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Ahem, Florida Lawmakers: State Insurance Market Badly Needs an Oil Change

By Kevin Comerer

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As the Florida Legislature prepares for its 2nd Special Session on property insurance in 2022, it's time we examine why our market sputtered out of control and discuss the necessary solutions to fix it. Many Floridians are wondering:

- How could nine insurance companies go bankrupt in less than two years?
- Why have rates tripled, on average, for every homeowner?
- What caused the state-backed Citizens Property Insurance Corp. to grow from an all-time low of 420,000 policyholders to more than 1 million — and heading for 2 million?

Media outlets across the state have done a decent job of highlighting the failing insurance market. However, there are many misconceptions associated with these reports. The first, that storms are to blame, and the second, that reinsurance rates are exploding due to climate change. In truth, many factors have contributed to the crisis and the insolvent companies failed or were failing long before the 2022 Hurricane season even began. Reinsurance rates have risen, but the cost that can be passed onto the consumer is statutorily capped at 15% per year. While considerable, that only accounts for 60% of the 300% in rate increases since 2018.

In short, this crisis starts and ends with litigation.



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Most have likely seen the headlines that Florida accounts for This question merits a complex answer, for sure, but can be boiled down to this: The combination of assignment-of-benefits (AOB) proliferation, an obscure, 2016 decision by the Florida Supreme Court ([Sebo vs. American Home Assurance](#)), and the 100-year-old one-way attorney fee statute (627.428), created a perfect legal storm so great that it brought our state's insurance market to its knees.

A layman's attempt to describe each is as follows...

AOBs have been often utilized in healthcare. You go to the doctor, and you assign your benefits to them so they can work with your insurance company for billing purposes. One day a few Florida attorneys figured out they could apply this practice to a homeowner in need of a fast repair, and assume complete control of a claim, including the ability to file a lawsuit. And, Voila! A massive incentive was created from thin air and a cottage industry was born. Prior to 2010, the state saw about 400 lawsuits annually, but once the AOB scheme was unleashed, that number ballooned to 30,000 in 2016. It took strong words from Gov. Ron DeSantis, in his very first State of the State address in 2019, to move the needle on moderate reform when he declared that AOB's "had degenerated into a racket." Unfortunately, by then, this racket had already metastasized out of control.

This then brings us to the 2016 Sebo decision by the state Supreme Court, which replaced the long-standing and efficient proximate cause doctrine with the concurrent causation doctrine. In practical terms, this enabled contractors to find very minimal damage on already deteriorating roofs or buildings and claim that the small damage,

combined with the crummy condition of the structure, necessitated a full replacement at insurers' expense. So, one windblown shingle on a 20-year-old roof was artfully used to get someone a new roof for "free".

Now, let us factor in the holy grail — one-way attorney fees, courtesy of Florida Statute 627.428. The way this statute works is relatively simple: If you sue your insurance company and the case goes to trial, you only need to win \$1 more than their last pretrial offer, regardless of the amount for which you were suing. If successful, the homeowner will be compensated for all attorney fees at the insurance company's expense. This fee structure, hailed as the David vs Goliath statute, was created to level the playing field so the Smith Family (David) could fight back against Big Insurance Co. (Goliath). For decades, it was considered to be a fair and reasonable concept.

However, mixing these three components together is where things go radioactive.

Essentially, nothing prevents a contractor from coming to your home and assuming your rights, finding minimal damage yet filing a large claim; and then working with a lawyer to inflate the claim higher to garner a huge settlement. Financially, it works like this: They sue an insurer for \$100,000 for a new roof that, if legitimately damaged, costs \$25,000. But it has only two shingles missing that should cost \$150 to replace. The insurance company must meet in the middle and settles for \$65,000 because it would cost more to go to trial. Now multiply by 130,000, which is the number of lawsuits filed last year, according to state Department of Financial Services data.

That equates to more than \$8 billion and a healthy dose of eyeball emojis.

Now you might find yourself saying: "How can these insurance companies claim poverty and any of this be true when 4 out of 5 television commercials is an advertisement for an insurance company?" The answer is that those "national" carriers combine for only 10% of the market share in Florida. This has been the case since the 2004-2005 hurricane seasons when Mother Nature alone was cause for concern. Citizens Insurance is now the largest provider in the state with more than 15% of the market share. "Domestic" (Florida-only or predominant) carriers are the primary source of homeowners insurance in the state.

These insurers, national and domestic, are not without blame, either. Despite the ongoing multibillion dollar racket being committed against them, many carriers that went belly up did so because they ignored the most fundamental aspect of insurance, risk management. The few companies that have weathered this market responsibly did so because they chose to sacrifice growth to protect solvency. The now-defunct carriers were 2-3 years too late when it came to tightening their underwriting practices. It is also unfathomable that some companies would pay not just normal, but increased, dividends or investor bonuses at a time when their company surpluses were being depleted by the tens of millions annually. Even worse, some took on debt to do so. Regardless of the reforms enacted in December, there will be more insolvencies and the number of existing companies on stable ground moving forward can be counted on one hand.

The topic of insurance can seem boring, but it is essential state infrastructure. It is the oil that keeps a free-market engine running, and it is safe to say Florida's property insurance market needs an oil change! What should the new synthetic blend look like? Thus far, the state has tried three times since 2019 to halt abusive practices: AOBs were first regulated to allow for a 14-day rescission period and a new fee-shifting measure for third-party lawsuits was put in place. Then in 2021, a hybrid version of that fee structure was enacted for first-party lawsuits and the amount of time to file a claim was lowered from 5 years to 2 years. Finally, in the May 2022 Special Session, one-way attorney fees were eliminated altogether for AOBs, attorney fee multipliers were prohibited, and building-codes for roofs were updated to combat the loophole being exploited post-2016 and the Sebo case.

Has it worked? Some, but not quick enough. Thankfully, Hurricane Ian did not deliver a death blow to the insurance industry partly because these previous reforms had been enacted. Each reform was a tough battle brought forth by good legislators and none made it across the finish line without the governor's vocal support. However, just surviving Ian is not good enough because Floridians know there will always be more hurricanes on the horizon.

To stabilize the marketplace for the foreseeable future, the one-way attorney fee must be abolished across the board, just as it is in most other states. Other changes: Price and scope arguments can be resolved through arbitration or independent appraisals.

The time frame to file a claim should be lowered to one year and any assignment of rights, benefits, etc. should be banned completely. Litigating when an insurance company has truly engaged in bad-faith practices should be allowed to continue.

If these measures happen, we will slowly get back to normal — or as normal as Florida can be.

The better in-class carriers will begin to grow again, pressure on Citizens will be relieved, and new capital will form to enter the state and fill the void left by insolvencies. Reinsurance pricing will also stabilize. Their world-class modeling can project storm losses down to the decimal, but no model can predict how legal rackets create hurricane-esque losses in years with no hurricanes. With the right public policy, the insurance market will fire on all cylinders again.

The oil change is long overdue.

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