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Florida's Property Insurance Market Is 'Spiraling Towards Collapse' Due to Litigation: Report

By Amy O'Connor | January 20, 2021

Florida's property insurance market is "spiraling towards collapse" and requires immediate attention if there is any chance of protecting the market, consumers, and ultimately, the state's economy, according to an analysis about to be presented to the Florida Legislature.

The report points a finger at the state's "litigation economy" as the main contributor to insurance market woes— seeing it as more of a direct cause than the many weather events Florida has suffered.

Among its findings:

- Litigation frequency and severity represents an additional expense load of 17% (and rising) on all earned premiums for insurers in Florida compared with other catastrophe-prone states.
- The fees paid to attorneys by Florida carriers far exceed the damages paid to the insureds.
- In 2019 alone, Florida insurers paid almost $3 billion in lawsuit costs that translated into higher premiums for insureds.
- Although the volume of claims after storms is a factor in costs, claims unrelated to catastrophes account for approximately 60% of all litigation.
- Florida consumers are paying a "hidden tax" to fund the litigation that averaged about $680 per family in 2020.

The report, "Florida's P&C Insurance Market: Spiraling Towards Collapse," was authored by Guy Fraker of Cre8tfutures Innovation System & Consultancy. Fraker has worked with the insurance industry for 30 years, including on auto insurance and autonomous vehicles, and with primary carriers, reinsurers and related sectors.

In tracing how the market got to this crisis point, the report identifies four Florida laws passed between 2011 and 2019 as fostering the litigation crisis. They are statutes governing assignment agreements, mandatory replacement cost coverage for residential roofs, multi-year statute of limitations to file a first notice of loss and the one-way attorney fee.

Also, two state Supreme Court rulings have exacerbated matters.

This litigation environment has carriers steadily hemorrhaging capital and surplus. Fraker's report says the roughly 6% of homeowners insurance claims being litigated are equal to the cost of a "good solid Cat 3 hurricane" every 12 months.

"This market is at a critical inflection point. The longer and broader these trends continue, the more likely the state will face a recovery measured in generational time horizons," the report warns. "The time for *hoping* some theoretical break point doesn't materialize is over."

Fraker was commissioned last year to do the Florida market analysis by insurers, lawsuit reform groups, and others. Florida State Senator Jeff Brandes, a member of the Senate Banking and Insurance Committee who has been sounding alarms about the Florida property insurance market, helped spearhead the effort.

Fraker's study argues that the state's residential P/C insurance marketplace "faces a convergence of existential threats in the form of increasingly unpredictable claims litigation, from rising costs of risk capital and from its persistently high exposure to natural catastrophe risks."

The report argues that "targeted legislative reforms are needed in order to preserve the insurance industry's viability while serving property owning Floridians and Florida's economy," while adding that "without intervening public policy solutions, the residential property insurance marketplace will experience failure."

Fraker said in an interview with Insurance Journal that he agreed to do the report on "behalf of Florida's economy and Florida's consumers, not the industry [or] any other stakeholder groups."

Florida Property Market Report Recommendations

There is no panacea to fix the Florida market, according to the Fraker report.

"For those seeking a single reform to turn this market around, such an answer does not exist," Fraker writes. Instead, he says, Florida legislators in the 2021 and 2022 sessions must take multiple actions to get this crisis under control.

The best reforms would include terminating any attorney contingency fee statutes that create arrangements unique to the insurance industry, followed by eliminating fee enhancements, particularly from litigation reliant upon the Concurrent Causation in order to prevail, the report states.

"Despite rhetoric lacking in facts to the contrary, those statutes included in this analysis have not evened the playing field for the consumers who dispute their insurers," it claims.

His other recommendations include:

- A total reversal of the statute that currently applies to all claim disputes placing responsibility on insurers to pay 100% of litigation costs when a plaintiff prevails by $1. Fraker says the language of the statute should be replaced with former U.S. Supreme

Court Justice Antonin Scalia's opinion that fee multipliers only be used on a "rare and exceptional" basis and never used for punitive measures.

- Changes to attorney fee arrangements so they are awarded based on policy limits and damages awarded to claimants; establish range of limits to one-way property fee awards
- Change the 3-year First Notice of Loss deadline to one year
- Enact pre-suit mediation or alternative dispute resolution modeled after Citizens
- Allow excluded or non-covered damages to remain non-covered
- Consolidate litigated cases so multiple suits are not filed for the same property
- Eliminate building tradesman (i.e., roofing contractors) from speaking on behalf of an insured without the insured's involvement

"Multiple legislative reforms are the only lock capable of closing Pandora's box," the report states, and the worst-case scenario without reform will be devastating to Florida's economy and take a generation to fix.

In a statement to Insurance Journal on the report, Florida State Senator Jeff Brandes, a member of the Senate Banking and Insurance Committee, said, "Mr. Fraker's report presents a new and objective voice and greater transparency than ever before for much needed legislative action."

Brandes, who sits on the Banking & Insurance Committee, has said one of his primary legislative goals over the next two years "is to put the Florida insurance market on a sustainable path."

In compiling the report, Fraker said he interviewed insurance executives from companies, regulators, lobbyists/advocates, plaintiff counsel firms, defense counsel firms, building and roofing contractors, consumer advocates, reinsurers, ratings agencies, as well as investors and a climate scientist. He also analyzed litigation records and reviewed thousands of documents from regulators.

While Florida has faced three consecutive years of major hurricanes from 2017 to 2019, insurers have insisted that the insurance problems are tied to an exponential increase in litigation.

Florida domestic carrier results showed a continuous drop in surplus over the last five years that culminated in a single year underwriting loss of more than $1 billion through the third quarter of 2020.

Florida Insurance Commissioner David Altmaier told the Senate Banking and Insurance Committee on Jan. 12 that carriers were on pace to nearly double their losses in 2020 compared with 2019, as their surpluses fell from $6.7 billion to $6.1 billion in just the first three quarters of the year. The combined ratio for Florida domestics was over 100% in the third quarter of 2020 and has been "trending upward for several years."

Carriers writing property risks in the state have been responding by pulling back capacity in certain areas including south Florida and more recently central Florida, along with filing for rate increases. Altmaier said insurers submitted 105 rate filings in 2020 for increases of 10% or more and 55 of those filings were approved; in 2016 only six rate increases were approved.

Florida’s insurer of last resort, Citizens Property Insurance Corp., [has received a flood of new policyholders]() over the last year as consumers struggle to find coverage in the private market.

The problems are also starting to impact Florida insurers’ ability to get reinsurance capital in the catastrophe prone state.

“These losses are having a direct impact on the surplus position of our industry,” Altmaier said. “As capital and surplus deteriorates, companies lose the flexibility to be able to write additional business … that has consequences for the consumer.”

Litigation Explosion

Fraker blames a convergence of several events that have “moved the market from stabilizing towards total collapse.”

Fraker said four individual Florida statutes governing assignment agreements, mandatory replacement cost coverage for residential roofs, multi-year statute of limitations to file a first notice of loss and the one-way attorney fee statute were passed between 2011 and 2019 “individually and in an isolated form without real consideration for how they might someday form a relationship.”

Additionally, two Florida Supreme Court decisions – *Joyce vs. FedNat* (2017) that found a contingency fee multiplier does not need to be reserved for rare and exceptional circumstances; and *Sebo vs. American Home Assurance* (2016) where the court shifted to using the Concurrent Causation Doctrine that permits a covered cause of loss (such as wind) to combine with damage caused by non-covered cause of loss – helped propel the market towards crisis.

“The combination of these policies and court decisions represents an ideal combination for significant financial exploitation,” the report states. “The volume of claims following each major storm became the fuel and the architecture for an economic engine distinct to Florida generally referred to as ‘Litigation.'”

Insurers have racked up more than 200,000 lawsuits since 2013, many of them stemming from non-catastrophe water damage and roofing claims, and many of them with assignment of benefits agreements attached. After reforms were passed in 2019, there was a dip in AOB lawsuits, particularly for Citizens, Fraker notes. However, by the third quarter of 2020 plaintiff attorneys had established a work around to AOB with a “Demand to Pay,” instead filing first party suits against carriers.

According to Fraker, the cost of this litigation cannot be understated. He found that while there has been an obvious influence of catastrophic storms on claim frequency, non-catastrophe claims have accounted for approximately 60% of all litigation filed against Florida’s domestic companies while 40% of the litigation is associated with cat losses.

In analyzing more than 3,000 insurance cases, Fraker found that litigation costs are 17% higher for Florida insurers than in other catastrophe-prone states. The fees paid to attorneys by Florida carriers for this litigation are on average more than 750% of the damages paid to the plaintiffs/insureds. In one case Fraker examined, the plaintiff attorney was awarded 21,041% of the damages in fees.

Insurers have paid out more than $12 billion in fees to attorneys since 2013 and were engaged in more than 221,000 suits between 2014 and 2020, according to the report.

The costs of all this litigation equals approximately $3 billion in expenses "being forced upon Florida property owners," the report states. In 2019 alone, Florida insureds paid between $2 billion and $2.7 billion in costs allocated to suits in the form of increased premiums.

Fraker said just 8% of damages are paid to insureds while plaintiff attorneys receive about 71% of the insurance litigation cash flow "because they are allowed to, not because plaintiff attorneys are motivated to do harm."

Insurer defense costs range from 237% to 307% of damages, or 21% of total litigation.

"Florida's P&C litigation economy may be rooted in hurricane recovery. However, like every emergent economy, the state's litigation economy required nurturing and protections in order to become established," the report says. "Yet, unlike an economic system balanced by governance relevant to all stakeholders, Florida's litigation economy operates almost entirely at the expense of insurers, then ultimately the State's economy and resident consumers. As a result, the value of corporations, the value of jobs, and spendable consumer income is either destroyed or greatly degraded."

Forecasting Litigation

It isn't just Florida insurers paying the price of the litigation. Reinsurers and investors are paying close attention to the Florida market because it is no longer profitable, and they are now seeing a negative return on their investments.

Fraker quoted one executive he spoke with for the report as saying, "I'd rather invest in time shares on the West Bank than to invest in the Florida insurance industry."

"Understand this proxy for an additional tax generates zero community, county, or state benefits because these billions are diverted away from Florida's economy," the report notes.

There isn't likely to be relief from rate increases for consumers either, as reinsurance rates increase for carriers and uncertainty about future litigation costs make it difficult for the industry to reliably model for litigation, the report notes.

Florida carriers already pay 30% to 35% more on reinsurance premiums than other hurricane prone states and soaring litigation costs creates more concern. Fraker said insurers have underestimated preliminary damage assessments immediately following a hurricane by an average of 300% because of unforeseen litigation costs and that is also influencing reinsurance rates.

For reinsurers as well as domestic carriers reflecting upon 212,000 litigated cases since 2015, the inability to reliably model litigation “is the final push off the cliff for Florida’s P&C market.”

Fraker said because “there’s no way to reliably forecast the dollars and cents of this litigation storm,” he created a new financial construct called the litigation probable maximum loss (LPML). It is similar to the probable maximum loss (PML) model companies use in modeling catastrophic storm damage, but the LPML forecasts the range of litigation frequency and severity from thousands of insurance litigation data points extracted between 2016 to 2020.

“Output from forecasting litigation costs through this construct is an assessment of litigation frequency and severity uncertainty, which is significantly influencing reinsurance rates in Florida which then becomes a cost burden affecting Florida’s domestic carriers, and ultimately for Florida consumers,” the study notes.

Florida consumers are the ultimate victims of what is happening Fraker says, as they are essentially paying a “hidden tax” to fund the litigation. This hidden tax averaged $487 per family in 2019, and is growing annually by 25.6%, totaling about $680 per family in 2020. That “tax” is being paid to less than 2,500 attorneys and contractors in the state.

Meanwhile, the narrative by plaintiffs’ attorneys that insurance companies created this crisis because of poor claims’ handling practices is a “catastrophic PR failure” on the part of the industry, Fraker said.

“The reality is whether it’s a catastrophe claim or not, 92.5% of all claims are closed within a year; 80% of the claims that require more than one year involve representation by a third party,” he said. The carriers in the marketplace have between a 95.2 and a 98.3 policy holder retention rate, he noted.

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