POLICY BRIEF

Battening Down: Policy Reforms to Avoid a Florida Insurance Meltdown

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INTRODUCTION

Florida's pro-growth business environment, as well as its climate, low taxes, and position as the gateway to Latin America have encouraged the flow of people and capital into the state and created enviable levels of economic and population growth. In 2014 Florida surpassed New York to become the third-most-populous state in the nation,[1] in 2018 it surpassed $1 trillion in GDP making it the 17th largest economy in the world,[2] and earlier this year it was awarded an additional congressional seat following the 2020 Census that found a population growth of 14.6 percent over the last decade.[3]

This growth has only accelerated in recent months due to the state's aversion to onerous pandemic restrictions and lockdowns. Governor Ron DeSantis' commitment to keeping the state open for business allowed Florida to weather many of the economic consequences of the pandemic relatively unscathed and led to the largest change in net move-ins of any state in 2020.[4] By May of 2021, the state's

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job vacancies were at pre-pandemic levels, the unemployment rate was returning to record lows, and salaries were climbing.[5] In September alone, Florida's job growth rate was three times that of the national average and the state accounted for roughly 43 percent of all jobs created nationwide.[6]

In the aggregate, this is all great news for Florida, but growth invariably brings growing pains. There are more cars, trucks, and accidents on increasingly congested roadways and more people and wealth concentrating predominantly in the state's more desired coastal areas, which are more naturally prone to storms and flooding. Florida's geographic position coupled with the aforementioned growth in population and economic activity has thus caused property and auto insurance rates to be costlier than in many other states.

Indeed, these are legitimate cost drivers that would justify some gradual rate escalation, especially when combined with modest reinsurance price increases after recent losses globally and this year's inflation spikes domestically. However, the dramatic double-digit rate increases many Florida insurance consumers are experiencing disproportionately exceed many of these cost factors. Even worse, most Florida property insurers are reporting multiple years of net profit losses[7] despite increasing their rates, confirming their inability to keep up with the costs driving their increasing premiums. As such, it is evident that the swelling price tags plaguing Florida consumers are being propelled by cost drivers disconnected from the economy, the state's inherent risks, and other organic factors state lawmakers cannot directly control.

The good news is, Florida lawmakers know what is driving these massive rate increases and they can and have taken steps to address it in recent years. But more needs to be done.

With the Legislature poised to confront several new challenges, lawmakers will also need to grapple with this familiar issue yet again. The following report outlines how insurance rate increases have stemmed from behavior by stakeholders exploiting vulnerabilities in the law, the meaningful steps the Florida Legislature has taken in recent years to combat the abuse, and how it can build upon those reforms to stabilize the insurance market and hopefully promote more investment, competition, and lower rates for consumers.

FLORIDA'S LITIGATION PROBLEM

For almost two decades, the Florida property insurance market has been plagued by excessive litigation and fraud stemming from insurance claims enabled by the exploitation of laws and court decisions governing attorney fees, bad faith rules, and an insurance practice known as "Assignment of Benefits" (AOB).

An AOB allows a third party – such as a contractor, body shop, water-extraction company or other vendor – to stand in the place of the insured and assume the policyholder's benefits by collecting payments directly from the insurance company for a covered loss. In doing so, the policyholder also transfers to the third party the right to negotiate and adjust the claim in question. Hence, no payments of reimbursement are made directly to the policyholder.

Most health insurance and personal injury protection (PIP) auto policies function under this arrangement, which allows health care providers to collect insurance payments directly for covered medical services.

In recent years, however, AOBs have become more common in property insurance claims where a policyholder has the right to assign his or her policy benefits for a specific loss,[8] including the benefit in Florida law allowing policyholders to sue an insurance company and then have their attorney fees covered by the insurer, also known as the "one-way attorney fees" provision.[9]

With the homeowner out of the picture and no longer in a position to negotiate and thus mitigate repair costs, crooked contractors would oftentimes inflate their bills, and/or charge for repairs that are unnecessary or unrelated to the loss in question. In more and more cases, contractors partnered with trial lawyers as a matter of practice, availing themselves of the aforementioned "one-way attorney fees" benefit in state law, as well as bad-faith rules that were designed to protect ordinary consumers.

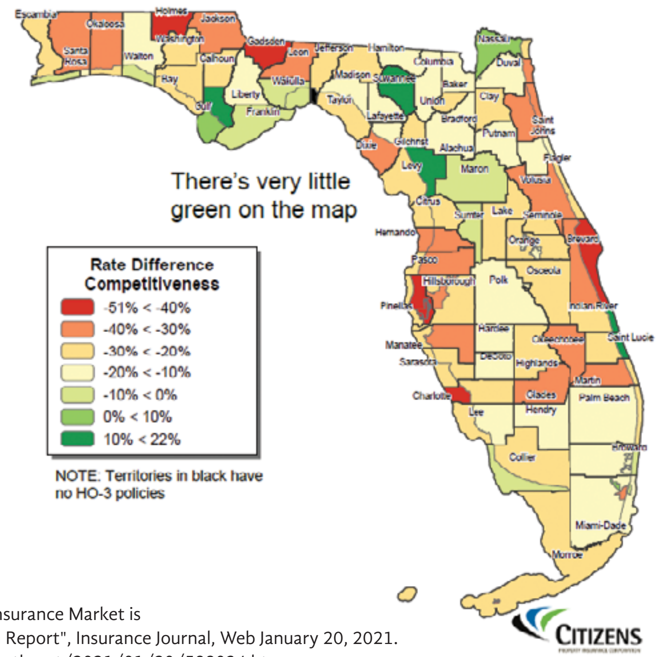
The constant threat of litigation and massive judgments far beyond policy coverage limits borne out of lawyers exploiting one-way attorney fee and bad faith laws served as a perverse incentive for insurers to settle for amounts greater than they otherwise would have. These abuses amplified the number and severity of claims and thus resulted in even higher rates for consumers.

But despite efforts by most insurers to avoid litigation, AOB-related lawsuits increased—exponentially, especially as they related to non-catastrophe claims, mostly involving water damage from broken pipes. Such lawsuits were rare in Florida almost 20 years ago; between 2004 and 2005, there were just slightly more than 9,400 AOB-related suits filed statewide. In subsequent years, these lawsuits multiplied by nearly 1,000 percent, with 92,000 such suits filed between 2013 and 2014.[10] In 2018 alone, there were roughly 135,000 AOB lawsuits – an increase of 70 percent in just 15 years.[11]

This scheme caused insurance rates to skyrocket despite an unprecedented "hurricane drought" in which no storm made landfall in the decade preceding 2016. Consumers had legitimate concerns when they asked why rates were rising so sharply, especially in the absence of hurricanes and with reinsurance rates and other risk transfer products at near-record low prices.

91% of Citizens' HO-3 policies are **LESS** than the average competitor's approved rates as of 10/1/20 using Citizens' in force data as of 9/30/20

In 2020, **105** rate filings for increases of **10% or more** have been made with the Office of Insurance Regulation



Source: O'Connor, Amy, "Florida's Property Insurance Market is 'Spiraling Towards Collapse' Due to Litigation Report", Insurance Journal, Web January 20, 2021. https://www.insurancejournal.com/news/southeast/2021/01/20/598034.htm

Prior to these reforms, there were justified fears that the AOB cottage industry could easily pivot from exploiting non-catastrophe losses to more lucrative hurricane-related claims should a storm finally strike the state after its long dry spell. Indeed, even reinsurers were expressing concerns as early as 2016 that the issue was trickling into Florida's reinsurance pricing[13] due to fears that reinsurers would be on the hook for artificially inflated hurricane claims stemming from AOB abuse and excess litigation.

And they were right.

Although better late than never, AOB reform appears to have arrived three years too late. Florida's decade-long hurricane drought ended when Hurricane Hermine made landfall in 2016, and major Hurricanes Irma and Michael in the years that followed. The catastrophic losses from these hurricanes allowed contractors and plaintiff's attorneys to continue exploiting the laws that existed before HB 7065 was enacted in 2019, but this time for much larger hurricane claims, as reinsurers and other stakeholders feared. Just days after Hurricane Michael struck the Florida Panhandle in October 2018, for example, there were already reports of vendors pushing AOBs in storm-ravaged areas.[14]

But the abuse did not simply end in 2019 when reforms were enacted. Even today, insurers are still being plagued with lawsuits from those storms because reforms do not have retroactive application to claims arising out of losses that occurred prior to a new law. Until this year, Florida law allowed policyholders to file a windstorm claim or supplemental claim up to three years after a storm's landfall. Although the Legislature reduced the window to file claims from three to two years as a result of SB 76 in 2021,[15] the rules for any insurance claim are governed first and foremost by the contractual provisions written in the policy in force at the time of the loss, not the policy or laws in force when the claim is filed; hence, the pre-reform exploitable rules apply.

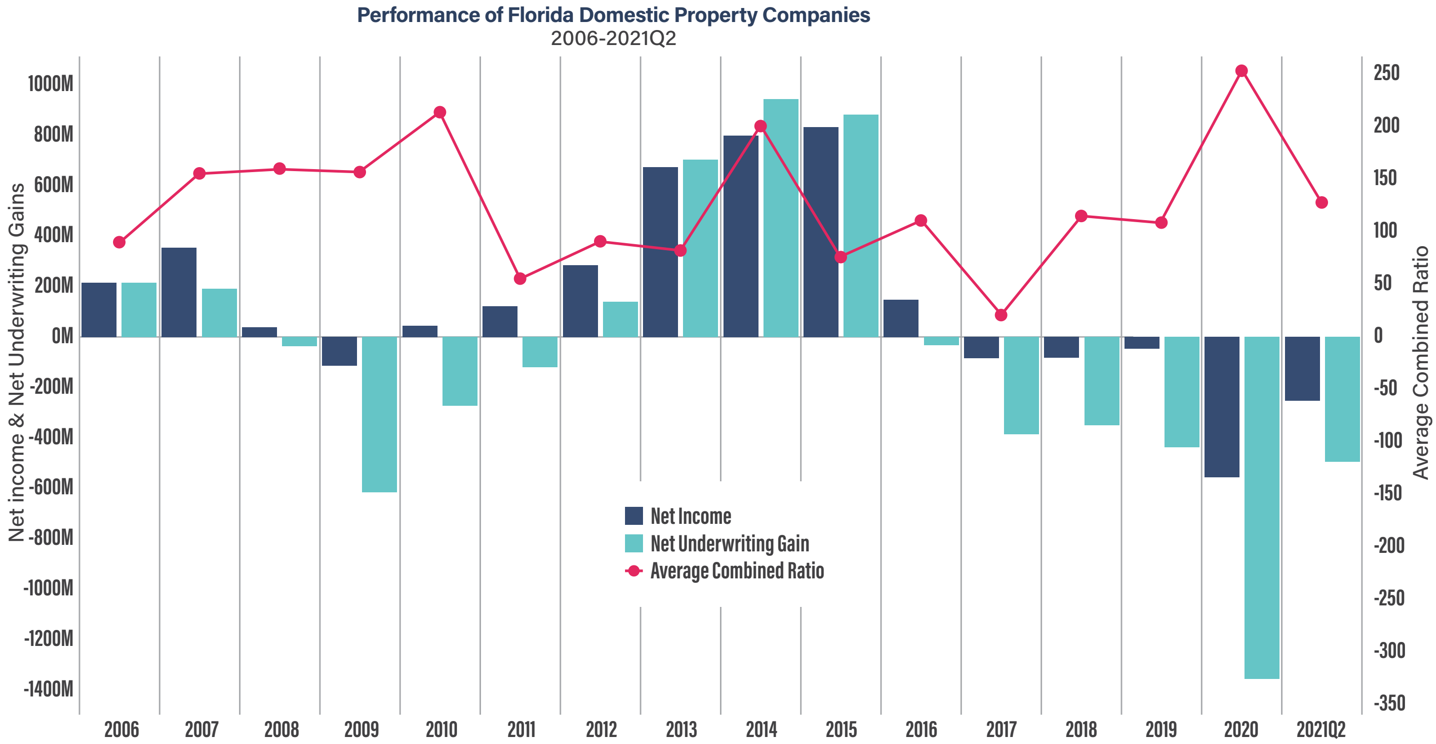
This is why insurers, including Citizens Property Insurance Corporation (Citizens), the state's government-run insurer of last resort, are still grappling with litigation from these storms years later. Citizens alone is still reporting over 900 AOB-related lawsuits per month; the majority of those are from losses prior to the enactment of HB 7065 and 45 percent stem just from Hurricane Irma.

In 2019 alone, Florida accounted for 76 percent of all insurance

RECENT REFORMS

After seven years of deliberation and several proposed reforms, the Legislature passed HB 7065 in 2019 to address unrestrained litigation incentivized by the one-way attorney fee law and unrestricted use of AOBs. The bill contained several provisions, including:

- Defining an AOB and establishing certain requirement for its execution;
- Transferring certain duties in the insurance contract to the assignee, such as the duties to cooperate with the insurer and to maintain certain records as conditions to access the policy benefits;
- Allowing insurers to restrict AOBs in their policies provided that they also make unrestricted policies available to the insured;
- Allowing policyholders to rescind an AOB within 14 days;
- Prohibiting certain fees;
- Protecting policyholders from liens due to an AOB;
- Requiring insurers to report prior-year AOB claims data yearly so the state and the public can better monitor claims and litigation trends;
- Requiring that prior written notice of a lawsuit (at least 10 business days before filing one) be given to insurers and policyholders; and
- Replacing the one-way attorney fee law with a fee formula based on the difference between the demand, offer, and judgement, which will determine which party, if any, receives attorney fees in AOB-related lawsuits.[12]



△ The domestic companies do not include Citizens Property Insurance Corporation. The data is from financial statements submitted to te National Association of Insurance Commissioners.

litigation nationwide, even though the state only accounted for 8 percent of all insurance claims filed during the same period.[16] Non-litigated claims vs. litigated claims make a huge difference: in Citizens' case, for example, the average non-litigated claim costs $10,200, while a litigated one costs $48,700.[17] As discussed earlier, this incentivizes insurers to increase their initial payouts to avoid litigation.

Had the Legislature enacted those reforms just three years earlier before hurricanes began to strike the state again, Floridians would likely be looking at a far healthier property insurance market.

Instead, the property insurance market finds itself in what the Florida Insurance Commissioner describes as a "dire" state.[18] Out of 52 carriers that represent the Florida domestic insurance market, 49 companies have generated net income losses in the years since 2017. This represents a $1 billion deficit for the industry, including national carriers,[19] and the losses are growing. In 2020, losses exceeded $1.5 billion,[20] and the trends for 2021 are worse. During the first six months of 2020, insurers experienced $500M in losses; during the same period in 2021, the losses increased by 50 percent to $750M.[21]

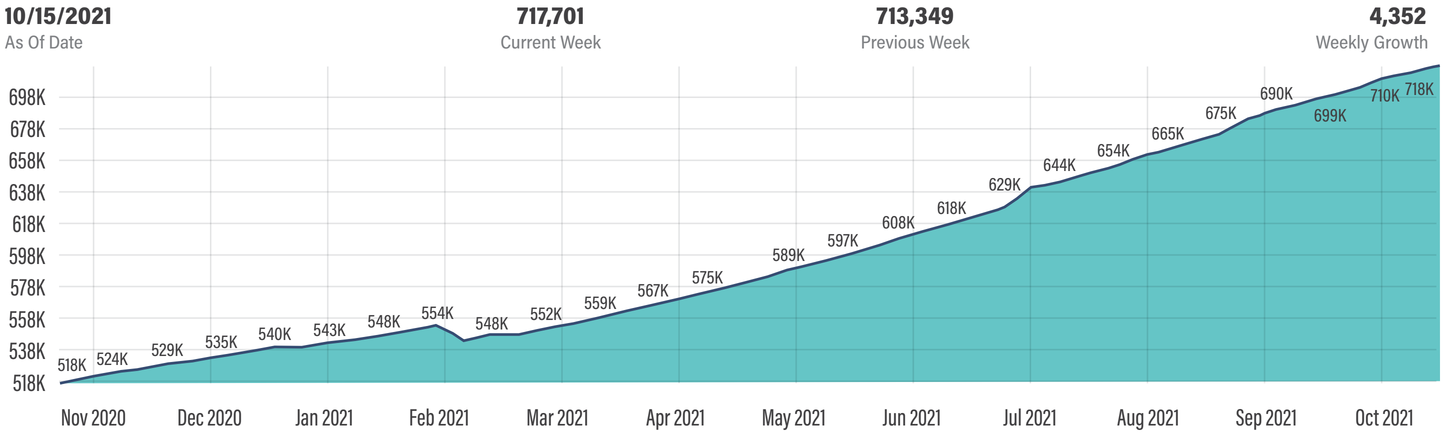
If these payouts were mostly due to actual losses from an outbreak of storms or legitimate damage caused by some other covered perils, and most of that money went to make policyholders whole, that would be one thing. But that is not the case in Florida. Since 2013, $15 billion has been paid out in claims by insurers across the state; out of that amount, 71 percent went to pay attorney fees, 21 percent went to pay insurer defense costs, and a meager eight percent went to the policyholders for their losses.[22]

The result? Florida consumers are seeing their property insurance rates soar by double digits. Rate increases being approved by the Office of Insurance Regulation (OIR), which are oftentimes below those requested by the insurers, range between 12 to 31 percent.[23] Even more unlucky policyholders are being canceled or non-renewed altogether.

To make matters worse, these double-digit rate increases consumers are experiencing, as well as private insurers' decisions to reduce their exposure are forcing policies back into state-run Citizens en masse. Because Citizens is prohibited from raising its rates beyond 10 percent per year due to the "glidepath" provision in state law,[24] it has been unable to keep up with the necessary rate increases to remain actuarially sound, which has created a widening gap between the premiums charged by Citizens and those charged by private insurers. Currently, Citizens is quoting a lower rate than its private market competitors about 91 percent of the time,[25] and due to that price difference, consumers are increasingly and understandably turning to government-run Citizens for their coverage instead of the private market. In September, Citizens had roughly nine percent of the state's policies;[26] the following month, that figure hit 10 percent, and next year's forecast is that Citizens will have a market share of 13 percent. Just a few years ago after successful depopulation efforts, Citizens had only 4.5 percent of the market.[27]

Given the dire state of the insurance market, the industry's ac-

Week-Over-Week Policy Count for Inforce



Citizens has grown by 200,000 policis over a 12-month period.

cruing losses, and consequent double-digit rate increases plaguing consumers, the legislature approved another insurance and tort reform package during its 2021 Legislative Session, which included provisions that built upon HB 7065.

SB 76, which passed the last day of the 2021 Legislative Session:

- Attempts to rein in the growth of Citizens by tightening its eligibility requirements and phasing in an expansion of the glidepath from its current 10 percent cap and increasing it one percent per year to 15 percent starting in 2022.
- Requires Citizens to include the cost of reinsurance in its rate calculations.
- Requires plaintiffs to notify the insurer before a lawsuit is filed in the form of a pre-suit demand at least 10 days before filing suit; the notice must include an estimate of the demand, the attorney fees and costs, and the disputed amount; and prohibits such notices to be filed before the insurance company has had an opportunity to make a determination of coverage.
- Allows an insurer to use mediation or another form of alternative dispute resolution after receiving a pre-suit notice.
- Replaces the one-way attorney fee statute with a formula modeled after the AOB attorney fee reforms in HB 7065 to make the recovery of attorney fees and costs contingent on obtaining a judgment for indemnity that exceeds the pre-suit offer made by the insurance company.
- Reduces the deadline to file insurance claims from three to two years from the date of loss, except for supplemental claims, which will have an additional year.
- Prohibits certain advertising and solicitations that encourage or instruct a policyholder to contact a contractor or public adjuster for the purpose of filing an insurance claim for roof damage.

The provision restricting solicitations for roofing insurance claims was quickly blocked by a federal judge days after the bill's effective date on constitutional grounds.[28] Nevertheless, the legislation was welcomed with guarded optimism by the insurance industry, stakeholders, and lawmakers. But much like HB 7065, it may have come too late.

Although SB 76 took effect in July of this year, it will likely take 18 months or more for the reforms to have a demonstrable effect on the property insurance market, as its provisions cannot be applied retroactively and the language in most policies in force today reflects what the rules were before the new law. Until then, the bleeding is expected to continue.

Just days after the bill passed, the OIR approved insurers' requests to drop over 50,000 policies,[29] and more recently it placed about a dozen companies under a monthly (versus quarterly) reporting requirement for additional scrutiny.[30] This year alone, two insurance companies—Gulfstream and American Capital (AmCap)—went insolvent and will have to be bailed out by the Florida Insurance Guarantee Association (FIGA) to the tune of $168 million, which Florida policyholders will likely cover through a 0.7 percent assessment on top of their already-rising insurance premiums—the first such assessment since 2012.[31]

So although the Legislature has taken meaningful steps, the current and projected losses remain unsustainable, as evidenced by this year's two insolvencies. As such, unless SB 76 has an unexpectedly immediate and powerful effect on the market, insurers are left with only three options:

1. Continue reducing exposure (i.e., non-renew policies or withdraw from the state entirely);
2. Increase rates; and/or
3. Raise or attempt to recover lost capital (i.e., attract investors).

IMMEDIATE SOLUTIONS

Although most experts and stakeholders believe SB 76 will have a meaningful effect, it is estimated that those effects will take at least 18 months to begin flattening the curve of claims, litigation, losses, and rate increases; as such, it is incumbent upon lawmakers to take additional steps to shore up the market in the meantime in order to avoid additional mass policy cancellations, insolvencies, or worse. Given current realities, it is doubtful investors will want to risk their capital in the state's "dire" property insurance market, but a few tweaks to existing law may encourage some modest investment to buy some time and keep the market afloat.

Open Surplus Lines

First, lawmakers can and should explore opening the HO3* policies market to surplus lines** carriers. Given that admitted carriers initially reported $100 million in Irma losses, which have now swollen to $250 million due to ongoing litigation,[32] surplus lines carriers would not be burdened with that "tail" of claims and litigation as new entrants into the market. As such, that "baggage" would not be reflected in their rates, and they would have the added benefit of operating fresh under the new reforms designed to mitigate against those problems prospectively.

Reduce Citizens

Reining in the growth of Citizens is another way for lawmakers to attract new capital and insurers. SB 76 tightened Citizens' eligibility by steering potential Citizens policyholders to private carriers if a comparable policy was available within 20 percent of the premium Citizens was charging. However, existing Citizens policyholders are currently under no obligation to switch to a private carrier even if one or more offers them a quote within the 20 percent range; instead, a Citizens policyholder must affirmatively opt-out of Citizens at his or her discretion.[33] Should lawmakers extend the same eligibility standards to existing Citizens policyholders, new and existing carriers would be able to quantify how many policies they could realistically take over and thus would be far more likely to enter into depopulation agreements with Citizens to write policies at rates unburdened by the litigation "tail" from past losses. Efforts should also be made to dispel the perception in many parts of the state that Citizens is the "Cadillac Plan" of property insurers by allowing it to write policies with less attractive coverage options compared to the private market.

Another way to reduce Citizens is to further limit where it can write policies. In 2013 the Florida Legislature enacted a provision[34] that prohibits Citizens from writing policies covering newly-constructed structures, or buildings whose footprints have been substantially expanded after 2015 if they lie seaward of the Coastal Construction Control Line (CCCL) or in any federally-designated wetland (existing structures were grandfathered for coverage eligibility).[35]

The CCCL is a line of jurisdiction in Florida law defining the landward limit of the state's authority to regulate coastal construction. It has been established along most of Florida's sandy beachfront properties, but does not extend into the Florida Keys or the mostly vegetated coastline of the state's "Big Bend" area.[36] This coverage prohibition has served a dual purpose:

1. Prospectively reducing the growth of Citizens' risk exposure by prohibiting it from covering the newest, most expensive buildings in the state's most storm and flood prone areas; and
2. Keeping this enormous risk in the appropriately-priced private market thereby encouraging any new development in these high-risk areas to be built stronger and more resiliently in order to obtain the most affordable coverage possible.

Lawmakers should consider expanding this prohibition to include more of the state's most storm and flood-prone areas. For example, expanding the prohibition to include newly built or substantially expanded structures within a *certain distance* of the CCCL (instead of merely seaward of the line) would further limit the growth of Citizens in the areas at highest risk of natural disasters and serve as a disincentive to over-develop and concentrate more wealth and people on barrier islands and other high-risk coastal zones. This would have positive environmental impacts as well as incentivize capital investments in insurers that specialize in coastal properties, especially since they would not be competitively undermined by the artificially-suppressed rates offered by Citizens.

These solutions would inject much-needed predictability into the state's insurance market, which would make investors look upon it more favorably; additionally, any efforts to slow and eventually reverse the migration of policies into government-run Citizens will protect the state's taxpayers and allow for more competition between private carriers.

**HO-3 insurance policies are the most common form of single-family home insurance that protect policyholders against property damage, legal liabilities and other expenses associated with unexpected disasters.*

***Surplus Lines carriers, also known non-admitted or unlicensed insurers, are authorized to write certain property and casualty insurance policies, but are not regulated by the state. They are usually specialized insurers covering certain risks that traditional regulated carriers are unable or unwilling to cover.*

Reinforce SB 76

In the short-term, lawmakers should also revisit the provisions that were left out of the final version of SB 76 regarding roof replacement cost coverage and those struck down by the courts.

One of the greatest cost drivers over the past few years has been the explosion of roof claims, driven largely by unscrupulous contractors and public adjusters offering homeowners a new roof paid for by their insurance companies. The four counties comprising the Greater Orlando area have been ground zero for roofing claims. Over the past four years, lawsuits there have increased by 588 percent and a majority of those are over roofing claims[37] despite no hurricanes or other major disasters directly impacting the area in recent years.

To combat this proliferation of roofing claims and litigation, SB 76 originally allowed insurers to only offer policies that adjusted roof claims to actual cash value if a roof is older than 10 years; it also allowed insurers to offer a policy that included a stated value limit for roof coverage with a disclosure that such a policy does not provide replacement cost coverage for the roof. In case of a catastrophic total loss of the primary structure, the homeowner would be reimbursed for the total amount of the insured property per the policy.[38] The final version of SB 76 did not include these provisions, so the Legislature would do well to revisit them with adequate consumer protections.

SB 76 also placed limits on how roofing contractors or anyone acting on their behalf could advertise their services to homeowners. Specifically, it prohibited electronic communications, telephone calls, or documents that solicit an insurance claim. A U.S. District Judge enjoined this provision of the law just days after it took effect, finding that it violates the First Amendment right of contractors, but left the rest of the law in force. Nevertheless, the judge suggested that the state can find a "less restrictive, narrowly drawn" way to address fraud.[39] Lawmakers should therefore revisit this provision and find a way to craft it so that it addresses unscrupulous behavior without restricting constitutionally-protected rights.

Additionally, the Florida Bar, which already regulates its members' advertising, would also do well in updating its rules with respect to the types of solicitations that promote inherently unscrupulous insurance claims and litigation.

LONG-TERM SOLUTIONS

Perverse incentives, abuse, and consequent rate increases have not been confined to the state's property insurance market. System-gaming and litigation have instigated auto insurance rate spikes that have disproportionately outpaced the gradual rise in auto accidents caused by additional drivers on the road, changes in driving behavior, the proliferation of mobile devices, and other inescapable risk factors. For example, there was only a 1.9 percent increase in insured automobiles in Florida[40] and only a four percent increase in injury crashes[41] between 2015 and 2017—hardly a justification for the 54 percent spike in Florida's PIP auto insurance rates in the same period. Despite the marginal increase in cars and accidents, there were over 60,000 PIP-related lawsuits filed in 2017, representing an increase of almost 50 percent in one year.[42]

The following meaningful reforms would combat Florida's deep-rooted culture of litigiousness perpetuated by loopholes in state law and restore sanity to the state's auto, property and other insurance systems:

Bad Faith Reform

In order to inflate claims and litigation beyond an insurance policy's coverage limits, many unscrupulous attorneys and third-party claimants have resorted to setting up insurers into a condition of bad faith. This is especially true in PIP automobile claims, which have low coverage limits of $10,000, but can become massive six or even seven-figure recoveries if a lawyer can successfully argue an insurer acted in bad faith.

Florida's bad faith statute outlines an insurer's responsibilities to act in good faith to settle a claim,[43] but is silent about the claimant's responsibilities to likewise act in good faith when dealing with an insurer to settle a claim. This one-sided application can reasonably create a situation where a claimant—be it a policyholder or a third party—can refuse to cooperate with the established claims settlement process or even sabotage it altogether thereby "setting up" an insurer into a condition of bad faith despite a clear willingness to settle the claim in a timely, good faith manner. A landmark case involving GEICO is one such example where the claimant's attorney refused to accept and actually returned a check for payment of full policy limits from the insurer, and then successfully sued for bad faith.[44] Other examples include intentionally making unreasonable or vague demands of insurance companies that are impossible to comply with, sending demand letters to an obscure company address (i.e., a different department or a satellite office in another state) in order to purposely create delays, and demanding payment of full policy limits when the case does not justify it.[45]

Indeed, even the courts have taken notice of how attorneys are gaming the system. In 2006, Florida's Second District Court of Appeal noted that:

> *The number of bad faith cases filed in the courts appears to be exponentially increasing, but the increase does not appear to be directly linked to the actions of the insurers. Instead, plaintiff's attorneys are filing bad faith actions over issues that it seems could be simply resolved, like the wording of the release in this case.*[46]

Allowing third-party bad faith lawsuits makes Florida an outlier. Eliminating them would be a bold move that would harmonize Florida with the 45 states that do not allow such lawsuits and would largely address many of the problems outlined herein.

Also, requiring both sides to act in good faith will deter unreasonable requests and foster more productive negotiations. When a claimant makes a settlement demand, the insurer should have a reasonable time—or "safe harbor" period—to accept, investigate, negotiate, or reject the offer. Engaging in dilatory and other devious tactics to deliberately plunge a good faith actor into a state of delinquency against his own will should be penalized, not rewarded with a cash windfall.

Lawmakers should also examine other states that have effectively dealt with similar abuse. West Virginia eliminated the right of third-party claimants to file third-party bad faith lawsuits in 2015. Instead, they were replaced with an administrative procedure allowing aggrieved third parties to file complaints with the insurance commissioner who investigates the cases and imposes fines and other punitive measures against insurers who act in bad faith, thus eliminating the profit motive. After just five years, consumers experienced an estimated $200 million reduction in automobile liability insurance rates in West Virginia[47]—a state with a population less than 10 percent of Florida's.[48]

No-Fault Auto Insurance Repeal & Replace

Several reforms have been undertaken in recent years to repeal Florida's no-fault PIP auto insurance system and replace it with a mandatory bodily injury liability structure,[49] but proposals have fallen short partly due to legitimate concerns that doing so without meaningful bad faith reform would exacerbate rate increases stemming from continued abuse of even higher coverage limits. Lawmakers should keep bad faith in mind should they revisit repealing and replacing PIP, and avoid mandating a medical payments (med-pay) benefit, which would essentially result in a "PIP-light" functioning almost identically to the current no-fault system.

Proponents of a mandatory med-pay benefit fairly argue about an inherent cost-shifting from auto insurers to health insurers, but given the managed care arrangements that health insurance companies operate under, there would be a significant reduction in overall costs.

If consumers want to add med-pay as an additional benefit to their auto insurance policies, they should be afforded the option. However, it should neither be required nor added to a policy by default in such a way that a policyholder must actively opt-out of it. The commission-based structure under which most insurance agents operate already incentivizes them to sell their customers additional insurance products, riders, and enhanced coverage options, and med-pay can be one of them.

Contingency Fee Multipliers

When claimants are awarded attorney fees, Florida courts follow the "lodestar" method established by the federal courts in which attorney fees are calculated based on the number of attorney hours reasonably expended on the case multiplied by a reasonable hourly rate. In certain cases, the court might increase the attorney fees reward by applying a contingency risk multiplier to the calculated lodestar amount. The United States Supreme Court determined that such multipliers may apply in "exceptional" circumstances,[50] but the Florida Supreme Court in 2017 dramatically expanded their use in state cases holding that a contingency fee multiplier may be applied in almost any case, even if the lodestar amount was itself reasonable.[51]

Consequently, fee multipliers are more regularly applied than not in Florida, even in the most ordinary of insurance litigation cases. Attorney fees awarded by state courts are oftentimes double what they would be without such multipliers, paid for by insurers and recovered through higher insurance rates. In one case where a jury awarded a plaintiff $41,000 for damage due to a plumbing leak, the attorney fees totaled over $600,000 per the lodestar method; but due to the judge granting the multiplier, the total amount paid to the attorneys swelled to $1.2 million – almost 30 times more than the jury awarded the policyholder.[52]

Lawmakers attempted to address this form of lawsuit abuse in 2021. HB 305 would have limited Florida courts' ability to apply contingency fee multipliers in property insurance cases only under rare and exceptional circumstances, as most states and the federal courts do. Specifically, the bill required a finding that a particular case is complex and uncommon; the insurer has been denied coverage for the claim; or the claimant cannot find competent counsel within a reasonable distance.[53]

Contingency fee multiplier reform would arguably have a positive long-term impact; but enacting it sooner rather than later will also help with the current crisis. Given the massive, unsustainable losses private property insurers are incurring due to pre-HB 7065 and SB 76 claims litigation, reforms to how contingency fee multipliers are awarded can at least reduce the final price tag of these lawsuits going forward.

CONCLUSION

High insurance rates are appropriate when they reflect actual risks. Costs inherent to a particular industry or regional market may be impossible to remedy through laws or the insurance system. However, it is apparent Florida's entrenched culture of litigiousness perpetuated by court decisions and loopholes in state law has been the root cause of the state's insurance problems for decades—from the medical malpractice and workers compensation insurance crises of 20 years ago, to auto and property insurance abuse today.

To tackle each of those insurance market crises, lawmakers enacted modest reforms around the margins to address specific abuses and fraud in hopes that it would be more difficult or otherwise less enticing for unscrupulous actors to continue fleecing insurers and consumers. But then the bad actors would simply pivot to exploiting other loopholes, and trying to catch up with their schemes became an almost yearly game of whack-a-mole in Tallahassee. All throughout, the common denominator remained: litigation and its perverse incentives.

It took meaningful tort and legal reforms in 2003 to finally restore sanity to the state's medical malpractice and workers compensation insurance systems.[54]

Almost 20 years later, it is apparent that Florida's current property and auto insurance problems are likewise due almost entirely to the state's legal climate, especially when:

- Florida accounts for only eight percent of insurance claims, but 76 percent of all insurance litigation nationwide;[55]
- Only 8 percent of the $15 billion in insurance payouts since 2013 went to Florida policyholders and 92 percent to lawyers and other legal expenses;[56] and
- Florida is ranked near the bottom at #46 among the 50 states in legal climate.[57]

Lawmakers rightfully identified the incentives to litigation as the main culprits behind the state's current property insurance woes and enacted the meaningful legal reforms in HB 7065 and more recently in SB 76. However, because those reforms were disputed, debated and ultimately put off for a number of years before eventually becoming law, the market will continue to experience crushing losses until those reforms fully kick in.

The Legislature must therefore take meaningful steps to build on those reforms and shore up the market in the short-term to mitigate losses, slow the bleeding, and avoid additional insolvencies. It would also do well in getting ahead of other legal issues before they further undermine the market instead of allowing them to fester in hopes that things simply improve. If there is one lesson to be learned, it is that putting off tough but needed reforms for just a couple of years will have consequences that extend far beyond.

Endnotes

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