss caused by the covered peril.<sup>81</sup>

Florida's VPL currently applies to the total loss of buildings, structures, mobile homes, or manufactured buildings located in Florida and insured as to a covered peril. While it does not differentiate between residential and commercial property, it does not cover policies issued by surplus lines insurers.

### ***Insurer Reporting of Property Insurance Data and other Information to the OIR***

All insurers with a Florida certificate of authority to transact insurance business must file quarterly and annual reports with the OIR containing various financial data, including audited financial statements and actuarial opinions, and claims data.<sup>82</sup>

### ***Report on Residential and Commercial Property Insurance Closed Claims***

In 2021, the Legislature enacted legislation<sup>83</sup> to assist the OIR and the Legislature in identifying current and emerging property insurance litigation trends that are cost drivers adversely affecting insurance rates. Effective January 1, 2022, each insurer or insurer group doing business in Florida must provide specific pieces of data regarding litigation of personal and commercial residential property insurance claims to OIR on an annual basis.<sup>84</sup> This data includes, but is not limited to, the following information on a per claim basis:

- Type of policy;
- Date, location, and type of loss;
- Name and type of vendors utilized for mitigation, repair, or replacement;
- Dates on which the claim was reported to the insurer, closed by the insurer, and reopened by the insurer;
- Dates on which a supplemental claim was made;
- Whether the claimant had a public adjuster or an attorney;

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<sup>76</sup> Section 627.702, F.S.

<sup>77</sup> *Florida Farm Bureau Cas. Ins. Co. v. Cox*, 967 So. 2d 815, 818 (Fla. 2007).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* Ch. 82-243, Laws of Fla. The Legislature amended the VPL in 2005 after *Mierzwa v Florida Windstorm Underwriting Ass'n*, 877 So.2d 774 (Fla. 4<sup>th</sup> DCA 2004) was released, "expressly providing that "when a loss was caused in part by a covered peril and in part by a noncovered peril, paragraph (a) does not apply. In such circumstances, the insurer's liability under this section shall be limited to the amount of the loss caused by the covered peril. See s. 627.702(1)(b), F.S. (2005)."

<sup>80</sup> Section 627.702(1)(a), F.S.

<sup>81</sup> Section 627.702(1)(b), F.S.

<sup>82</sup> Section 624.424, F.S.

<sup>83</sup> Ch. 2021-77, Laws of Fla.

<sup>84</sup> Section 624.424(11), F.S.

- Total amounts that the insurer paid for indemnity, loss adjustment expenses,<sup>85</sup> and insured's attorney fees;
- Whether the insured's attorney requested that a contingency risk multiplier (CRM)<sup>86</sup> be applied to the attorney fees calculation and, if so, what CRM was applied.

### ***Insurer Quarterly Reports***

Section 624.424(10), F.S., requires insurers and insurer groups doing business in Florida to file quarterly reports with the Office of Insurance Regulation (OIR). These reports, also known as QUASR reports, must include the following information for each county in Florida, compiled on a quarterly basis:

- The total number of policies in force at the end of each month.
- The total number of policies canceled.
- The total number of policies nonrenewed.
- The number of policies canceled due to hurricane risk.
- The number of policies nonrenewed due to hurricane risk.
- The number of new policies written.
- The total dollar value of structure exposure under policies that include wind coverage.
- The number of policies that exclude wind coverage.

### ***Protection for Trade Secrets***

In 2014, State Farm Florida Insurance Company (State Farm) began filing its QUASR reports on media marked as trade secret. State Farm subsequently sought a declaratory opinion to prevent OIR from releasing the information. A trial court found in favor of State Farm, a decision which was affirmed by the Florida First District Court of Appeal (First DCA). State Farm argued that "it wrote very limited new business from 2007 to 2014 and began writing additional new homeowners business in the first quarter of 2014." Further, State Farm claimed that "county-level data and information provided in its QUASR report was trade secret information that would allow competitors to identify where its business and marketing efforts were focused." The First DCA agreed with State Farm's reasoning and found that State Farm's QUASR data had independent economic value, or at least potential value, and was trade secret under s. 688.002, F.S. Therefore, pursuant to s. 119.0175, the information was confidential and exempt from public records disclosure under s. 119.07(1) and s. 24(a), Art. I of the State Constitution. Since this decision in 2017, other insurers in Florida have exercised similar trade secret claims regarding their QUASR data.

In addition to statutory protections, in most states, trade secrets are property protected by the Takings Clause of the Fifth Amendment to the United States Constitution.<sup>87</sup> Florida provides significant protections for trade secrets. For example, Florida provides for injunctive relief for actual and threatened misappropriation of trade secrets,<sup>88</sup> damages for misappropriation,<sup>89</sup>

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<sup>85</sup> Loss adjustment expenses are the costs associated with investigating and adjusting losses or insurance claims. IRMI, <https://www.irmi.com/term/insurance-definitions/loss-adjustment-expense> (last visited Apr. 2, 2021).

<sup>86</sup> A CRM is a multiplier applied to attorney fees that reflects the risk of attorneys accepting, on a contingency fee basis, cases that may be difficult to win. *See e.g., Joyce v. Federated Nat'l Ins. Co.*, 228 So. 3d 1122 (Fla. 2017).

<sup>87</sup> *Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 31 (1st Cir. 2002).

<sup>88</sup> Section 688.003, F.S.

<sup>89</sup> Section 688.004, F.S.



exceptions from public records disclosure,<sup>90</sup> and significant criminal penalties for trade secret theft or trafficking.<sup>91</sup>

In analyzing whether a regulatory taking of a trade secret has occurred, federal courts have used the three part analysis used in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). In *Penn Central* the United States Supreme Court used a three-part “ad hoc, factual inquiry” to evaluate whether a regulatory taking has occurred: (1) what is the economic impact of the regulation; (2) whether the government action interferes with reasonable investment-backed expectations; and (3) what is the character of the government action. If a regulatory taking occurs, the owner of the taken property has a constitutional right to receive just compensation for it. Once such a constitutional right arises, the government may not require a person to give it up in exchange for discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property.<sup>92</sup> In regards to trade secrets, the United States Supreme Court has found that, as part of a regulatory scheme which confers some benefit, the government may require the relinquishment of a trade secret.<sup>93</sup>

## Claims Adjustment

### *Communications between a Consumer and Insurer*

Section 627.70131, F.S., provides base requirements for communications between an insurer and consumer who has notified the insurer of a possible claim. Generally, the residential property insurance company must respond to the consumer within 14 days to acknowledge the claim and provide necessary claim forms, instructions, and telephone contact information. The insurer is then required to commence an investigation within 14 days after it received proof of loss statements from the consumer. Additionally, if the investigation involves a physical inspection of the property, the insurance company’s assigned adjuster must provide the policyholder with a document containing the adjuster’s name and license number. Subsequent communications with the policyholder regarding the claim must also include this information. Lastly, the insurer is required to pay or deny a claim within 90 days after notice of the claim was made;<sup>94</sup> if the insurer fails to make such a payment until after 90 days have passed, the payment bears interest due to the consumer. These duties generally constitute the consumer rights outlined in the Homeowner Claims Bill of Rights.<sup>95</sup>

### *The Homeowner Claims Bill of Rights*

The Homeowner Claims Bill of Rights (Bill of Rights) outlines consumers’ rights and responsibilities as a homeowner’s insurance policyholder during the insurance claims process.<sup>96</sup> An insurance company must provide a consumer with a copy of the Bill of Rights within 14 days

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<sup>90</sup> Section 119.0175, F.S.

<sup>91</sup> Section 812.081, F.S.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 47, citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984).

<sup>94</sup> The statute does provide an exception the failure to pay is caused by factors beyond the control of the insurer which reasonably prevent such payment. In such case, the payment is due 15 days after such condition abates.

<sup>95</sup> See further discussion of the Homeowner Claims Bill of Rights, *infra*.

<sup>96</sup> Florida Department of Financial Services, *Know Your Rights- Homeowner Claims Bill of Rights* (Jan. 2022), available at <https://www.myfloridacfo.com/Division/Consumers/understandingCoverage/Guides/documents/HOABillRights.pdf> (last visited May 19, 2022).

of receiving any communication about a claim.<sup>97</sup> Florida law provides form language that the insurer must include in the Bill of Rights, which gives notice of the consumer's right to:<sup>98</sup>

- Receive from their insurance company an acknowledgment of their reported claim within 14 days after the time you communicated the claim.
- Receive written confirmation of a claim's coverage, denial, or continued investigation within 30 days of specific communication;
- Obtain full settlement payment, or partial payment on the undisputed portion of a claim, within 90 days;
- Receive free mediation of a disputed claim, under most circumstances and subject to certain restrictions.
- Receive neutral evaluation of a claim relating to sinkhole damage; and
- Contact the Department of Financial Services for assistance.

The Bill of Rights also includes consumer advice for best practices after a loss has been incurred.

### ***Disclosure of Adjuster Reports and Other Elements of Property Insurance Claim Files***

Currently, under Florida law, an insurer is not required to provide a claimant with a copy of any adjuster reports it has received regarding the claimant's claim. However, Florida courts have found that such reports may be obtained, in some instances, through the discovery process if a claimant files suit against an insurer regarding their claim. Some insurers have attempted to assert a "claims file privilege" to prevent such discovery, but Florida's courts have generally rebuffed such a privilege per se.<sup>99</sup> However, some documents in a claim file may be protectable work product (i.e. Work-Product Privilege) under Florida Rule of Civil Procedure 1.280(b)(4) if said documents were prepared in anticipation of litigation.<sup>100</sup> As found by the Fifth District Court of Appeal in *Bankers Sec. Ins. Co. v. Symons*, 889 So. 2d 93, 96 (Fla. 5th DCA 2004), while a claims file may be compiled in anticipation of litigation (and materials within such a file frequently fit within the definition of work product<sup>101</sup>), it does not necessarily make a document within said claims file automatically work product. Instead, each document for which protection is asserted must meet the requirements of being a protected work product. The mere act of placing a document within a claim file does not make it immune from discovery and there is no categorical protection of items within a claim file.<sup>102</sup>

Florida courts have denied plaintiff access to documents within claims files in mere breach of contract claims, finding that such documents are irrelevant to the determination of whether

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<sup>97</sup> Section 627.7142, F.S.

<sup>98</sup> *Id.* These consumer rights are partially based on the insurer's duties as outlined in s. 627.70131, F.S.

<sup>99</sup> See *Homeowners Choice Prop. & Cas. Ins. Co. v. Avila*, 248 So. 3d 180, 184 (Fla. 3d DCA 2018), which states that there is no such thing as a claims file privilege. Cited with approval in *Avatar Prop. & Cas. Ins. Co. v. Flores*, 46 Fla. L. Weekly D884 (Fla. 2d DCA Apr. 16, 2021).

<sup>100</sup> *Avatar Prop. & Cas. Ins. Co. v. Simmons*, 298 So. 3d 1252, 1254 (Fla. 5th DCA 2020).

<sup>101</sup> *Progressive Am. Ins. Co. v. Herzoff*, 290 So. 3d 153, 157 (Fla. 2d DCA 2020), citing *Zirkelbach Constr., Inc. v. Rajan*, 93 So. 3d 1124, 1127 (Fla. 2d DCA 2012), *Ill. Nat'l Ins. Co. v. Bolen*, 997 So. 2d 1194, 1196 (Fla. 5th DCA 2008), *Scottsdale Ins. Co. v. Camara De Comercio Latino-Americana De Los Estados Unidos, Inc.*, 813 So. 2d 250, 252 (Fla. 3d DCA 2002), and *Nat'l Sec. Fire & Cas. Co. v. Dunn*, 705 So. 2d 605, 607 (Fla. 5th DCA 1997).

<sup>102</sup> See also *Avatar*, 298 So. 3d 1252, 1254. Cited with approval in *People's Tr. Ins. Co. v. Foster*, 47 Fla. L. Weekly D299 (Fla. 1st DCA Jan. 26, 2022).

liability for coverage was still in dispute.<sup>103</sup> However, Florida courts have allowed for broader discovery in bad faith claims, where the claims handling conduct of the insurer is at issue.<sup>104</sup>

Though Florida statutes do not have a particular right for consumers or claimants to see all or portions of a claim file, a few states do provide for such a privilege. California Insurance Code s. 2071 provides a standard form insurance policy and requires that insurers “notify every claimant that they may obtain, upon request, copies of claim-related documents,” and that the insurer must provide such documents, upon receipt of such request by a claimant, within 15 days. The Code defines “claim-related documents” as those that “relate to the evaluation of damages, including, but not limited to, repair and replacement estimates and bids, appraisals, scopes of loss, drawings, plans, reports, third-party findings on the amount of loss, covered damages, and cost of repairs, and all other valuation, measurement, and loss adjustment calculations of the amount of loss, covered damage, and cost of repairs.” Attorney work product and attorney-client privileged documents, and documents that indicate fraud by the insured or that contain medically privileged information, are excluded from this requirement.

Louisiana has recently adopted a more limited requirement. In 2021, the Louisiana State Legislature made significant revisions to LA R.S. 22:1892—one of the state’s bad faith statutes. As part of the revisions, a requirement that insurance companies must provide an insured claimant with any field adjuster report, relative to the insured’s property damage claim. Such report must be provided within 15 days of receiving a request for such from the insured.

### ***Time Limits for Filing Claims***

A property insurance claim or reopened claim must be provided to the authorized or surplus lines insurer within two years of the date of loss.<sup>105</sup> A supplemental claim is barred unless notice is provided to the insurer within three years after the date of loss.<sup>106</sup> Further, the law clarifies that the date of loss for claims resulting from hurricanes, tornadoes, windstorms, severe rain, or weather-related events is the date a hurricane makes landfall or when the tornado, windstorm, severe rain, or another type of weather-related event is verified by the National Oceanic and Atmospheric Administration.<sup>107</sup> Florida law currently places a five-year statute of limitations for bringing an action for the breach of a property insurance contract that runs from the date of the loss.<sup>108</sup>

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<sup>103</sup> See *Homeowners Choice Prop. & Cas. Ins. Co., Inc. v. Avila*, 248 So. 3d 180, 182 (Fla. 3d DCA 2018), *Nationwide Ins. Co. of Fla. v. Demmo*, 57 So.3d 982 (Fla. 2d DCA 2011), and *Avatar Prop. & Cas. Ins. Co. v. Mitchell*, 314 So. 3d 640, 642 (Fla. 3d DCA 2021). However, a recent First District Court of Appeal case, *People’s Tr. Ins. Co. v. Foster*, 47 Fla. L. Weekly D299 (Fla. 1st DCA Jan. 26, 2022), states that though “number of cases have quashed the premature discovery of insurers’ business practices, claims files, underwriting files, underwriting manuals, and the like in breach of contract actions, there is no categorical legal rule prohibiting discovery of underwriting manuals in breach of contract cases, especially if they are relevant.”

<sup>104</sup> See *Allstate Indem. Co. v. Ruiz*, 899 So. 2d 1121, 1129 (Fla. 2005), and *Am. Home Assurance Co., Inc. v. Sebo*, 324 So. 3d 977 (Fla. 2d DCA 2021), reh’g denied (Aug. 24, 2021).

<sup>105</sup> Section 627.70132(2), F.S.

<sup>106</sup> *Id.*

<sup>107</sup> Section 627.70132(3), F.S.

<sup>108</sup> Section 95.11(2), F.S.

## **Litigation of Property Insurance Claims**

### ***Presuit Notice to Initiate Litigation***

A claimant must provide DFS with written notice of intent to initiate litigation at least 10 business days before filing suit.<sup>109</sup> The notification must be made on a form provided by DFS and may not be given before the earlier of the insurer's denial of coverage or the expiration of the 90-day period to adjust a claim under s. 627.70131, F.S. The notice must detail the alleged acts or omissions of the insurer giving rise to the suit. If the insurer denied coverage, the notice must include an estimate of damages. If the insurer did not deny coverage, notice must include a presuit settlement demand that itemizes damages, attorney fees, costs, and the disputed amount. The notice may include supporting documents. The notice and supporting documents are admissible only in a proceeding regarding attorney fees. A court must dismiss without prejudice any claimant's suit if the claimant has not complied with the requirement to provide 10 business days' notice of intent to initiate litigation.

The insurer must respond in writing within 10 business days after receiving notice of intent to initiate litigation.<sup>110</sup> If the insurer denied coverage, the insurer must either accept coverage, deny coverage, or assert the right to re-inspect the property within 14 business days. If the notice alleges the insurer did an act other than denying coverage, the insurer must respond by making a settlement offer or requiring the claimant to participate in an appraisal or another method of alternative dispute resolution (ADR). If appraisal or ADR is not concluded within 90 days after the 10-day notice of intent to initiate litigation, the claimant may immediately file suit.

### **Consolidation of Multiple Residential Property Insurance Actions**

Each party that is aware of ongoing multiple actions, based upon coverage provided under the same residential property insurance policy for the same property and owners, must provide written notice to the court of the multiple actions.<sup>111</sup> Once the court receives notice, it may order that the actions be consolidated and transferred to the court having jurisdiction based on the total amount in controversy of all consolidated claims. If multiple cases are pending in circuit courts, the cases may be consolidated based on the date the first case was filed.

### ***Attorney Fee Awards in Suits Arising Under Property Insurance Policies***

For suits under surplus lines<sup>112</sup> and authorized residential and commercial property insurance policies<sup>113</sup> not brought by an assignee, attorney fees may only be awarded as provided in s. 57.105, F.S., or s. 627.70152, F.S. Section 627.428, F.S., generally governs the award of attorney fees in civil litigation under a property insurance policy. There are circumstances, however, where the insurer may obtain attorney fees from an insured. These circumstances include when litigation is brought by an assignee of benefits under a residential property insurance policy, when a claimant brings an action that has no good faith legal or genuine factual basis, or in certain circumstances when the insurer's offer of settlement is refused.

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<sup>109</sup> Section 627.70152(3), F.S.

<sup>110</sup> Section 627.70152(4), F.S.

<sup>111</sup> Section 627.70153, F.S.

<sup>112</sup> Section 626.9373, F.S.

<sup>113</sup> Section 627.428, F.S.

The provisions of s. 627.70152, F.S., apply exclusively to all suits not brought by an assignee arising under a residential or commercial property insurance policy, including such coverage issued by an eligible surplus lines insurer.

Attorney fees and costs are awarded based on a formula that compares the amount obtained by the claimant in excess of the insurer's presuit settlement offer (exclusive of attorney fees and costs) with the disputed amount between the two parties (the difference between the claimant's presuit settlement demand and the insurer's presuit settlement offer, also exclusive of attorney fees and costs).<sup>114</sup> If the amount obtained by the claimant in excess of the insurer's presuit settlement offer is:

- Less than 20 percent of the disputed amount, each party pays its own attorney fees and costs.
- At least 20 percent but less than 50 percent of the disputed amount, the insurer pays the claimant's attorney fees equal to the percentage of the disputed amount obtained times the total attorney fees and costs.
- At least 50 percent of the disputed amount, the insurer pays the claimant's full attorney fees and costs.

### *Lodestar Calculation*

Florida courts set reasonable attorney fees using the federal lodestar approach, which is calculated as the product of the number of hours reasonably expended multiplied by a reasonable hourly rate.<sup>115</sup> In adopting a "suitable foundation for an objective structure" for the award of attorney fees, the Court explained in *Fla. Patient's Comp. Fund v. Rowe*, that:

There is but little analogy between the elements that control the determination of a lawyer's fee and those which determine the compensation of skilled craftsmen in other fields. Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorney's fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that. It brings the court into disrepute and destroys its power to perform adequately the function of its creation.<sup>116</sup>

In calculating the lodestar amount under *Rowe*, courts must consider the following elements:

- The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service.
- The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- The fee customarily charged in the locality for similar legal services.
- The amount involved and the results obtained.

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<sup>114</sup> Section 627.70152(8), F.S.

<sup>115</sup> *Fla. Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985).

<sup>116</sup> *Id.* at 1149 (quoting *Baruch v. Giblin*, 122 Fla. 59, 63, 164 So. 831, 833 (1935)).

- The time limitations imposed by the client or by the circumstances.
- The nature and length of the professional relationship with the client.
- The experience, reputation, and ability of the lawyer or lawyers performing the services.
- Whether the fee is fixed or contingent.<sup>117</sup>

***Contingency Fee Multipliers – Florida Court Discretion to Apply a Contingency Fee Multiplier and the Contingency Fee Multiplier Schedule***

Florida courts have discretion to consider applying a contingency fee multiplier to the produced lodestar amount.<sup>118</sup> However, before determining that a multiplier is warranted, a court must consider whether:

- The relevant market requires a contingency fee multiplier to obtain competent counsel.
- The attorney was able to mitigate the risk of nonpayment in any way.
- Any of the factors set forth in *Rowe* are applicable, especially, the amount involved, the results obtained, and the type of fee arrangement between the attorney and the client.<sup>119</sup>

When a court concludes the presented evidence supports utilization of a multiplier, courts may use the following *Quanstrom* multiplier schedule:<sup>120</sup>

Contingency Fee Multiplier	Case’s Likelihood of Success at Outset
1.0 to 1.5	More likely than not.
1.5 to 2.0	Approximately even.
2.0 to 2.5	Unlikely.

Florida’s adoption of this approach in *Rowe* was followed by a series of United States Supreme Court decisions rejecting and limiting the use of contingency fee multipliers in federal cases. In response, the Florida Supreme Court has reaffirmed Florida precedent and the underlying public policy reasoning for the use of contingency fee multipliers as articulated in *Rowe* on multiple occasions.

***Federal Precedent Limiting the Use of Contingency Fee Multipliers***

Following the Florida Supreme Court’s decision in *Rowe*, Justice Scalia, writing the majority opinion in *Dague*, couched his disapproval of contingency fee multipliers by reasoning that the multipliers incentivize nonmeritorious claims, so that those claims are effectively raised as often as meritorious claims:

[T]he consequence of awarding contingency enhancement to take account of this “merits” factor would be to provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones. Assume, for example, two claims, one with underlying merit of 20 percent, the other of 80 percent. Absent any contingency enhancement, a contingent-fee attorney would prefer to take the latter, since he is four times more likely to be paid. But with a contingency enhancement, this

<sup>117</sup> *Fla. Patient’s Comp. Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985).

<sup>118</sup> *Joyce v. Federated National Insurance Company*, 228 So.3d 1122, 1124 (Fla. 2017).

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

preference will disappear: the enhancement for the 20 percent claim would be a multiplier of 5 (100/20), which is quadruple the 1.25 multiplier (100/80) that would attach to the 80 percent claim. Thus, enhancement for the contingency risk posed by each case would encourage meritorious claims to be brought, but only at the social cost of indiscriminately encouraging nonmeritorious claims to be brought as well. We think that an unlikely objective of the “reasonable fees” provisions.<sup>121</sup>

Building on *Dague*, the U.S. Supreme Court in *Perdue* further limited the use of contingency fee multipliers, reserving them for “rare and exceptional circumstances” in which the lodestar insufficiently accounts for a factor that may properly be considered in determining a reasonable fee.<sup>122</sup> Such circumstances “require specific evidence that the lodestar fee would not have been ‘adequate to attract competent counsel.’<sup>123</sup>

### ***Florida Precedent Approving the Use of Contingency Fee Multipliers***

The Florida Supreme Court has rejected the U.S. Supreme Court’s reasoning in *Dague* and *Perdue* on multiple occasions. Beginning with *Bell*, the Court reaffirmed the *Rowe* rationale for contingency fee multipliers, explaining:

[W]e find that the primary policy that favors the consideration of the multiplier is that it assists parties with legitimate causes of action or defenses in obtaining competent legal representation even if they are unable to pay an attorney on an hourly basis. In this way, the availability of the multiplier levels the playing field between parties with unequal abilities to secure legal representation.<sup>124</sup>

In *Lane*, the Court similarly noted the role full contingency fee cases, generally, and partial contingency fee cases, specifically, play in providing access to the court system:

Attorneys should be encouraged to take cases based on a partial contingency-fee arrangement, since this policy also will encourage attorneys to provide services to persons who otherwise could not afford the customary legal fee. No incentive would exist under the approach taken by the district court below, because no “enhancement” of the customary fee would be given to offset losses.<sup>125</sup>

More recently, the Florida Supreme Court has rejected the “rare and exceptional” standard as articulated in *Perdue*. In *Joyce*, the Court held there is no “rare and exceptional” circumstances requirement before a court can apply a contingency fee multiplier.<sup>126</sup> *Joyce* also reaffirmed *Rowe*, *Quanstrom*, and *Bell*. Moreover, Justice Pariente, writing for the majority, criticized

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<sup>121</sup> *City of Burlington v. Dague*, 505 U.S. 557, 563 (1992).

<sup>122</sup> *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 543 (2010).

<sup>123</sup> *See id.* at 543.

<sup>124</sup> *Bell v. U.S.B. Acquisition Co. Inc.*, 734 So.2d 403, 411 (Fla. 1999).

<sup>125</sup> *Lane v. Head*, 566 So. 2d 508, 511 (Fla. 1990).

<sup>126</sup> *Joyce v. Federated National Insurance Company*, 228 So.3d 1122, 1135 (Fla. 2017).

Justice Scalia’s reasoning from the majority opinion in *Dague*, arguing that Justice Scalia wrongly conflated nonmeritorious claims with claims that are unlikely to prevail in arguing that multipliers incentivize the pursuit of nonmeritorious claims.<sup>127</sup>

### ***Statutory and Common Law Bad Faith Actions***

Florida’s bad faith law and jurisprudence were designed to hold insurers accountable for failing to fulfill their contractual obligation to indemnify the insured or beneficiary on a valid claim.<sup>128</sup> Florida recognizes two distinct bad faith causes of action that may be initiated against an insurer. In the first, s. 624.155, F.S., provides first-party and third-party statutory bad faith causes of action against an insurer. Here, bad faith is defined as the commission of any of the following acts by the insurer:

- Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured with due regard for her or his interests;
- Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or
- Except as to liability coverages, failing to promptly settle claims, when the obligation to settle the claim has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.<sup>129</sup>

The second recognized bad faith cause of action provides a third-party common law cause of action when an insurer fails in good faith to settle a third party’s claim against the insurer within policy limits and exposes the insured to liability in excess of his or her insurance coverage.<sup>130</sup> Florida courts do not recognize a common law first-party bad faith causes of action by the insured against its own insurer.<sup>131</sup> Most property insurance claims are first-party claims<sup>132</sup>, thus bad faith actions on such claims may proceed only pursuant to s. 624.155, F.S.

In most United States jurisdictions, the default rule is that each party to the litigation pays its own attorney, regardless of the outcome of the litigation, and a court may only award attorney fees to the prevailing side if authorized by statute or agreement of the parties to the litigation.<sup>133</sup> This is often referred to as the “American Rule” for attorney fees, and contravenes the “English Rule” under which English courts generally awarded attorney fees to the prevailing party in litigation.<sup>134</sup>

Florida has enacted a number of statutes that authorize the award of attorney fees in civil litigation. As the Florida Supreme Court (Court) has noted, these statutory provisions are of two

<sup>127</sup> *Id.* at 1132-33.

<sup>128</sup> *Harvey v. GEICO General Insurance Company*, 251 So.3d 1, 6, (Fla. 2018)(quoting *Berges v. Infinity Insurance Company*, 896 So.2d 665 at 682).

<sup>129</sup> Section 624.155(1)(b)(1)-(3), F.S.

<sup>130</sup> *Opperman v. Nationwide Mutual Fire Insurance Company*, 515 So.2d 263, 265 (Fla. 5th DCA 1987).

<sup>131</sup> *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 58-59 (Fla. 1995).

<sup>132</sup> Homeowners insurance provides liability coverage, thus third-party litigation may occur under a property insurance policy.

<sup>133</sup> *Florida Patient’s Compensation Fund v. Rowe*, 472 So. 2d 1147-1148, (Fla. 1985).

<sup>134</sup> *Id.*



types.<sup>135</sup> In the first, statutes direct the courts to assess attorney fees against only one side of the litigation in certain types of actions. An example is found in s. 627.428, F.S., which directs the court to assess the insurer a reasonable sum as fees for the prevailing party's attorney. The second category adopts the English Rule, authorizing the prevailing party, whether plaintiff or defendant, to recover attorney fees from the opposing party. An example is found in the recently enacted s. 627.7152, F.S., which directs the court to award an attorney fee to the statutorily defined prevailing party in assignment of benefits litigation under a residential or commercial property insurance policy.

### **Property Insurance Related Practices by Contractors**

The 2021 property insurance reforms<sup>136</sup> attempted to address increases in roof claims by prohibiting contractors, and persons acting on behalf of contractors, from engaging in the following practices:

- Soliciting residential property owners through prohibited advertisements, which are communications to a consumer that encourage, instruct, or induce a consumer to contact a contractor to file an insurance claim for roof damage;
- Offering the residential property owner consideration to perform a roof inspection or file an insurance claim;
- Offering or receiving consideration for referrals when property insurance proceeds are payable;
- Engaging in unlicensed public adjusting; and
- Providing an authorization agreement to the insured without providing a good faith estimate.<sup>137</sup>

The above acts are subject to discipline by the Department of Business and Professional Regulation and a \$10,000 fine per violation. The law provides the residential property owner may void the contract with the contractor within 10 days of its execution if the contractor fails to provide notice to the residential property owner of these prohibited practices.<sup>138</sup>

The law prohibits licensed contractors and subcontractors from advertising, soliciting, offering to handle, handling, or performing public adjuster (PA) services without a license.<sup>139</sup> The prohibition does not prohibit the contractor from recommending the consumer consider contacting his or her insurer to determine if the proposed repair is covered by insurance.

The law prohibits a PA, PA apprentice, or person acting on behalf of a PA or PA apprentice, from offering financial inducements for allowing a roof inspection of residential property or making an insurance claim for roof damage. The law also prohibits them from offering or accepting consideration for referring services related to a roof claim. Each violation subjects the PA or PA licensee to up to a \$10,000 fine. Unlicensed persons not otherwise exempted from PA

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<sup>135</sup> *Id.*

<sup>136</sup> Ch. 2021-77, Laws of Fla.

<sup>137</sup> Section 489.147, F.S.

<sup>138</sup> *Id.*

<sup>139</sup> Section 626.854, F.S.

licensure commit the unlicensed practice of public adjusting when they do these prohibited acts, and are subject to a \$10,000 fine per act and the criminal penalty for unlicensed activity.<sup>140</sup>

### ***Regulations of Commercial Speech***

The United States Supreme Court set forth the standards for analyzing whether a restriction on commercial speech<sup>141</sup> violates the First Amendment of the United States Constitution in the case of *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*.<sup>142</sup> Justice Powell succinctly set forth the standards.

In commercial speech cases, then, a four-part analysis has developed. At the outset, we must determine whether the expression is protected by the First Amendment. For commercial speech to come within that provision, it at least must concern lawful activity and not be misleading. Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, we must determine whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest.<sup>143</sup>

The court explained in *Central Hudson* that if a law restricts commercial speech that address speech that is not misleading or related to unlawful activity, the government's power to regulate such speech is limited:

If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Florida Courts have applied the *Central Hudson* test to determine whether government restrictions on commercial speech violate article 1, section 4 of the Florida Constitution.<sup>144</sup>

The United State Supreme Court in *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, noted state laws that require disclosures in advertising do not receive the same degree of constitutional protection as a prohibition on commercial free speech.

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<sup>140</sup> *Id.*

<sup>141</sup> Commercial speech is expression related solely to the economic interests of the speaker and its audience.

<sup>142</sup> 447 U.S. 557 (1980).

<sup>143</sup> See *Central Hudson Gas*, 447 US. 557 at pg. 565.

<sup>144</sup> See *Kortum v. Sink*, 54 So.3d 1012 (Fla. 1st DCA, 2010).

Because the extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides, appellant's constitutionally protected interest in not providing any particular factual information in his advertising is minimal. An advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers.<sup>145</sup>

The United States Supreme Court (Court) used the *Zauderer* test to uphold disclosure requirements in *Milavetz, Gallop & Milavetz, P.A., v. U.S.* In delivering the opinion of the Court, Supreme Court Associate Justice Sonia Sotomayor upheld disclosure requirements placed by federal law<sup>146</sup> upon debt relief agents that provide bankruptcy assistance for payment because, "...the disclosures are intended to combat the problem of inherently misleading commercial advertisements... [and] ... entail only an accurate statement of the advertiser's legal status and the character of the assistance provided."<sup>147</sup>

### ***Federal Preliminary Injunction against Provisions of SB 76 Banning Prohibited Advertisements***

On July 11, 2021, a federal district court enjoined the enforcement of the provisions of CS/CS/CS/SB 76 (2021)<sup>148</sup> that ban contractors from making prohibited advertisements regarding property insurance roof claims.<sup>149</sup> Within the law, a prohibited advertisement is any written or electronic communication that encourages, instructs, or induces a consumer to contract a public adjuster or contractor for purposes of making an insurance claim for roof damage. The preliminary injunction prevents the enforcement of specific prohibitions in newly created s. 489.147, F.S., specifically (2)(a), (3), and (4)(b), F.S. These provisions are:

- (2)(a): A contractor may not directly or indirectly solicit a residential property owner by means of a prohibited advertisement;
- (3): A contractor who violates this section is subject to a disciplinary proceeding through Department of Business and Professional Regulation (DBPR) under s. 489.129, F.S., and is subject to a \$10,000 fine for each violation; and
- (4)(b): An unlicensed person who violates s. 489.147, F.S., is subject to the penalties in s. 489.13, F.S., and is subject to a fine of up to \$10,000 for each violation.

The judge issued the injunction on the basis that these provisions of the bill violate First Amendment commercial free speech rights of contractors under the United States Constitution. The injunction against subsections (3) and (4)(b) above only apply to the prohibited advertisement provision. The prohibitions in s. 489.147, F.S., regarding roof claims that ban offering inducements to consumers, accepting or paying referral fees, interpreting the insurance policy, or signing a contract with a consumer for roof repairs without providing a good faith estimate remain valid and enforceable. The judge did not enjoin enforcement of the rest of the

<sup>145</sup> *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626, at pg. 628 (1985).

<sup>146</sup> 11 U.S.C. s. 528 (2006).

<sup>147</sup> *Milavetz, Gallop & Milavetz, P.A., v. U.S.*, 559 U.S. 229 at pg. 231 (2010).

<sup>148</sup> Ch. 2021-77, Laws of Fla.

<sup>149</sup> *Gale Force Roofing & Restoration, LLC v. Julie I. Brown*, 2021 WL 3046800, Case No. 4:21CV246-MW/MAF (U.S.D.C., N.D. Fla., Tallahassee Division) (Order Granting Preliminary Injunction, July 11, 2021).

bill, thus the only provisions affected are those mentioned above that were specifically addressed by the preliminary injunction order.

### **Citizens Property Insurance Corporation**

Citizens is a state-created, not-for-profit, tax-exempt government entity that is an integral part of the state, whose public purpose is to provide property insurance to those unable to find affordable coverage in the private market.<sup>150</sup> Citizens is governed by an eight member Board of Governors (board) that administers its plan of operations (plan).<sup>151</sup> The plan is subject to approval by the Financial Services Commission (FSC).

### ***Current Policy Count***

On December 31, 2021, Citizens reported 759,305 policies in force with a total exposure of \$232,502,323,529.<sup>152</sup> As of May 13, 2022, Citizens reports 861,764 policies in force with a total exposure of \$281,498,561,911.<sup>153</sup>

### ***Rates***

From 2007 until 2010, Citizens' rates were frozen by statute at the level that had been established in 2006. In 2010, the Legislature established a "glidepath" to impose annual rate increases up to a level that is actuarially sound. Under the original glidepath, Citizens had to implement an annual rate increase that, except for sinkhole coverage, does not exceed 10 percent above the previous year for any individual policyholder, adjusted for coverage changes and surcharges. In 2021, the Legislature revised this glidepath to increase it one percent per year to 15 percent, as follows:<sup>154</sup>

- 11 percent for 2022.
- 12 percent for 2023.
- 13 percent for 2024.
- 14 percent for 2025.
- 15 percent for 2026 and all subsequent years.

The implementation of this increase ceases when Citizens has achieved actuarially sound rates.<sup>155</sup> In addition to the overall glide path rate increase, Citizens can increase its rates to recover the additional reimbursement premium it incurs as a result of the annual cash build-up factor added to the price of the mandatory layer of the Florida Hurricane Catastrophe Fund coverage, pursuant to s. 215.555(5)(b), F.S.<sup>156</sup>

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<sup>150</sup> Section. 627.351(6)(a)1., F.S.

<sup>151</sup> *Id.*

<sup>152</sup> Citizens Property Insurance, *About Us, Snapshot, December 31, 2021*, <https://www.citizensfla.com/-/20211231-policies-in-force> (last visited May. 17, 2022).

<sup>153</sup> Email from Citizens staff, Policies In Force Weekly Summary (May 13, 2022). On file with Senate Banking and Insurance Committee.

<sup>154</sup> Section 627.351(6)(n)5., F.S. (Ch. 2021-77, Laws of Fla).

<sup>155</sup> Section 627.351(6)(n)7., F.S.

<sup>156</sup> Section 627.351(6)(n)6., F.S.

### ***Policyholder Eligibility***

Current law requires Citizens to provide a procedure for determining the eligibility of a potential risk for insurance in Citizens and provides specific eligibility requirements based on premium amounts, value of the property insured, and the location of the property. Risks not meeting the statutory eligibility requirements cannot be insured by Citizens. Citizens has additional eligibility requirements set out in their underwriting rules. These rules are approved by the OIR and are established in Citizens' underwriting manuals.<sup>157</sup>

### ***Citizens Financial Resources***

If the Citizens' Board of Directors determines a Citizens' account has a projected deficit, Citizens is authorized to levy assessments<sup>158</sup> on its policyholders and on each line of property and casualty line of business other than workers' compensation insurance and medical malpractice insurance.<sup>159</sup> Citizens may impose three assessment tiers and their sequence is as follows:<sup>160</sup>

*Citizens Policyholder Surcharge* – A surcharge of up to 15 percent of premium on all Citizens' policies, collected upon issuance or renewal. This 15 percent assessment can be levied for each of the three Citizens' accounts—the CLA, the PLA, and the Coastal Account—that project a deficit. Thus, the total maximum premium surcharge a policyholder could be assessed is 45 percent.<sup>161</sup>

*Regular Assessment* – If the Citizens' surcharge is insufficient to cure the deficit for the coastal account, Citizens can require an assessment against all other insurers except medical malpractice and workers' compensation. The assessment may be recouped from policyholders through a rate filing process of up to two percent of premium or two percent of the deficit, whichever is greater.<sup>162</sup> This assessment is not levied against Citizens' policyholders.

*Emergency Assessment* – Requires any remaining deficit for Citizens' three accounts be funded by multi-year emergency assessments on all insurance policyholders (except medical malpractice and workers' compensation), including Citizens' policyholders. This assessment may not exceed the greater of 10 percent of the amount needed to cover the deficit, plus interest, fees, commissions, required reserves, and other costs associated with financing the original deficit, or 10 percent of the aggregate statewide direct written premium for subject lines of business and all accounts of the corporation for the prior year, plus interest, fees, commissions, required reserves, and other costs associated with financing the deficit.<sup>163</sup>

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<sup>157</sup> See Citizens Property Insurance Corporation *Revised Underwriting Manuals*, <https://www.citizensfla.com/-/20160329-revised-underwriting-manuals> (last visited Jan. 22, 2022).

<sup>158</sup> Assessments are charges that Citizens and non-Citizens policyholders can be required to pay, in addition to their regular policy premiums.

<sup>159</sup> Accident and health insurance and policies written under the National Flood Insurance Program or the Federal Crop Insurance Program are not assessable types of property and casualty insurance. Surplus lines insurers are not assessable, but their policyholders are. Section 627.351(6)(b)3.f.-h., F.S.

<sup>160</sup> Section 627.351, F.S.

<sup>161</sup> Sections 627.351.(6)(b)3.i.(I) and 627.351.(6)(c)21., F.S.

<sup>162</sup> Section 627.351(6)(b)3.a., F.S.

<sup>163</sup> Section 627.351(6)(b)3.d., F.S.

## Florida Hurricane Catastrophe Fund

The Florida Hurricane Catastrophe Fund (FHCF) is a tax-exempt trust fund created by the Legislature in 1993 as a form of reinsurance for residential property catastrophic hurricane losses.<sup>164</sup> The purpose of the FHCF is to protect and advance the state's interest in maintaining insurance capacity in Florida by providing reimbursements to insurers for a portion of their catastrophic losses.<sup>165</sup> The FHCF provides insurers a source of reinsurance that is stable and generally less expensive than private reinsurance.

The State Board of Administration (board) administers the FHCF and reimburses property insurers for a selected percentage of hurricane losses to residential property when those losses exceed the insurer's retention (deductible).<sup>166</sup> The FHCF industry retention for the 2022-2023 contract year will be approximately \$8.5 billion. The FHCF reimburses participating insurers for losses under covered policies, subject to limitations.<sup>167</sup> A covered policy is defined as "any insurance policy covering residential property" in Florida, including, but not limited to the following types of policies:

- homeowner
- mobile home owner
- farm owner
- condominium association
- condominium unit owner
- tenant
- apartment building policy, and
- any other policy covering a residential structure or its contents.<sup>168</sup>

Covered policies may be issued by any authorized insurer,<sup>169</sup> a commercial self-insurance fund holding a certificate of authority issued by the OIR, Citizens Property Insurance Corporation (Citizens), and any joint underwriting association or similar legal entity.<sup>170</sup>

### *FHCF Mandatory Coverage*

All insurers admitted to transact business in this state writing residential property insurance that includes wind coverage must buy reimbursement coverage (reinsurance) on their residential property exposure through the FHCF.<sup>171</sup> The FHCF is authorized by statute to sell \$17 billion of mandatory layer coverage.<sup>172</sup> Each insurer that purchases coverage may receive up to its proportional share of the \$17 billion mandatory layer of coverage based upon the insurer's share

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<sup>164</sup> See s. 215.555, F.S.

<sup>165</sup> See *id.*

<sup>166</sup> *Id.* Retention is defined as the amount of losses below which an insurer is not entitled to reimbursement from the FHCF. It is calculated for each insurer based upon that insurer's proportionate share of overall premiums charged by the FHCF. See s. 215.555(2)(e), F.S.

<sup>167</sup> Section 215.555(2)(d), F.S.

<sup>168</sup> Section 215.555(2)(c), F.S.

<sup>169</sup> Authorized insurers are those insurers that have obtained a certificate of authority from OIR to transact insurance business in Florida. s. 624.09(1), F.S.

<sup>170</sup> Section 215.555(2)(c), F.S.

<sup>171</sup> *Id.*

<sup>172</sup> Section 215.555(4)(c)1., F.S.

of the actual premium paid for the contract year, multiplied by the claims paying capacity of the fund. Each insurer may select a reimbursement contract wherein the FHCF promises to reimburse the insurer for 45 percent, 75 percent, or 90 percent of covered losses, plus 10 percent<sup>173</sup> of the reimbursed losses for loss adjustment expenses.<sup>174</sup>

### ***FHCF Premiums***

The FHCF must charge insurers the actuarially indicated premium<sup>175</sup> for the coverage provided, based on hurricane loss projection models found acceptable by the Florida Commission on Hurricane Loss Projection Methodology.<sup>176</sup> The actuarially indicated premium is an amount that is adequate to pay current and future obligations and expenses of the fund. In practice, each insurer pays the FHCF annual reimbursement premiums that are proportionate to each insurer's share of the FHCF's risk exposure. The cost of FHCF coverage is generally lower than the cost of private reinsurance because the fund is a tax-exempt non-profit corporation and does not charge a risk load as it relates to overhead and operating expenses incurred by other private insurers.<sup>177</sup>

### **Hazard Mitigation**

The goal of natural hazard mitigation efforts is to reduce loss of life and property by lessening the impact of disasters.<sup>178</sup> Hazard mitigation may include adopting up-to-date building codes and exceeding codes to addressing the retrofit of existing buildings.<sup>179</sup>

One of the dominant source of natural-hazard risk today is the existing inventory of older buildings that predate modern building codes.<sup>180</sup> In 2019, the median age of owner-occupied housing stock in Florida was in the range of 31-35 years. Older homes may not be as resilient as newer construction. Studies demonstrate that modern building codes have been very effective in preventing the destruction of homes due to various storms, fires and earthquakes.<sup>181</sup> For example, after Hurricane Michael hit Mexico Beach, Florida, studies indicated that homes built post-2000 remained standing, while older homes did not.<sup>182</sup> According to a 2019 report, the implementation

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<sup>173</sup> Section 215.555(4)(b), F.S.

<sup>174</sup> Loss adjustment expenses are costs incurred by insurers when investigating, adjusting, and processing a claim.

<sup>175</sup> Section 215.555(2)(a), F.S.

<sup>176</sup> See State Board of Administration of Florida, *Florida Commission on Hurricane Loss Methodology*, <https://www.sbafla.com/method/> (last visited December 29, 2021).

<sup>177</sup> [State Board of Administration of Florida, Florida Hurricane Catastrophe Fund, 2020 Annual Report](https://www.sbafla.com/fhcf/Portals/FHCF/Content/Reports/Annual/20210614_2020_FHCFAnnualReport.pdf?ver=2021-06-14-123243-403), [https://www.sbafla.com/fhcf/Portals/FHCF/Content/Reports/Annual/20210614\\_2020\\_FHCFAnnualReport.pdf?ver=2021-06-14-123243-403](https://www.sbafla.com/fhcf/Portals/FHCF/Content/Reports/Annual/20210614_2020_FHCFAnnualReport.pdf?ver=2021-06-14-123243-403) (last visited December 29, 2021).

<sup>178</sup> Florida Mitigation Projects Prove Successful (Mar. 14, 2018) [Florida Mitigation Projects Prove Successful | FEMA.gov](https://www.fema.gov/florida-mitigation-projects-prove-successful) (last visited May 13, 2022).

<sup>179</sup> Multi-Hazard Mitigation Council (2019), Natural Hazard Mitigation Saves [Natural Hazard Mitigation Saves: 2019 Report](https://www.nibs.org/research-and-data/natural-hazard-mitigation-saves-2019-report) | [National Institute of Building Sciences \(nibs.org\)](https://www.nibs.org) (last visited May 13, 2022).

<sup>180</sup> National Home Builders Association, Age of Housing Stock by Age (Mar. 26, 2021) [Age of Housing Stock by State | Eye On Housing](https://www.nhba.org/age-of-housing-stock-by-age) (last visited May 13, 2022).

<sup>181</sup> National Home Builders Association, Market-Driven Solutions Will Keep Homes Resilient and Affordable, [Market-Driven Solutions Will Keep Homes Resilient and Affordable - NAHB](https://www.nhba.org/market-driven-solutions-will-keep-homes-resilient-and-affordable) (last visited May 13, 2022).

<sup>182</sup> Id.

of some of the most common or practical retrofit measures on existing residential building inventory produces \$4 of benefit for every \$1 invested.<sup>183</sup>

### ***My Safe Florida Home Program***

During the 2004 and 2005 hurricane seasons, 2.8 million Florida homeowners suffered more than \$33 billion in insured property damage.<sup>184</sup> At that time, 86 percent of the 4.4 million homes in Florida were built prior to the adoption of stronger building codes in 2002. The average age of a home was 26 years.<sup>185</sup>

In response, the Legislature created the My Safe Florida Home Program within the DFS<sup>186</sup> to provide financial incentives for Florida residential property owners to obtain free home inspections that would identify mitigation measures and provide grants to retrofit such properties, thereby reducing their vulnerability to hurricane damage and helping decrease the cost of residential property insurance. The Legislature appropriated \$250 million for the program.<sup>187</sup>

In 2007, the Legislature directed the DFS to:

- Provide free home inspections for at least 400,000 single family, residential properties, and
- Provide mitigation grants for hardening homes to at least 35,000 applicants before June 30, 2009.

The DFS contracted with wind certification entities to provide free hurricane mitigation inspections. At a minimum, the inspections included:

- A home inspection and report that identifies recommended improvements a homeowner may take to mitigate hurricane damage.
- A range of cost estimates regarding the recommended mitigation improvements.
- Insurer-specific information regarding premium discounts correlated to current mitigation features and the recommended mitigation improvements identified by the inspection.

The program offered matching grants of up to \$5,000 to homeowners. Low-income homeowners were not required to provide matching funds. A homeowner was required to meet the following requirements to be eligible for a grant:

- The homeowner must have been granted a homestead exemption for the property pursuant to ch. 196, F.S.
- The home must be a dwelling with an insured value of \$300,000 or less. However, a low-income homeowner is exempt from this requirement.

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<sup>183</sup> Multi-Hazard Mitigation Council (2019), Natural Hazard Mitigation Saves [Natural Hazard Mitigation Saves: 2019 Report | National Institute of Building Sciences \(nibs.org\)](#) last visited May 13, 2022. .

<sup>184</sup> Department of Financial Services, My Safe Florida Home, 2008 Annual Report (Feb. 2009) (On file with Senate Banking and Insurance Committee.

<sup>185</sup> *Id.* My Safe Florida Home 2008 Annual Report.

<sup>186</sup> The Legislature initially established the program as the Florida Comprehensive Hurricane Damage Mitigation Program (Ch. 2006-12, Laws of Fla.) however, the name was subsequently changed in 2007. (Ch. 2007-126, Laws of Fla.) Significant changes were made to the program in 2007.

<sup>187</sup> Ch. 2006-12 Laws of Fla. Any unused funds appropriated to the program would revert to the state on June 30, 2009. The program was not funded thereafter.



- The home must have undergone an acceptable hurricane mitigation inspection after May 1, 2007.
- The home must be located in the wind-borne debris region as that term is defined in the Florida Building Code.<sup>188</sup>
- The building permit application for initial construction of the home was made before March 1, 2002.

As of January 30, 2009, the program had performed more than 391,000 inspections and awarded 39,000 grants. Funding for the program ceased on June 30, 2009.<sup>189</sup>

### III. Effect of Proposed Changes:

#### Reinsurance to Assist Policyholders (RAP) Program

**Section 1** creates s. 215.5551, F.S., to establish the Reinsurance to Assist Policyholders (RAP) program within the State Board of Administration (board). The bill authorizes the transfer of up to \$2 billion dollars from the General Revenue Fund to the program for the 2022-2023 contract term beginning June 1, 2022. The RAP program statute expires July 1, 2025, if no general revenue funds have been transferred to fund the RAP program. If such funds were transferred, the statute expires July 1, 2029, and all unencumbered RAP Program funds must be transferred back to the General Revenue Fund.

The RAP program authorizes a \$2 billion dollar reimbursement layer of reinsurance for hurricane losses directly below the mandatory layer of the Florida Hurricane Catastrophe Fund (FHCF). The FHCF mandatory retention is \$8.5 billion for the 2022-2023 contract year. All eligible insurers must participate in the program. The RAP program coverage reimburses 90 percent of each insurer's covered losses and 10 percent of their loss adjustment expenses up to each individual insurer's limit of coverage for the two hurricanes causing the largest losses for that insurer during the contract year. Each insurer's limit of the \$2 billion in RAP coverage is their pro-rata market share among all insurers that participate in the RAP program. Thus, an insurer with five percent of the risk reinsured by RAP coverage would have a limit of coverage of \$100 million.

All eligible insurers will participate in the RAP program for one year. Insurers that do not have private reinsurance within the RAP layer of coverage for the 2022-2023 contract year must participate during the 2022-2023 contract year. Insurers that have private reinsurance at the RAP layer for the 2022-2023 contract year must defer using RAP program coverage until the 2023-2024 contract year.

The bill establishes a process to trigger release of funds necessary to reimburse RAP insurers for losses associated with covered events and the administration of the program.

- Requires the board to submit an initial notice, and any subsequent requests, if applicable, to the Executive Office of the Governor if it determines that a specified amount of funds for the RAP program will be necessary to reimburse RAP insurers for losses associated with a

<sup>188</sup> The term, "wind-borne debris region," is defined in the Florida Building Code.

<sup>189</sup> Supra note 9. My Safe Florida Annual Report.

covered event. Upon receipt of such notice, the EOG will direct the Chief Financial Officer to draw a warrant from the General Revenue Fund for a transfer to the board for the RAP program in the amount requested. Cumulative transfers to the board to pay claims may not exceed \$2 billion.

- The board may request, via the same process for reimbursing RAP insurers, up to \$5 million for the administration of the program and post-event examinations for covered events that require RAP coverage.

The bill defines the following terms as follows:

- “Covered event” to mean any one storm declared to be a hurricane by the National Hurricane Center, which storm causes insured losses in this state.
- “RAP insurer” as an insurer in the FHCF on June 1, 2022. Residual markets, risk apportionment plans, or other entities created pursuant to s. 627.351, F.S., are not considered RAP insurers and are prohibited from obtaining coverage under the RAP program
- “RAP limit” as a RAP insurer’s maximum payout, which is its share of the \$2 billion RAP layer aggregate limit.
- “RAP qualification ratio” in the following manner:
  - For the 2022-2023 contract year, the ratio of FHCF mandatory premium adjusted to 90 percent for RAP insurers divided by the FHCF mandatory premium adjusted to 90 percent for all insurers.
  - For the 2023-2024 contract year, the ratio of FHCF mandatory premium adjusted to 90 percent for the qualified RAP insurers that have deferred RAP coverage to 2023-2024 divided by the FHCF mandatory premium adjusted to 90 percent for all insurers.
- “RAP reimbursement contract” as the reimbursement contract reflecting the obligations of the RAP program to insurers.

### ***Qualifications and Requirements of RAP Program Insurers***

The bill specifies that an insurer is ineligible to participate in the RAP program if the board receives a notice from the OIR Commissioner that certifies that the insurer is in a unsound financial condition no later than June 15, 2022, for participation in the 2022-2023 contract year or February 1, 2023, for RAP insurers that defer and participate during the 2023-2024 contract year. The OIR must determine whether an insurer is in an unsound financial condition based on the following factors:

- The insurer’s compliance with the requirements to qualify for and hold a certificate of authority under s. 624.404, F.S.;
- The insurer’s compliance with the applicable surplus requirements of 624.408, F.S.,
- The insurer’s compliance with the applicable risk-based capital requirements under s. 624.4085, F.S.;
- The insurer’s compliance with the applicable premium to surplus requirements under s. 624.4095; F.S., and
- An analysis of quarterly and annual statements, including an actuarial opinion summary, and other information submitted to the office pursuant to s. 624.424, F.S.
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Additionally, the bill provides that if the board receives timely notice from the OIR regarding an insurer, such insurer is disqualified from participating in the program.

***RAP Program Reimbursement Contracts***

The board must enter into a RAP reimbursement contract with each eligible RAP insurer writing covered policies in Florida to provide reimbursement through the RAP program. The contract is effective:

- June 1, 2022, for RAP insurers that participate in the RAP program during the 2022-2023 contract year; or
- June 1, 2023, for RAP insurers that defer and participate during the 2023-2024 contract year.

The RAP reimbursement contract must be executed no later than July 15, 2022, for RAP insurers that participate in the program during the 2022-2023 contract year; or March 1, 2023, for those RAP insurers that are subject to deferral and participate in the program during the 2023-2024 contract year. If a RAP insurer fails to execute the RAP reimbursement contract by the dates required in this paragraph, the RAP insurance contract is deemed to have been executed by the RAP insurer.

The sum of the losses and a 10 percent LAE allocation from the RAP layer may not exceed the RAP limit. Recoveries on losses in the FHCF mandatory layer must inure to the benefit of the RAP contract layer.

The RAP reimbursement amounts may not be reduced by reinsurance paid or payable to the insurer from other sources, excluding the FHCF.

The board must calculate and report to each RAP insurer the RAP payout multiples formula. The RAP payout multiples is the ratio of the RAP industry limit of \$2 billion for contract year 2022-2023, or the deferred limit for contract year 2023-2024, to the mandatory FHCF retention multiplied by the mandatory FHCF retention multiples divided by the RAP qualification ratio. The RAP payout multiple for an insurer is multiplied by the RAP insurer's FHCF premium to calculate its RAP maximum payout. RAP payout multiples are calculated for 45 percent, 75 percent, and 90 percent FHCF mandatory coverage selections.

The retention for a RAP insurer is calculated in the following manner:

- The RAP retention multiples for each FHCF coverage selection is the FHCF retention multiple minus the RAP payout multiple.
- The RAP retention multiple for an insurer is multiplied by the RAP insurer's FHCF premium to calculate its RAP retention. RAP retention multiples are calculated for 45 percent, 75 percent, and 90 percent FHCF coverage selections.

The RAP industry retention for the 2022-2023 contract year is the FHCF industry retention minus \$2 billion, prior to allocation to qualifying RAP insurers. The RAP industry retention for the 2023-2024 contract year is the FHCF industry retention for the 2023-2024 contract year minus the total deferred RAP limit, prior to allocation to qualifying RAP insurers. A RAP insurer must determine its actual RAP retention by multiplying its actual mandatory reimbursement FHCF premium by the RAP retention multiple.

The bill authorizes the board to inspect, examine, and verify the records of covered policies of each RAP insure to validate the accuracy of losses reported pursuant to the RAP reimbursement contract.

The RAP reimbursement contract must provide for a commutation period not to exceed five years from the end of the 2022-2023 contract year for RAP insurers that participate during that contract year; or the 2023-2024 contract year for RAP insurers that defer and participate during that contract year.

### ***Other Provisions***

- Prohibits the payment of premiums for participation in the RAP program.
- Provides that the RAP program shall not affect the claims-paying capacity of the FHCF.
- Specifies that any violation of this section or of rules adopted under the section constitutes a violation of the insurance code.
- Requires the RAP reimbursement contract to provide that in the event of an insolvency of a RAP insurer, the RAP program shall pay reimbursements directly to the applicable state guaranty fund for the benefit of Florida policyholders of the RAP insurer.
- Provides that, if an authorized insurer or Citizens assumes or otherwise provides coverage for policies of an unsound RAP insurer, the authorized insurer or Citizens may, pursuant to conditions mutually agreed to between the authorized insurer or Citizens and the State Board of Administration, accept an assignment of the unsound RAP insurer's RAP contract with the FHCF.
- Provides that, if an authorized insurer or Citizens accepts an assignment of an unsound RAP insurer's RAP contract, the FHCF shall apply the unsound RAP insurer's RAP contract to such policies and treat the authorized insurer or Citizens as if it were the unsound RAP insurer for the remaining term of the RAP contract, with all rights and duties of the unsound RAP insurer beginning on the date it provides coverage for such policies.
- Authorizes the board to take any action necessary to enforce the provisions, rules, and requirements of the RAP reimbursement contract.
- Authorizes the board to adopt rules to implement this section and it is the intent of the Legislature that all rules adopted to implement this section will be adopted as emergency rules pursuant to s. 120.54(4), F.S.
- Requires the board to submit a report to Executive Office of the Governor, the President of the Senate, and the Speaker of the House of Representatives no later than January 31, 2023, and quarterly thereafter. The report must delineate any reimbursement obligations of the RAP program, all loss development projections, the amount of RAP reimbursement coverage deferred until the 2023-2024 contract year, and information regarding administrative and post-event examination expenses.

**Section 2** creates undesignated section and requires an insurer that participates in RAP program for 2022-2023 to reduce their rates by filing a rate filing or amending a pending rate filing with the OIR by June 30, 2022, to reflect the savings from the RAP program. An insurer that defers using the RAP program until the 2023 year must reduce rates in a rate filing submitted to the OIR by May 1, 2023. The OIR is directed to expedite the review of such filings.

## **My Safe Florida Home Program**

**Section 3** amends s. 215.5586, F.S., to revise the My Safe Florida Home Program in the following manner.

### ***Eligibility for Hurricane Mitigation Inspections***

Requires an application for inspection to contain a provision requiring applicants to agree to make their home available for inspection after the mitigation project is completed, as provided in the application for inspection.

### ***Eligibility for Mitigation Grants***

- The homeowner eligibility requirements for the mitigation grants are revised in the following manner: The home must be a dwelling with an insured value of \$500,000 or less. Low-income homeowners are exempt from this requirement. The current maximum insured value is \$300,000 or less.
- Requires as a condition for participation in the program, a building permit for the initial construction of the home must have been made before January 1, 2008. Current law specifies May 1, 2007.
- Requires the home must have undergone an acceptable hurricane mitigation inspection after July 1, 2008 instead of May 2007. The program is effective July 1, 2022.
- Clarifies that the home must be in the “wind-borne debris,” as that term is defined in the Florida Building Code. This is a technical change.

All program grants must be matched on the basis of \$1 provided by the applicant for \$2 provided by the state, up to a maximum state contribution of \$10,000 toward the actual cost of the mitigation project. Low-income homeowners may receive up to \$5,000 in grant funds without providing matching dollars.

### ***Program Transparency Requirements***

- Expands the scope of the current annual report of program activities DFS submits to the President of the Senate and the Speaker of the House of Representatives to include the average annual amount of insurance premium discounts and the total of such discounts homeowners received from insurers resulting from the mitigation funded through the program.

This section is effective July 1, 2022.

### ***Funding of My Safe Florida Home Program***

**Section 4** provides funding for the My Safe Florida Home Program in the following manner:

- Appropriates \$150 million from nonrecurring funds from the General Revenue Fund for the 2022-2023 fiscal year to implement the program.
- Requires that appropriated funds be placed in reserve. The DFS must submit budget amendments requesting release of the funds held in reserve pursuant to ch. 216, F.S. The budget amendment must include a detailed spending plan.
- Provides that the funds must be allocated as follows:

- \$25 million dollars for hurricane mitigation inspections.
- \$115 million dollars for mitigation grants.
- \$4 million for education and consumer awareness.
- \$1 million for public outreach for contractors and real estate brokers and sales associates.
- \$5 million for administrative costs.
- Specifies that any unexpended balance of funds remaining on June 30, 2023, reverts and is appropriated to the DFS for the 2023-2024 fiscal year for the same purpose.

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This section expires October 1, 2024.

### **Contractor Solicitation of Roof Claims**

**Section 5** amends s. 489.147, F.S., relating to prohibited property insurance practices. The section prohibits contractors from making written or electronic communications that encourage or induce a consumer to contact a contractor or public adjuster for the purpose of making a property insurance claim for roof damage unless such solicitation provides notice in a prescribed format that:

- The consumer is responsible for the payment of any deductible.
- It is insurance fraud punishable as a third-degree felony for a contractor to knowingly or willfully, and with intent to injure, defraud, or deceive, pay, waive, or rebate all or part of an insurance deductible applicable to payment to the contractor for repairs to a property covered by a property insurance policy; and
- It is insurance fraud punishable as a third-degree felony to file intentionally an insurance claim containing false, fraudulent, or misleading information.

### **Civil Remedy**

**Section 6** creates s. 624.1551, F.S. to require a claimant to establish that a property insurer breached the insurance contract in order for the claimant to prevail in a bad faith claim for extracontractual damages under s. 624.155(1) (b), F.S. The provisions will apply to civil remedy actions based upon a property insurer:

- Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for his or her interests;
- Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or
- Except as to liability coverages, failing to promptly settle claims, when the obligation to settle a claim has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy.

### **Insurer Transparency and Reporting**

**Section 7** amends s. 624.307, F.S., relating to the OIR, to require the OIR to publish all orders, data required by ss. 624.313, 624.315, and 627.915, F.S., reports required by s. 627.7154(3), F.S., and all reports that are not confidential and exempt on its website in a timely manner.

**Section 8** amends s. 624.313, F.S., relating to publications, to require the OIR to provide an analysis of the availability of reinsurance to domestic insurers selling homeowners' and condominium unit owners' insurance in Florida in OIR's annual statistical report. The report must be available no later than July 1 of each year.

**Section 9** amends s. 624.315, F.S., to revise the scope of the OIR annual report and other available information in the following manner:

- Requires the inclusion of the names of insurers against which delinquency or similar proceedings were instituted, including the date that each insurer was deemed impaired of capital or surplus, as the terms "impairment of capital" and "impairment of surplus" are defined in s. 631.011, F.S., or insolvent, as the term "insolvency" is defined in s. 631.011, F.S.; and
- Requires a concise statement of the circumstances that led to each insurer's delinquency; a summary of the actions taken by the insurer and the office to avoid delinquency; and the results or status of each such proceeding.

Further, the OIR must maintain the following information and make such information available upon request:

- Reports relating to the health of the homeowners' and condominium unit owners' insurance market must include the percentage of policies written by voluntary carriers, the percentage of policies written by Citizens; and
- Any trends related to the relative shares of the voluntary and residual markets.

**Section 10** amends s. 624.424, F.S., relating to annual statements and other insurer reporting requirements. The section directs the OIR to make publicly available data detailing the number of policies, amount of premium, number of cancellations, and other data for each property insurer on a statewide basis. The information must be published on the OIR website within 1 month after each quarterly and annual filing. The section specifies such information is not a trade secret as defined in s. 688.002(4), F.S., or s. 812.081, F.S., and is not subject to the public records exemption for trade secrets provided in s. 119.0715, F.S.

### **Attorney Fees – Prohibiting Assignment of the Right to Recover Attorney Fees**

**Sections 11 and 12** amend ss. 626.9373 and 627.428, F.S., respectively, to prohibit assignment of the right to obtain attorney fees in suits arising out of a property insurance policy to persons other than a named or omnibus insured or a named beneficiary under the policy. This prohibition applies to surplus lines and authorized insurers. As a result, agreements may occur, but the assignee vendor will no longer be able to recover attorney fees in suits against an insurer.

### **Roof Deductibles**

**Section 13** amends s. 627.701, F.S., to allow property insurers to include in a homeowner's policy a separate roof deductible of up to two percent of the Coverage A limit of the policy or 50 percent of the cost to replace the roof. The policyholder must also be offered the option to decline the roof deductible by signing a form approved by OIR. If a roof deductible is added to the policy at renewal, the insurer must provide a notice of change in policy terms and allow the policyholder to decline the separate roof deductible.

Policyholders that select a roof deductible must receive an actuarially sound premium credit or discount.

The bill specifies that the roof deductible does not apply to:

- A total loss to the primary structure in accordance with the valued policy law under s. 627.702, F.S., which is caused by a covered peril.
- A roof loss caused by a hurricane.
- A loss resulting from a tree fall or other hazard that damages the roof and punctures the roof deck.
- A roof loss requiring the repair of less than 50 percent of the roof.

When a roof deductible is applied, no other deductibles under the policy may be applied.

The bill requires a roof deductible provision to be clear and unambiguous.

The bill requires the inclusion of the following disclosures related to the roof deductible:

- On the page immediately behind the declarations page, notice that a roof deductible may result in high out-of-pocket expenses to the policyholder.
- On the policy declarations page, prominent display of the actual dollar value of the roof deductible at issuance and renewal.

### **Roofs – Insurer Underwriting and Requirement to Pay Roof Deductible**

**Section 14** amends s. 627.7011, F.S., to provide that an insurer may not refuse to issue or refuse to renew a homeowner's policy insuring a residential structure with a roof that is less than 15 years solely because of the age of the roof. When a roof is at least 15 years old, an insurer must allow a homeowner to have a roof inspection performed by an authorized inspector at the homeowner's expense before requiring the replacement of the roof as a condition of issuing or renewing a homeowner's insurance policy. The insurer may not refuse to issue or refuse to renew a homeowner's insurance policy solely because of roof age if an inspection of the roof of the residential structure performed by an authorized inspector indicates that the roof has 5 years or more of useful life.

The bill allows an insurer to limit payment on a roof claim to actual cash value until the policyholder pays the roof deductible.

### **Claims Handling**

**Section 15** amends s. 627.70131, F.S., relating to communications between an insurers and insureds in the following manner:

- Provides that for claims other than those subject to a hurricane deductible, an insurer must conduct any such physical inspection within 45 days after its receipt of the proof of loss statements.
- Requires insurers to notify policyholders of their right to receive any detailed report created by an adjuster that estimates the amount of the loss.



- The insurer must provide a reasonable explanation of the claim decision in relation to the insurance policy, facts, and law. If the insurer makes a claim payment that is less than contained in an adjuster's estimate of the loss, the insurer must explain the discrepancy.

This section is effective January 1, 2023.

### **Attorney Fees – Standard for Fee Multiplier Awards**

**Section 16** amends s. 627.70152, F.S., in the following manner:

- Creates a new standard for the award of an attorney fee multiplier in property insurance litigation. The bill creates a presumption that in property insurance cases, attorney fee awards based on the Lodestar methodology are presumed sufficient and reasonable. Attorney fee multipliers may only be awarded under rare and exceptional circumstances with evidence that competent counsel could not be hired in a reasonable manner.
- Allows a court to award attorney fees when a first-party claimant's property insurance suit is dismissed without prejudice for failure to provide a Notice of Intent to Initiate Litigation.

### **Technical Change**

**Section 17** provides a technical, conforming change to update a cross reference in s. 627.7142, F.S.

### **Assignment of Benefits**

**Section 18** amends s. 627.7152, F.S., relating to assignment agreements, to revise the definition of assignment agreement to include AOBs executed by a party that inspects the property, clarifies that public adjuster fees are not an assignment agreement, and clarifies the requirement to provide a Notice of Intent to Initiate Litigation before filing suit. Further, the section:

- Requires that a valid AOB must specify that the assignee will hold harmless the assignor from all liabilities, including attorney fees.
- Eliminates statutory language authorizing attorney fee awards to plaintiffs or defendants in litigation brought by an assignee of benefits under a property insurance policy.

The bill repeals statutory language detailing the methodology for awarding attorney fees to plaintiffs or defendants in litigation brought by an assignee of benefits under a property insurance policy. The language is no longer necessary because the bill prohibits assignment of the right to recover attorney fees in suits arising out of a property insurance policy.

### **OIR Insurer Stability Unit**

**Section 19** creates s. 627.7154, F.S., to establish an insurer stability unit within the OIR. The purpose of the unit is to detect and prevent insurer insolvencies in the homeowners' and condominium unit owners' insurance market. Specifically, the unit is to identify significant concerns regarding insurer compliance with the insurance code. The unit must, at minimum:

- Conduct target market exams when there is reason to believe that an insurer's claims practices, rate requirements, investment activities, or financial statements suggesting said insurer may be in an unsound financial condition.

- Conduct target market exams when there is reason to believe that an insurer's claims practices, rate requirements, investment activities, or financial statements suggest that the insurer may be in an unsound financial condition.
- Have primary responsibility, coordinating with Florida Commission on Hurricane Loss Projection Methodology, to conduct annual catastrophe stress tests of all domestic insurers and insurers that are commercially domiciled in this state.
- Update required wind mitigation credits.
- Review the causes of insolvency and business practices of insurers that have been referred to the Division of Rehabilitation and Liquidation of DFS, and make recommendations to prevent future occurrences of such.
- File biannual reports on the status of the homeowners' and condominium unit owners' insurance market to the Governor, the President of the Senate, the Speaker of the House of Representatives, the Minority Leader of the Senate, the Minority Leader of the House of Representatives, and the chairs of the legislative committees with jurisdiction over matters of insurance.

The section also specifies events that trigger a referral to the insurer stability unit. Expenses for the unit are to be paid from the Insurance Regulatory Trust Fund, except that, if the unit recommends that a market conduct exam or targeted market exam be conducted, the reasonable cost of the examination shall be paid by the person examined.

### **Initiation and Commencement of Delinquency Proceedings; Prevention of Insolvencies**

**Sections 20 and 21** amend ss. 631.031 and 631.398, F.S., respectively, to require the OIR to include an affidavit that identifies the grounds for rehabilitation pursuant to s. 631.051, F.S., a statement of the circumstances that led to the insurer's delinquency, and a summary of the actions taken by the insurer and the OIR to avoid delinquency. Further, the DFS is required to analyze and submit reports on the history and causes of insolvencies involving a domestic property insurer.

### **Conflict with Laws Passed During the 2022 Regular Session**

**Section 22** provides that if any law amended by this act was also amended by a law enacted during the 2022 Regular Session of the Legislature, such laws shall be construed as if enacted during the same session of the Legislature, and full effect shall be given to each if possible.

### **Effective Date**

**Section 23** provides that except as otherwise provided, the bill is effective upon becoming a law.

## **IV. Constitutional Issues:**

### **A. Municipality/County Mandates Restrictions:**

None.

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

None.

**C. Trust Funds Restrictions:**

None.

**D. State Tax or Fee Increases:**

None.

**E. Other Constitutional Issues:**

None.

**V. Fiscal Impact Statement:****A. Private Sector Impact:**

Inspections and retrofits of residential homes through the My Safe Florida Home will result in homeowners having more resilient and safer homes, and receiving reductions in insurance premiums due to such mitigation. Additionally, savings generated from the mandatory RAP program will directly result in either refunds or lower rates from insurers that participate in the RAP program.

**B. Tax/Fee Issues:**

None.

**C. Government Sector Impact:**

There is \$2 billion in nonrecurring funds from the General Revenue Fund designated for reimbursements for the RAP program. These funds may be used if the SBA determines that funds from the RAP program coverage will be necessary to reimburse RAP insurers for losses associated with a hurricane. Additionally, there is \$5 million in nonrecurring funds from the General Revenue Fund designated for administrative costs of the State Board of Administration in the event such RAP program reimbursements are implemented.

There is \$150 million in nonrecurring funds from the General Revenue Fund appropriated to the Department of Financial Services for the My Safe Florida Home Program. These funds are designated for the following purposes:

- \$25 million for hurricane mitigation inspections.
- \$115 million for hurricane mitigation grants.
- \$4 million for education and consumer awareness.
- \$1 million for public outreach to contractors, real estate brokers, and sales associates.
- \$5 million for administrative costs.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 215.5586, 489.147, 624.307, 624.313, 624.315, 624.424, 626.9373, 627.428, 627.701, 627.7011, 627.70131, 627.70152, 627.7142, 627.7152, 631.031, and 631.398.

This bill creates the following sections of the Florida Statutes: 215.5551, 624.1551, and 627.7154.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.