

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Fiscal Policy

BILL: SB 2-A

INTRODUCER: Senator Boyd

SUBJECT: Property Insurance

DATE: December 12, 2022

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Thomas/Moody</u>	<u>Knudson</u>	<u>BI</u>	Favorable
2.	<u>Thomas/Moody</u>	<u>Yeatman</u>	<u>FP</u>	Favorable
3.	_____	_____	_____	_____

I. Summary:

Senate Bill 2-A is a comprehensive bill intended to ensure policyholders in this state have access to quality, affordable private market property insurance. The bill also requires insurers to more promptly communicate, investigate and pay valid claims. Anticipated shortages in the reinsurance market are addressed through a new optional state reinsurance program. Excessive litigation is addressed by eliminating one-way attorney fees for property insurance and instead allowing both parties to obtain fees through the offer of judgment statute. The bill strengthens the regulatory authority of the Office of Insurance Regulation over property insurers. Specifically, the bill:

Florida Optional Reinsurance Assistance Program

- Establishes the Florida Optional Reinsurance Assistance (FORA) Program for the 2023 hurricane season, which:
 - Creates an optional hurricane reinsurance program that insurers can purchase at “reasonable” rates. Rates vary by tier level purchased and will range from 50% to 65% rate on-line.
 - Provides purchase tiers that begin at the Florida Hurricane Catastrophe Fund (FHCF) attachment point and cumulatively are limited to no more than \$5 billion below the FHCF attachment point.
 - Allows insurers that purchase FORA coverage or receive free Reinsurance to Assist Policyholders (RAP) coverage at each tier to have the option to purchase the next tier down.
 - Maintains the Reinsurance to Assist Policyholders (RAP) program, thus allowing those insurers and their policyholders that could not participate during 2022-2023, to receive and benefit from RAP reinsurance in 2023-2024.
 - Funds FORA coverage with \$1 billion in general revenue funds and the premiums insurers pay for FORA coverage.

- Returns remaining revenue to general revenue after the FORA program ends.

Claim Filing Deadline

- Reduces the deadline for policyholders to report a claim under the policy from 2 years to 1 year for a new or reopened claim, and from 3 years to 18 months for a supplemental claim.

Regulation of Insurance in Florida

- Authorizes the Office of Insurance Regulation (OIR) to subject any authorized insurer to a market conduct examination after a hurricane under certain conditions relating to property insurance claims.
- Ensures that insurers do not abuse the appraisal process under property insurance policies by:
 - Specifying the OIR has discretionary authority to suspend or revoke an insurer's certificate of authority or issue administrative fines and restitution upon if the insurer engages in a general business practice of, without just cause, compelling insureds to participate in appraisal in order for the insured to secure the full payment or settlement of a property insurance claims.
 - Adding additional elements to the mandated insurer's quarterly reports filed with the OIR related to claims.
 - Authorizing the OIR, based on finding that the insurer had exhibited a pattern or practice of one or more willful unfair insurance trade practice violations with regard to its use of appraisal, to withdraw OIR approval of the property insurer's forms and, in addition to any other authorized regulatory action, issue an order that prohibits the insurer from invoking appraisal for up to two years.
 - Adding an element to the Property Insurer Stability Unit's required semiannual report on the status of the homeowners' and condominium homeowners' insurance market to include the name of any insurer found to have exhibited a pattern or practice of one or more willful unfair insurance trade practice violations with regard to its use of appraisal. The bill also requires the OIR to publish this same information on its internet webpage.

Prompt Pay Laws for Property Insurance

- Amends the prompt pay laws to encourage the prompt payments of claims, as follows:
 - Reduces the time for insurers to pay or deny the claim from 90 to 60 days. Allows the Florida Office of Insurance Regulation (OIR) to extend the 60 day period up to 30 additional days if a state of emergency, cyberattack, or computer systems failure prevents the insurer from meeting the time frames of the prompt-pay law.
 - Reduces the time for insurers to review and acknowledge a claim communication from 14 days to 7 days.
 - Reduces the time for insurer to begin an investigation from 14 days to 7 days.
 - Reduces the time for insurer to conduct a physical inspection from 45 days to 30 days, and applies this requirement to hurricane claims.
 - Specifies insurers may use electronic methods to investigate the loss and allows policyholders to participate in the use of such methods.
 - Requires insurers to send any adjuster's report estimating the loss to the policyholder within 7 days after it is created.

- Requires that the insurer's claim records include various parts of the claim investigation and their dates.
- Provides that the requirements of the section are tolled: during the pendency of any mediation or alternative dispute resolution procedure provided in the insurance contract and upon failure of a policyholder or representative to provide material claim information within 10 days, if the request for such information was made within the first 45 days after notice of the claim.
- Amends the Homeowner Claim Bill of Rights to conform to the bill's changes to the prompt pay laws.
- Amends the Unfair Insurance Trade Practices Act to conform to changes made to the prompt pay laws by reducing the requirement to pay undisputed amounts of benefits from 90 days to 60 days and revising the factors that excuse failure to perform.

Awards of Attorney Fees in Litigation under Property Insurance Contracts

- Provides that the one-way attorney fee provisions of s. 627.428, s. 626.9373, and s. 627.70152 are not applicable in a suit arising under a residential or commercial property insurance policy.
- Reinstates application of the civil offer of judgment statute to civil actions arising under a residential or commercial property insurance policy.
 - Allows joint offers of settlement in property insurance litigation contingent on acceptance of all joint offerees.
- Removes provisions regarding attorney fees relating to the alternative procedure for resolution of disputed sinkhole insurance claims.

Assignments of Benefits

- Prohibits the assignment, in whole or in part, of any post-loss insurance benefit under any residential property insurance policy or under any commercial property insurance policy issued on or after January 1, 2023.

Bad Faith Failure to Settle Actions against Property Insurers

- Provides that bad faith litigation for failure to settle a property insurance claim may not be filed until after the insured has established through adverse adjudication by a court that the insurer breached the insurance contract and a final judgment or decree has been rendered against the insurer.

Citizens Property Insurance Corporation (Citizens)

- Increases the eligibility threshold for Citizens renewal personal lines policyholders. Under the bill, such policyholders are ineligible for Citizens coverage at renewal upon receiving an offer of comparable coverage from an authorized insurer for a premium that is not more than 20 percent greater than the Citizens renewal premium.
- Increases the eligibility threshold for Citizens new policies for commercial residential coverage from 15 percent to 20 percent, which is consistent with the current threshold for new policies of personal residential coverage.

- Amends provisions on take-out offers and the Citizens clearinghouse to conform to the increased eligibility thresholds contained in the bill.
- Requires that Citizens' rate be non-competitive with the approved rates charged in the admitted market, in addition to being actuarially sound.
- Increases the potential rates charged for coverage on risks that are not primary residences.
- Defines the term "primary residences."
- Repeals language allowing policyholders to return to Citizens as a renewal if the take-out carrier increases their rates above the Citizens' glidepath.
- Combines Citizens three accounts into a single account upon Citizens eliminating all outstanding financing obligations. A single account structure will allow Citizens to access its entire surplus to pay claims. Currently, surplus in a particular account may only be used to pay claims in that account. The bill also revises the Citizens policyholder surcharge imposed in the event of a deficit from 15 percent per account (maximum 45 percent) to 15 percent for the single account.
- Provides that Citizens personal lines residential policyholders must secure and maintain flood insurance that meets certain requirements as a condition of eligibility for Citizens coverage.
- Provides a timetable for which flood insurance coverage must be implemented for personal lines residential Citizens policyholders.
 - For risks located in areas designated by the Federal Emergency Management Agency as special flood hazard areas, flood insurance must be secured for new Citizens policies with an effective date on or after April 1, 2023, and at renewal for Citizens policies that renew on or after July 1, 2023.
 - For all other risks, the requirement to obtain flood insurance at policy issuance or renewal is effective:
 - March 1, 2024, for policies insuring property to a limit of \$600,000 or more.
 - March 1, 2025, for policies insuring property to a limit of \$500,000 or more.
 - March 1, 2026, for policies insuring property to a limit of \$400,000 or more.
 - March 1, 2027, for all other policies.

Flood Notice

- Amends the mandatory flood insurance notice by requiring it to be part of the declarations page and makes revisions to the content of notice to encourage purchase of flood insurance.

Arbitration

- Provides conditions whereby a property insurer may include mandatory binding arbitration in its policies. The insurer may not require a policyholder to participate in mandatory binding arbitration unless specified conditions are met, including that the insurer also offer a policy that does not have a mandatory binding arbitration clause. Insurers must also provide an appropriate premium discount in exchange for the rights ceded by the policyholder.

Continuation of Coverage

- Authorizes the OIR to extend the 30-day coverage period for policies of insolvent insurers by an additional 15 days if the OIR reasonably believes that market conditions are such that the policies cannot be placed with an authorized insurer within the 30-day period.

Appropriations

- For 2022-2023 fiscal year, appropriates \$1,757,982 in recurring funds from the Insurance Regulatory Trust Fund to the OIR with an associated salary rate of \$844,464.
 - Allocates the funds as follows: \$1,356,615 for Salaries and Benefits, \$400,000 for Other Personal Services Category, and \$1,367 to DMS. Funds also will be used for recruitment and retention of personnel within the OIR.
- Authorizes cumulative transfers from general revenue not to exceed \$1 billion from the General Revenue Fund to the Florida Optional Reinsurance Assistance (FORA) Program for the 2022-23 contract term beginning June 1, 2023.
 - Authorizes up to \$6 million in transfers from general revenue to the State Board of Administration to administer the FORA program.

See Section V. Fiscal Impact Statement.

The bill, except as otherwise provided, is effective upon becoming law.

II. Present Situation:

Market Conditions

Domestic property insurers in Florida have incurred large financial losses from 2017 to the present. According to the Florida Office of Insurance Regulation (OIR), from 2017 to 2021, Florida domestic property insurers had cumulative net underwriting losses in excess of negative three billion dollars.¹ In 2020 and 2021, the combined net income of these insurers was cumulatively over a negative 1 billion dollars. The last time these carriers has a positive net income was 2016. In 2020, property insurance claims exceeded original estimates by approximately \$676 million.²

Adverse claim development has also become an acute problem for domestic property insurers. Insurers set a claim reserve for each claim in order to set aside the money the insurer believes will be necessary to pay the claim. As time passes, carriers will then compare their initial reserves to the actual cost of the claim. In 2021, when domestic property insurers looked back at claim reserves from one year prior, the claim costs were approximately \$481 million more than estimated, and \$337 million at the two-year mark.³ These losses have led to an increasing trend of domestic property insurers filing for rate increases. Homeowners who have purchased coverage from a private insurer have seen annual rate increases of approximately 33 percent and are expected to see that number rise to 40 percent next year.⁴

¹ The OIR, *Property Insurance Stability Report*, p. 12, Jul. 1, 2022, https://floir.com/docs-sf/default-source/property-and-casualty/stability-unit-reports/july-2022-isu-report.pdf?sfvrsn=34f77ed6_2 (last visited Dec. 7, 2022) (hereinafter cited as “Insurance Stability Report”).

² *Id.*

³ *Id.*

⁴ WUSF, *Property Insurance Market is Facing Multiple Challenges*, Dec. 5, 2022 <https://wusfnews.wusf.usf.edu/economy-business/2022-12-05/florida-property-insurance-market-multiple-challenges-special-session> (last visited Dec. 7, 2022).

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

- Claims with litigation;
- Claims solicitation; and
- Adverse loss reserve development.⁵

In 2020, the OIR conducted a data call of Florida's domestic property insurers.⁶ The results of the data call showed the severity of non-weather water claims with litigation is nearly double that of the claims that are closed without litigation.⁷ According to the OIR, the increased severity of claims involving litigation is driving adverse loss reserve development, leading to high rate filings.⁸ 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.⁹

According to the OIR, these numbers reflect the high degree of uncertainty that exists in the property insurance market, which in turn impacts reinsurance capacity and reinsurance rates for insurers.¹⁰ To spread Florida's significant catastrophic risk outside of Florida's borders, insurers turn to the global reinsurance market.¹¹ Fitch Ratings expects reinsurance prices will rise by more than 10% in 2023 with the highest increases in areas such as Florida which were affected by natural catastrophe events in 2022.¹² The OIR reports that, based on its Annual Reinsurance Data Call (ARDC) and Catastrophe Stress Test for the 2020-2021 year, the cost of reinsurance that year increased by 54 percent from its 2019 figures.¹³ Based on the OIR's findings from the 2021-2022 year, the cost of that reinsurance increased by 28 percent from its 2020 figures.¹⁴

Recent Insolvencies of Property Insurers

Federal law specifies that insurance companies cannot file for bankruptcy and are instead subject to state laws regarding receivership.¹⁵ Typically, insurers that are insolvent or about to become insolvent are put into liquidation to liquidate the business of the insurer and use the proceeds to

⁵ The Florida Senate, *Meeting of the Committee on Banking and Insurance* (Jan. 12, 2021) (statement of David Altmaier, Commissioner, Florida Office of Insurance Regulation).

⁶ The OIR, *Assignment of Benefits*, <https://www.floir.com/Sections/PandC/AssignmentofBenefits.aspx> (last visited Dec. 9, 2022).

⁷ The Florida Senate, *Meeting of the Committee on Banking and Insurance* (Jan. 12, 2021) (statement of David Altmaier, Commissioner, Florida Office of Insurance Regulation).

⁸ The Florida Senate, *Meeting of the Committee on Banking and Insurance* (Jan. 12, 2021) (statement of David Altmaier, Commissioner, Florida Office of Insurance Regulation).

⁹ International Risk Management Institute, *Glossary*, <https://www.irmi.com/term/insurance-definitions/loss-development> (last visited Dec. 9, 2022).

¹⁰ *Id.*

¹¹ Insurance Stability Report, p. 16.

¹² Saunders, J. Florida Realtors, *Fitch Ratings: Ian Pushes Reinsurance Rates Higher*, Nov. 28, 2022, [Fitch Ratings: Ian Pushes Reinsurance Rates Higher | Florida Realtors](#) (last visited Dec. 8, 2022).

¹³ Insurance Stability Report, p. 15.

¹⁴ *Id.*

¹⁵ 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. s. 109(b)(2). The exclusion of insurers from the federal bankruptcy court process is consistent with federal policy generally allowing states to regulate the business of insurance. See 15 U.S.C. s. 1012 (McCarran-Ferguson Act).

pay off the company's debts and outstanding insurance claims;¹⁶ whereas, the goal of rehabilitation¹⁷ 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.¹⁸ An unfortunately high number of property insurers have recently become insolvent.

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.¹⁹ 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.²⁰

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.²¹ 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.²²

On July 28, 2021, Gulfstream Property and Casualty Insurance Company, was ordered into liquidated by the Second Judicial Circuit Court in Leon County, Florida.²³ 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.²⁴

¹⁶ Section 631.061, F.S.

¹⁷ Section 631.051, F.S.

¹⁸ Part I, ch., 631, F.S.

¹⁹ The Florida Insurance Guaranty Association (FIGA), *Florida Specialty Insurance Company*, Nov. 22, 2019, [Florida Specialty Insurance Company – Florida Insurance Guaranty Association \(figafacts.com\)](#) (last visited Dec. 7, 2022).

²⁰ The DFS, *Florida Specialty Insurance Company: Notice of Receivership*, [FLORIDA SPECIALTY INSURANCE COMPANY \(myfloridacfo.com\)](#) (last visited Dec. 7, 2022).

²¹ The FIGA, *Florida Specialty Insurance Company*, Nov. 22, 2019, [American Capital Assurance Corporation – Florida Insurance Guaranty Association \(figafacts.com\)](#) (last visited Dec. 7, 2022).

²² The DFS, *Rehabilitation & Liquidation, American Capital Assurance Corporation*, [AMERICAN CAPITAL ASSURANCE CORPORATION \(myfloridacfo.com\)](#) (last visited Dec. 7, 2022).

²³ The FIGA, *Gulfstream Property & Casualty Insurance*, Jul. 28, 2021, [Gulfstream Property & Casualty Insurance – Florida Insurance Guaranty Association \(figafacts.com\)](#) (last visited Dec. 7, 2022).

²⁴ The DFS, *Gulfstream Property and Casualty Insurance Company*, [GULFSTREAM PROPERTY AND CASUALTY INSURANCE COMPANY \(myfloridacfo.com\)](#) (last visited Dec. 7, 2022).

2022 Liquidations. 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.²⁵ 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.²⁶

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.²⁷ The company was a property and casualty insurance company.²⁸

On June 15, 2022, Southern Fidelity Insurance Company (SFIC) was ordered into liquidation by the Second Judicial Circuit Court in Leon County, Florida.²⁹ The company was located in Tallahassee, Florida and offered property and casualty insurance. SFIC was licensed in Florida in 2005, and authorized to write homeowners multiple peril, commercial multiple peril, inland marine, allied lines, fire, and other liability in Florida, Louisiana, Mississippi, and South Carolina. SFIC had approximately 150,000 in-force policies at the time of receivership.³⁰

On August 8, 2022, Weston Property & Casualty Insurance Company was ordered into liquidation by the Second Judicial Circuit Court in Leon County, Florida.³¹ The court authorized the DFS to utilize the services of a Special Deputy Receiver and limited information is available about the proceedings on the DFS's website.³²

On September 27, 2022, FedNat Insurance Company (FedNat) was ordered into liquidation by the Second Judicial Circuit Court in Leon County, Florida.³³ The company was located in Sunrise, Florida, and offered property and casualty insurance. FedNet was licensed in Florida in 1984, and authorized to write homeowners multiple peril, fire, allied lines, other liability, private passenger auto liability, and boiler and private passenger auto physical damage in Alabama, Florida, Georgia, Louisiana, Mississippi, South Carolina and Texas. FedNet had approximately 13,000 in-force policies at the time of receivership.³⁴

²⁵ The FIGA, *St. Johns Insurance Company*, Feb. 25, 2022, [St. Johns Insurance Company – Florida Insurance Guaranty Association \(figafacts.com\)](#) (last visited Dec. 7, 2022).

²⁶ The DFS, *St. Johns Insurance Company, Inc., Background*, [ST. JOHNS INSURANCE COMPANY, INC. \(myfloridacfo.com\)](#) (last visited Dec. 7, 2022).

²⁷ The FIGA, *Avatar Property & Casualty Insurance Company*, Mar. 14, 2022, [Avatar Property & Casualty Insurance Company – Florida Insurance Guaranty Association \(figafacts.com\)](#) (last visited Dec. 7, 2022).

²⁸ The DFS, *Avatar Property and Casualty Insurance Company Financial Statement June 30, 2022*, [558_QST_20220630_FinancialStatement.pdf \(myfloridacfo.com\)](#) (last visited Dec. 7, 2022).

²⁹ The FIGA, *Southern Fidelity Insurance Company*, Jun. 16, 2022, [Southern Fidelity Insurance Company – Florida Insurance Guaranty Association \(figafacts.com\)](#) (last visited Dec. 7, 2022).

³⁰ The DFS, *Southern Fidelity Insurance Company, Background Information*, [SOUTHERN FIDELITY INSURANCE COMPANY \(myfloridacfo.com\)](#) (last visited Dec. 7, 2022).

³¹ The FIGA, *Weston Property & Casualty Insurance Company*, Aug. 8, 2022, [Weston Property & Casualty Insurance Company – Florida Insurance Guaranty Association \(figafacts.com\)](#) (last visited Dec. 7, 2022).

³² The DFS, *Weston Property & Casualty Insurance Company*, [WESTON PROPERTY & CASUALTY INSURANCE COMPANY \(myfloridacfo.com\)](#) (last visited Dec. 7, 2022).

³³ The FIGA, *FedNat Insurance Company*, Sept. 27, 2022, [FedNat Insurance Company – Florida Insurance Guaranty Association \(figafacts.com\)](#) (last visited Dec. 7, 2022).

³⁴ The DFS, *FedNat Insurance Company, Background Information*, [FEDNAT INSURANCE COMPANY \(myfloridacfo.com\)](#) (last visited Dec. 7, 2022).

Hurricanes Ian and Nicole

On top of the already strained property insurance market, Hurricanes Ian and Nicole made landfall this year in Florida. Hurricane Ian made landfall on September 28, 2022 near Cayo Costa in southwest Florida as a Category 4 storm and weakened to a tropical storm after crossing over the Florida peninsula.³⁵ Ian had maximum sustained winds of 150 mph when it came ashore, tying the record for the fifth-strongest hurricane on record to strike the United States.³⁶ The Florida District Medical Examiners has reported, and the Medical Examiners Commission have confirmed, that there are 141 fatalities in Florida attributed to Hurricane Ian.³⁷ Preliminary estimated total damages from Hurricane Ian may be as high as \$40 billion to \$64 billion, which includes uninsured flood loss of \$10 billion to \$16 billion.³⁸

Shortly after Hurricane Ian hit Florida, Hurricane Nicole made landfall on November 10, 2022 as a Category 1 storm with maximum sustained winds of up to 75 mph but soon after weakened to a tropical storm.³⁹ The Florida District Medical Examiners have reported, and the Medical Examiners Commission has confirmed, that there are 5 fatalities in Florida attributed to Tropical Storm Nicole.⁴⁰ Early estimates of private market U.S. insurer losses are less than \$2 billion with wind and storm surge losses of \$1.2 billion to \$1.8 billion and losses primarily in Florida and Georgia for the National Flood Insurance Program at less than \$300 million.⁴¹

Florida Hurricane Catastrophe Fund

The Florida Hurricane Catastrophe Fund (FHCF) is a tax-exempt fund created by the Legislature in 1993 as a form of reinsurance for residential property catastrophic hurricane losses.⁴² 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.⁴³ 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 participating insurers for a selected percentage of hurricane losses to residential property when those losses

³⁵ The National Environmental Satellite Data and Information Service, *Hurricane Ian's Path of Destruction*, Oct. 4, 2022, [Hurricane Ian's Path of Destruction | NESDIS \(noaa.gov\)](https://www.nesdis.noaa.gov/hurricane-ian-path-of-destruction) (last visited Dec. 7, 2022).

³⁶ *Id.*

³⁷ The Florida Department of Law Enforcement, *Update: Florida Medical Examiners Commission Hurricane Ian Deaths*, Dec. 1, 2022, [Update: Florida Medical Examiners Commission Hurricane Ian deaths \(state.fl.us\)](https://www.fl.gov/news/2022/12/01/update-florida-medical-examiners-commission-hurricane-ian-deaths) (last visited Dec. 7, 2022).

³⁸ The Association of State Floodplain Managers, *Estimated Damage for Hurricane Ian Between \$41 Billion and \$70 Billion*, Oct. 11, 2022, [Estimated Damages for Hurricane Ian Between \\$41 Billion and \\$70 Billion \(floods.org\)](https://www.asfpm.org/estimated-damage-for-hurricane-ian-between-41-billion-and-70-billion) (last visited Dec. 7, 2022) (citing data from CoreLogic, Inc.)

³⁹ DW, *Hurricane Nicole Makes Landfall in Florida*, Nov. 10, 2022, [Hurricane Nicole makes landfall in Florida – DW – 11/10/2022](https://www.dw.com/hurricane-nicole-makes-landfall-in-florida) (last visited Dec. 7, 2022).

⁴⁰ The Florida Department of Law Enforcement, *Update: Florida Medical Examiners Commission Tropical Storm Nicole Deaths*, Nov. 12, 2022, [Update: Florida Medical Examiners Commission Tropical Storm Nicole deaths \(state.fl.us\)](https://www.fl.gov/news/2022/11/12/update-florida-medical-examiners-commission-tropical-storm-nicole-deaths) (last visited Dec. 7, 2022).

⁴¹ Walker, A., Insurance Edge, *RMS Offers Hurricane Nicole Damage Estimates*, Nov. 17, 2022, [RMS Offers Hurricane Nicole Damage Estimates - \(insurance-edge.net\)](https://www.insurance-edge.net/rms-offers-hurricane-nicole-damage-estimates) (last visited Dec. 7, 2022).

⁴² See s. 215.555, F.S.

⁴³ See *id.*

exceed the insurer's retention (deductible).⁴⁴ The FHCF industry retention for the 2022-2023 contract year is \$8.5 billion. The FHCF reimburses participating insurers for losses under covered policies, subject to limitations.⁴⁵ 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.⁴⁶

Covered policies may be issued by any authorized insurer,⁴⁷ including 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.⁴⁸

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.⁴⁹ The FHCF is authorized by statute to sell up to \$17 billion of mandatory layer coverage each contract year.⁵⁰ Each insurer that purchases coverage may receive up to its proportional share of the total mandatory layer of coverage based upon the insurer's share 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 percent⁵¹ of the reimbursed losses for loss adjustment expenses.⁵²

FHCF Premiums

The FHCF must charge insurers the actuarially indicated premium⁵³ for the coverage provided, based on hurricane loss projection models found acceptable by the Florida Commission on

⁴⁴ *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.

⁴⁵ Section 215.555(2)(d), F.S.

⁴⁶ Section 215.555(2)(c), F.S.

⁴⁷ Authorized insurers are those insurers that have obtained a certificate of authority from the Office of Insurance Regulation to transact insurance business in Florida. Section 624.09(1), F.S.

⁴⁸ Section 215.555(2)(c), F.S.

⁴⁹ Section 215.555(4)(a), F.S.

⁵⁰ Section 215.555(4)(c)1., F.S.

⁵¹ Section 215.555(4)(b), F.S.

⁵² Loss adjustment expenses are costs incurred by insurers when investigating, adjusting, and processing a claim.

⁵³ Section 215.555(2)(a), F.S.

Hurricane Loss Projection Methodology.⁵⁴ 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.⁵⁵

Reinsurance to Assist Policyholders (RAP) Program

The Legislature created s. 215.5551, F.S., in Special Session 2022D, establishing the Reinsurance to Assist Policyholders (RAP) program within the State Board of Administration (board).⁵⁶ The RAP program authorizes the transfer of up to \$2 billion from the General Revenue Fund to the program for the 2022-2023 contract term beginning June 1, 2022.⁵⁷ The RAP program statute expires July 1, 2029, and all unencumbered RAP Program funds must be transferred back to the General Revenue Fund.⁵⁸

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).⁵⁹ 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.⁶⁰

All eligible insurers will participate in the RAP program for one year. Insurers that did not have private reinsurance within the RAP layer of coverage for the 2022-2023 contract year were required to participate during the 2022-2023 contract year. Insurers that had private reinsurance that duplicates RAP coverage for the 2022-2023 contract year were required to notify the board in writing of such duplicative coverage no later than June 30, 2022. Participation in the RAP program for such insurers is deferred until the 2023-2024 contract year.⁶¹

Insurer that participated in the RAP program for 2022-2023 were required 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 deferred 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.⁶²

⁵⁴ See State Board of Administration of Florida, *Florida Commission on Hurricane Loss Methodology*, fchlpm.sbafla.com/ (last visited Dec. 4, 2022).

⁵⁵ State Board of Administration of Florida, *Florida Hurricane Catastrophe Fund, 2021 Annual Report*, <https://fhcf.sbafla.com/media/2s0lhu2b/2021-annual-report-final-33022.pdf> (last visited Dec. 9, 2022).

⁵⁶ Section 1, ch. 2022-268, Laws of Fla.

⁵⁷ Section 215.5551(13), F.S.

⁵⁸ *Id.*

⁵⁹ Section 215.5551(3)(b), F.S.

⁶⁰ Section 215.5551(4), F.S.

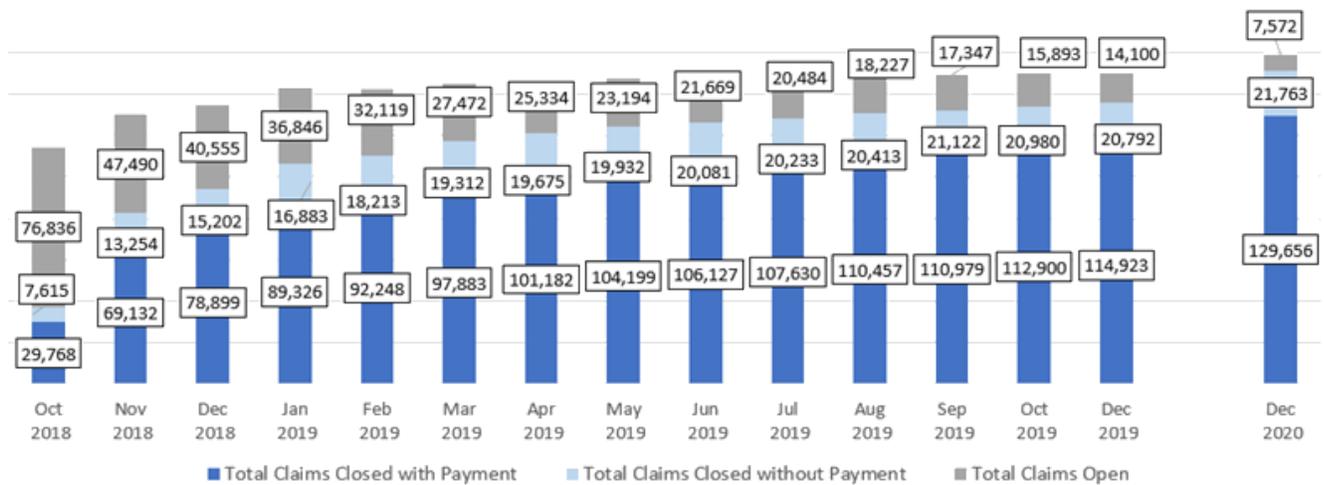
⁶¹ Section 215.5551(6), F.S.

⁶² Section 2, ch. 2022-268, Laws of Fla.

Claim Filing Deadline

Section 627.70132, F.S., currently requires insureds to notify an insurer of a claim or reopened claim,⁶³ within 2 years after the date of loss.⁶⁴ Notice of a supplemental claim⁶⁵ must be given to the insurer within 3 years of the date of loss or such claim is barred. Section 627.706(5), F.S., currently requires insureds to notify an insurer of a claim, supplemental claim, or reopened sinkhole claim within 2 years after the insured knew or reasonably should have known about the loss.

The chart below summarizes the OIR data for insurance claims by filing deadline as a result of Hurricane Michael.⁶⁶



According to the chart, most claims were filed within 1 year from the time Hurricane Michael made landfall in Florida in October 2018. Policyholders filed 112,900 of the 129,656 claims by October 2019.

From October 1, 2022 to November 30, 2022, over 600,000 claims have been reported with respect to Hurricane Ian. The graph below illustrates the claims breakdown for the storm.⁶⁷

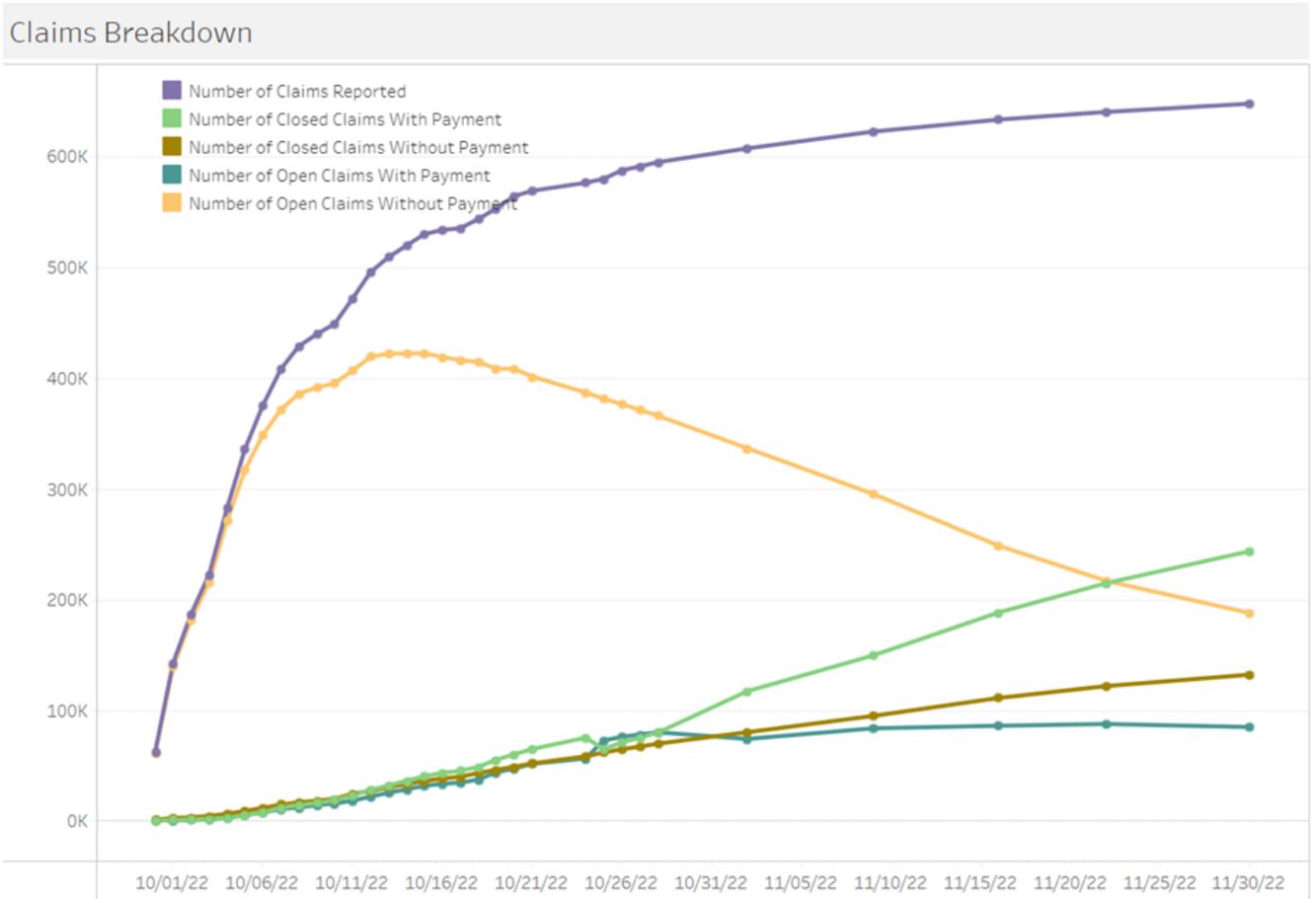
⁶³ Section 627.70132(1)(a), F.S., defines “reopened claim” as a claim that an insurer has previously closed, but that has been reopened upon an insured’s request for additional costs for loss or damage previously disclosed to the insurer.

⁶⁴ Section 627.702(3), F.S., provides that the date of loss for claims resulting from specified and other weather-related events, such as hurricanes and tornadoes, is the date that the hurricane made landfall or the other weather-related event is verified by the National Oceanic and Atmospheric Administration.

⁶⁵ Section 627.70132(1)(b), F.S., defines “supplemental claim” as a claim for additional loss or damage from the same peril which the insured has previously adjusted or for which costs have been incurred while completing repairs or replacement pursuant to an open claim for which timely notice was previously provided to the insurer.

⁶⁶ The OIR, *Hurricane Michael Claims Data*, [Hurricane Michael Claims Data \(floir.com\)](https://www.floir.com/hurricane-michael-claims-data) (last visited Dec. 6, 2022).

⁶⁷ Marante, S., electronic mail to Jacqueline M. Moody, *Re: Claims by filing deadline*, Dec. 7, 2022 (on file with the Senate Committee on Banking & Insurance) (attaching *Ian claims trend by filing deadline*).



Prompt Pay Law for Property Insurance

Florida’s property insurance prompt payment statute provides for an insurer’s⁶⁸ duty to acknowledge, investigate, and settle payment of a claim, if appropriate, within certain timeframes. These laws are meant to require insurance companies to make quick payments of any claims filed and deter unnecessary delays.

The insurer must acknowledge a filed claim within 14 days of its submission,⁶⁹ and begin an investigation, as is reasonably necessary, within 14 days after receiving a proof-of-loss statement.⁷⁰ Within 90 days of receiving notice of the initial, reopened, or supplemental claim, the insurer must either pay the claim in full, pay a portion of the claim, or deny the claim.^{71,72} These provisions must be complied within the stated timeframes unless the failure is caused by

⁶⁸ Section 627.70131(5), F.S., defines “insurer” as any residential property insurer.

⁶⁹ Section 627.70131(1)(a), F.S.

⁷⁰ Section 627.70131(3)(a), F.S.

⁷¹ Section 627.70131(7)(b), F.S., defines “claim”, for purposes of this subsection, as: 1. A claim under an insurance policy providing residential coverage as defined in s. 627.4025(1), F.S.; 2. A claim for structural or contents coverage under a commercial property insurance policy if the insured structure is 10,000 square feet or less; or 3. A claim for contents coverage under a commercial tenant policy if the insured premises is 10,000 square feet or less.

⁷² Section 627.70131(7)(a), F.S.

factors beyond the control of the insurer which reasonably prevent the insurer from complying with them.⁷³ Section 627.70131, F.S. does not define the phrase “factors beyond the control of the insurer.”

Except for claims subject to a hurricane deductible, any physical inspection must be conducted within 45 days after the insurer receives the proof-of-loss statement.⁷⁴ Section 627.70131, F. S., is silent on whether an insurer may use electronic methods to investigate claims. Within 7 days of assigning an adjuster, the insurer must notify the insured that a request may be made for an estimate of the amount of the loss. If a request is received, the insurer must send such estimate to the insured within the later of 7 days after the insurer received the request or 7 days after the detailed estimate is completed.⁷⁵

A licensed adjuster assigned to investigate a claim must provide a policyholder with written notification of his or her name and state adjuster license number, and include it on any subsequent communication with the policyholder.⁷⁶ An insurer must keep a record or log of each adjuster who communicates with the policyholder and provide a list of such adjusters to the insured, the OIR or the DFS upon request.

Section 627.70131, F.S., does not contain any provisions that toll the requirements under the section.⁷⁷

Homeowner Claim Bill of Rights

An insurer must provide a policyholder with a Homeowner Claim Bill of Rights (“Bill of Rights”) within 14 days after receiving the first communication on a claim which contains information about a homeowner’s rights specific to the claims process. The provisions relating to the acknowledgement and payment of a claim set out above are substantially included in the Bill of Rights. It also provides that, when requested in writing by the insured, the insurer must confirm the claim is either covered in full, partially covered, denied, or being investigated within 30 days of the insured providing a proof-of-loss statement. The Bill of Rights also advises homeowners to take certain steps with respect to a claim, such as contacting his or her insurance company before entering into any contract for repairs.⁷⁸

Unfair Insurance Claim Settlement Practices

Florida law prohibits a person from engaging in an unfair or deceptive act or practice involving the business of insurance.⁷⁹ The definition of unfair or deceptive acts or practices includes, in part, the following unfair claim settlement practices:

⁷³ Section 627.70131(1)(a) and (3)(a), F.S.

⁷⁴ Section 627.70131(3)(b), F.S.

⁷⁵ Section 627.70131(3)(d), F.S.

⁷⁶ Section 627.70131(3)(b) and (c), F.S.

⁷⁷ “Tolling” means to suspend or interrupt. Muniz, M.H., *The Florida Bar, Tolling or Suspending the Florida Statutes of Limitations Pursuant to Applicable Law*, April 2018, [Tolling or Suspending the Florida Statutes of Limitations Pursuant to Applicable Law – The Florida Bar](#) (last visit Dec. 6, 2022).

⁷⁸ Section 627.7142, F.S.

⁷⁹ Section 626.9521(1), F.S.

- Attempting to settle claims on the basis of a document that was altered without knowledge or consent of the insured;
- A material misrepresentation made to an insured for the purpose and with the intent of effecting settlement on less favorable terms than provided under the contract or policy;
- Committing or performing with such frequency as to indicate a general business practice certain acts, such as failing to adopt and implement standards for the proper investigation of claims;
- Failing to pay undisputed amounts of partial or full benefits owed under first-party property insurance policies within 90 days after an insurer received notice of a residential property insurance claim, determines the amounts of partial or full benefits, and agrees to coverage, unless payment of the undisputed benefits is prevented by “an act of God, prevented by the impossibility of performance, or due to actions by the insured or claimant that constitute fraud, lack of cooperation, or intentional misrepresentation regarding the claim for which benefits are owed.”⁸⁰

An insurer that violates these provisions is subject to a fine in an amount not greater than \$5,000 for each nonwillful violation, not to exceed an aggregate amount of \$20,000, and not greater than \$40,000 for each willful violation arising from the same action, not to exceed an aggregate amount of \$200,000.⁸¹

Awards of Attorney Fees in Litigation under Property Insurance Contracts

Under Florida law, first- and third-party litigants under a property insurance contract are sometimes subject to different sets of statutory and case law and procedural requirements. One of the primary challenges for Florida’s property market is an increase in the frequency and severity of litigated claims. One of the data points used by the OIR to track insurer litigation practices in the market is the National Association of Insurance Commissioners (NAIC) Market Conduct Annual Statement (MCAS).⁸² The MCAS is a regulatory tool developed in 2002 by state insurance regulators to collect information from insurers on a uniform basis to identify concerns regarding claims and underwriting.⁸³ Homeowners’ insurance companies report data via MCAS using uniform definitions and reporting requirements across all states.⁸⁴ The MCAS data below contains the percentage of nationwide homeowners’ claims and suits opened in Florida over the past six years.⁸⁵

Year	Percent of Nationwide Homeowners’ Claims Opened in Florida	Percent of Nationwide Homeowners’ Suits Opened in Florida
2016	7.75%	64.43%
2017	16.46%	68.07%
2018	11.85%	79.91%
2019	8.16%	76.45%
2020	8.81%	79.16%

⁸⁰ Section 626.9541(1)(i), F.S.

⁸¹ Section 626.9521(2), F.S.

⁸² Insurance Stability Report, p. 3.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

2021	6.91%	76%
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Presuit Notice to Initiate Litigation

A property insurance claimant must provide the DFS with written notice of intent to initiate litigation at least 10 business days before filing suit.⁸⁶ The notification must be made on a form provided by the 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.⁸⁷ 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 known. 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.⁸⁸ 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.⁸⁹

The insurer must respond in writing within 10 business days after receiving notice of intent to initiate litigation.⁹⁰ 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.⁹¹ 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).⁹² 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.⁹³

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.⁹⁴ 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.

Awarding Attorney Fees in Litigation

In most United States jurisdictions, each party to civil 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.⁹⁵ This is often referred to as the

⁸⁶ Section 627.70152(3)(a), F.S.

⁸⁷ *Id.*

⁸⁸ Section 627.70152(6)(a), F.S.

⁸⁹ Section 627.70152(5), F.S.

⁹⁰ Section 627.70152(4), F.S.

⁹¹ Section 627.70152(4)(a), F.S.

⁹² Section 627.70152(4)(b), F.S.

⁹³ *Id.*

⁹⁴ Section 627.70153, F.S.

⁹⁵ *Florida Patient's Compensation Fund v. Rowe*, 472 So.2d 1145, 1147-1148 (Fla. 1985).

“American Rule” for attorney fees, and contravenes the “English Rule” under which English courts generally awarded attorney fees to the prevailing party in litigation.⁹⁶

Florida has enacted a number of statutes that authorize courts to award attorney fees in civil litigation. As the Florida Supreme Court has noted, these statutory provisions generally fall into two categories.⁹⁷ In the first category, statutes direct a court to assess attorney fees against only one side in certain types of actions. An example is found in s. 627.428, F.S., which directs the court to assess reasonable attorney fees against the insurer and in favor of the insured or a beneficiary who prevails in litigation. The second category follows the English Rule and authorizes the prevailing party, whether it is the plaintiff or the defendant, to recover its attorney fees from the opposing party.

Attorney Fees Arising from Insurance Litigation

Section. 627.428, F.S., allows an insured to recover attorney fees if he or she prevails in a lawsuit against the insurer to enforce an insurance policy – which has been referred to as the “one-way attorney fee” in insurance litigation.⁹⁸ Some version of this statute has been the law in Florida since at least 1893.⁹⁹ The statute provides, in part:

Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured’s or beneficiary’s attorney prosecuting the suit in which the recovery is had.¹⁰⁰

Section 626.9373, F.S., applies the same standard to suits against a surplus lines insurers.

In 2021, the Legislature amended s 627.428, F.S., and s. 626.9373, F.S., to provide that for suits arising under residential and commercial property insurance policies, attorney fees may only be awarded as provided in s. 627.70152, F.S., or if the court imposes sanctions for prohibited litigation tactics under s. 57.105, 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. Under this statute, attorney fees and costs are awarded based on a formula that compares the amount obtained by

⁹⁶ *Id.*

⁹⁷ *Id.*

⁹⁸ Other states with similar “one-way” attorney fee provisions for insureds are Arkansas (Ark. Code s. 23-79-208), Delaware (18 Del. Code s. 4102), Hawaii (Hi. Rev. Stat. s. 431:10-242), Idaho (Id. Code 41-1839), Kansas (Kan. Stat. s. 40-256), Nebraska (Neb. Rev. Stat. Ann. S. 44-359), New Hampshire (N.H. Rev. Stat. s. 491-22-b), New Jersey – by court rule (N.J. Court R. 4:42-9(a)(6)), New Mexico (N.M. Stat. s. 39.2-1), North Carolina - for litigation not over \$25,000 (N.C. Gen. Stat. s. 6-21.1), and Texas (Tex. Ins. Code s. 542.060).

⁹⁹ See *Tillis v. Liverpool & London & Globe Insurance Company*, 35 So. 171 (Fla. 1903) (rejecting an insurance company argument that the 1893 law providing that an insured may recover attorney fees in actions against an insurance company to enforce a policy violates due process and equal protection).

¹⁰⁰ Section 627.428(1), F.S. This is similar to the language in s. 626.9373, F.S., which applies to surplus lines insurers. Florida courts interpret the statutes to have the same meaning.

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).¹⁰¹ 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.

The statute creates a strong presumption that a "lodestar fee is sufficient and reasonable."¹⁰² The "presumption may be rebutted only in a rare and exceptional circumstance with evidence that competent counsel could not be retained in a reasonable manner."¹⁰³ The lodestar amount is calculated as the product of the number of hours reasonably expended multiplied by a reasonable hourly rate.

Attorney Fees Arising from Assignment of Benefits

Section 627.7152, F.S., prevents recovery of "one way" attorney fees under s. 627.428, F.S., for assignees of post-loss benefits under a residential property insurance policy or commercial property insurance policy. Instead, an assignee may only recover attorney fees and costs if sanctions are imposed under s. 57.105, F.S.¹⁰⁴

Subsection 626.9373(3), F.S., and s. 627.428(4), F.S., 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.

Attorney Fees Arising from Unsupported Claims, Defenses, or Delays

Section 57.105, F.S., provides the court with authority to award attorney fees, including prejudgment interest, to the prevailing party if the court finds the losing party or losing party's attorney brought a civil claim or raised a defense in a civil cause of action that has no good faith legal or genuine factual basis. The court may also award attorney fees if the opposing party took any action, including, but not limited to, the filing of any pleading or part thereof, the assertion of or response to any discovery demand, the assertion of any claim or defense, or the response to any request by any other party, for the primary purpose of unreasonable delay.¹⁰⁵

¹⁰¹ Section 627.70152(8), F.S.

¹⁰² Section 627.70152(8)(c), F.S.

¹⁰³ *Id.*

¹⁰⁴ Section 627.7152(10), F.S.

¹⁰⁵ Section 57.105(1) and (2), F.S.

Attorney Fees Arising from Offers of Judgment

Section 768.79, F.S., provides for attorney fees where a party's offer to settle a case has been rejected. The statute states, in part:

(1) In any civil action for damages filed in the courts of this state, if a defendant files an offer of judgment which is not accepted by the plaintiff within 30 days, the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him ... if the judgment is one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer.... If a plaintiff files a demand for judgment which is not accepted by the defendant within 30 days and the plaintiff recovers a judgment in an amount at least 25 percent greater than the offer, she or he shall be entitled to recover reasonable costs and attorney's fees....

An offer must:

- Be in writing and state that it is being made pursuant to this section;
- Name the party making it and the party to whom it is being made;
- State with particularity the amount offered to settle a claim for punitive damages, if any; and
- State its total amount.¹⁰⁶

The court may disallow an award of costs and attorney fees to the prevailing party if it is determined the prevailing party did not make the offer in good faith.¹⁰⁷ When determining the reasonableness of an award of attorney fees, the court must consider the following factors along with other relevant criteria:

- The then apparent merit or lack of merit in the claim;
- The number and nature of offers made by the parties;
- The closeness of questions of fact and law at issue;
- Whether the person making the offer had unreasonably refused to furnish information necessary to evaluate the reasonableness of such offer;
- Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting nonparties; and
- The amount of the additional delay cost and expense that the person making the offer reasonably would be expected to incur if the litigation should be prolonged.¹⁰⁸

Prior to the passage of SB 76 by the legislature in 2022,¹⁰⁹ property insurance litigation was subject to both s. 627.428, F.S., and s. 768.79, F.S.¹¹⁰ Florida courts applied both statutes to the same litigation. Section 627.428, F.S., governed the award of attorney fees prior to the insurer making an offer of judgment, while both s. 627.428, F.S., or s. 768.79, F.S., applied to the award of attorney fees after an offer of judgment was made, depending on how much the insured recovered. The Florida Supreme Court in *State Farm Mut. Auto Ins. Co. v. Nichols* explained

¹⁰⁶ Section 768.79(2), F.S.

¹⁰⁷ Section 768.79(7)(a), F.S.

¹⁰⁸ Section 768.79(7)(b), F.S.

¹⁰⁹ The Legislature enacted s. 627.70152, F.S., in 2022 that applies exclusively to all suits not brought by an assignee arising under a residential or commercial property insurance policy. See s. 12, ch. 2021-77, Laws of Fla.

¹¹⁰ See *Pennsylvania Lumbermans Mut. Ins. Co. v. Sunrise Club Inc.*, 711 So.2d 593 (Fla. 3rd DCA 1998).

how the two statutes interacted in different circumstances by including the following chart in its opinion:¹¹¹

If the judgment is:	The insured receives:	The insurer receives:
No liability	No fees	Post-offer fees under the offer of judgment statute.
75 percent or less of the insurer’s offer	Pre-offer fees under s. 627.428, F.S.	Post-offer fees under the offer of judgment statute.
More than 75 percent of the insurer’s offer, but not more than 100 percent	Pre-offer fees under s. 627.428, F.S.	No fees.
More than the insurer’s offer	All fees under s. 627.428, F.S.	No fees.

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.¹¹² 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 that damages any person:

- Violating certain provisions of the Florida Insurance Code such as specified provisions of the unfair insurance trade practices act under s. 626.9541, F.S.
- 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.¹¹³

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.¹¹⁴ Florida courts do not recognize a common law first-party bad faith causes of action by the

¹¹¹ *State Farm Mut. Auto. Ins. Co. v. Nichols*, 932 So.2d 1067, 1074 (Fla. 2006).

¹¹² *Harvey v. GEICO General Insurance Company*, 259 So.3d 1, 6, (Fla. 2018) (quoting *Berges v. Infinity Insurance Company*, 896 So.2d 665, 682 (Fla. 2004)).

¹¹³ Section 624.155(1)(b)(1)-(3), F.S.

¹¹⁴ *Opperman v. Nationwide Mutual Fire Insurance Company*, 515 So.2d 263, 265 (Fla. 5th DCA 1987).

insured against its own insurer.¹¹⁵ Most property insurance claims are first-party claims¹¹⁶, thus bad faith actions on such claims may proceed only pursuant to s. 624.155, F.S.

Presuit Notice to Initiate Bad Faith Litigation

As a condition precedent to bringing a bad faith cause of action under s. 624.155, F.S., the insured must have provided the insurer and the Department of Financial Services at least 60 days written notice of the alleged violation.¹¹⁷ The 60-day window contemplated under s. 624.155, F.S., provides insurers with a final opportunity to comply with their claim-handling obligations when a good-faith decision by the insurer would indicate that contractual benefits are owed.¹¹⁸ The civil remedy notice must specify the following information:

- The statutory provision, including the specific language of the statute, which the authorized insurer allegedly violated;
- The facts and circumstance giving rise to the violation;
- The name of any individual involved in the violation;
- A reference to specific policy language that is relevant to the violation, if any. If the person bringing the civil action is a third-party claimant, she or he shall not be required to reference the specific policy language if the authorized insurer has not provided a copy of the policy to the third party claimant pursuant to written request; and
- A statement that the notice is given in order to perfect the right to pursue the civil remedy authorized under s. 624.155, F.S.¹¹⁹

Response by the Insurer in Bad Faith Litigation

If the insurer fails to respond to a civil remedy notice under s. 624.155, F.S., within the 60-day window, there is a presumption of bad faith sufficient to shift the burden to the insurer to show why it did not respond.¹²⁰ No action shall lie if the insurer responds within 60 days of receipt of the civil remedy notice by either paying damages or correcting the circumstances giving rise to the claim.¹²¹

Statutory Bad Faith Actions against Property Insurers

The Legislature, in 2022,¹²² created s. 624.1551, F.S., requiring 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 provision applies to civil remedy actions based upon a property insurer:

¹¹⁵ *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 58-59 (Fla. 1995).

¹¹⁶ Homeowners insurance provides liability coverage, thus third-party litigation may occur under a property insurance policy.

¹¹⁷ Section 624.155(3), F.S.

¹¹⁸ *See Talat Enterprises, Inc., v. Aetna Cas. and Sur. Co.*, 753 So.2d 1278, 1284 (Fla. 2000).

¹¹⁹ Section 624.155(3)(b)(1)-(5), F.S.

¹²⁰ *Fridman v. Safeco Ins. Co. of Illinois*, 185 So.3d 1214, 1220, (Fla. 2016); *Imhof v. Nationwide Mut. Ins. Co.*, 643 So.2d 617, 619 (Fla 1994).

¹²¹ *Id.*

¹²² Sections 11 and 12, ch. 2022-268, Laws of Fla.

- 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.

The enactment of 624.1551, F.S., follows decisions by Florida courts that considered whether conditions precedent must be met before bad faith causes of action become ripe for litigation. In *Cammarata v. State Farm Fla. Ins. Co.*, the Court held an insurer's liability for coverage and the extent of damages owed must be determined before a statutory bad faith cause of action was ripe.¹²³ However, it also held that breach of contract need not necessarily be determined before a bad faith action may be filed. The *Cammarata* Court found that "the parties' settlement via the appraisal process, which determined the existence of liability and the extent of the insured's damages, established the first two conditions precedent of a bad faith action."¹²⁴

While the newly created s. 624.1551, F.S., does not address the *Cammarata* decision directly because it does not address conditions precedent to bringing suit, the bill has the effect of receding from the decision to the extent it requires that a breach of contract be established in order to prevail in such a lawsuit. Furthermore, the bill may eliminate the ability of a claimant to bring a statutory bad faith lawsuit where the parties have settled through informal means, or in the alternative dispute resolution or appraisal processes because a breach of contract would not likely have been determined during those processes.

Assignments of Benefits

Assignment Agreements Generally

An assignment is the voluntary transfer of the rights of one party under a contract to another party, the transfer by a party to another party of some valuable interest.¹²⁵ Current Florida law generally allows an insurance policyholder to assign the benefits of the policy, such as the right to be paid, to another party. This assignment is often called an "assignment of benefits" or "AOB." Once an assignment is made, the assignee can take action to enforce the contract. Accordingly, if the benefits are assigned and the insurer refuses to pay, the assignee may file a lawsuit against the insurer to recover the insurance benefits.¹²⁶

Assignment of Benefits - Insurance

Subsection 627.428(1), F.S., provides that "any named or omnibus insured or the named beneficiary under a policy" may be entitled to attorney fees. In 1971, the Fourth District Court of

¹²³ *Cammarata v. State Farm Fla. Ins. Co.*, 152 So.3d 606, 607 (Fla. 4th DCA 2014). In *Cammarata*, the claim was settled through the appraisal process using a neutral umpire appointed by the court at the request of the parties.

¹²⁴ *Id.* at 612.

¹²⁵ Black's Law Dictionary, 2nd Ed., <https://thelawdictionary.org/assignment/> (last visited Dec. 6, 2022).

¹²⁶ *Nationwide Mutual Insurance Company v. Pinnacle Medical, Inc.*, 753 So.2d 55, 57 (Fla. 2000) ("The right of an assignee to sue for breach of contract to enforce assigned rights predates the Florida Constitution.").

Appeal considered whether the insured's assignee of benefits from a property insurance policy was entitled to attorney fees and held the assignee was not entitled to fees because the assignee was not a named insured or beneficiary.¹²⁷ However, the Fourth District's opinion was appealed to the Florida Supreme Court and the Florida Supreme Court reversed, holding that an insured's assignee is entitled to attorney fees under s. 627.0127, F.S., the predecessor statute to s. 627.428, F.S.¹²⁸ The court held that "an assignee of an insurance claim stands to all intents and purposes in the shoes of the insured and logically should be entitled to an attorney's fee when he sues and recovers on the claim."¹²⁹

The court reaffirmed the holding in 2008:

[S]ection 627.428 authorizes an award of attorney's fees only to "the named or omnibus insured or named beneficiary" under an insurance policy and to other third parties who obtain coverage based on an assignment from an insured.¹³⁰

Section 627.422, F.S., governs the assignability of insurance contracts and provides that a policy may or may not be assignable according to its terms. The statute provides that a "property insurance policy may not prohibit the assignment of post-loss benefits unless it complies with s. 627.7153."¹³¹

Assignment of Benefits – Property Insurance

The Legislature, in 2019,¹³² created s. 627.7152, F.S., relating to assignment agreements under residential or commercial property insurance policies. Under this statute, an AOB is an instrument that assigns or transfers post-loss benefits to or from "a person providing services, including, but not limited to, inspecting, protecting, repairing, restoring, or replacing the property or mitigating against further damage to the property."¹³³ Fees charged by a public adjuster are not included in the definition of assignment agreement.¹³⁴ A valid AOB must specify that the assignee will hold harmless the assignor from all liabilities, including attorney fees.¹³⁵ Insurers are allowed to make available a policy that restricts in whole or in part an insured's right to execute an assignment agreement, including post-loss benefits, under certain conditions. The 2019 provisions also directed 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. However, the Legislature, in 2022,¹³⁶ amended the statute 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.

¹²⁷ *Southern American Fire Insurance Company v. All Ways Reliable Building Maintenance, Inc.*, 251 So.2d 11 (Fla. 4th DCA 1971), *reversed*, *All Ways Reliable Building Maintenance, Inc. v. Moore*, 261 So.2d 131 (Fla. 1972).

¹²⁸ *All Ways Reliable Bldg. Maintenance, Inc. v. Moore*, 261 So.2d 131 (1972).

¹²⁹ *Id.* at 132.

¹³⁰ *Continental Cas. Co. v. Ryan, Inc. Eastern*, 974 So.2d 368, 379 (citation omitted) (Fla. 2008).

¹³¹ Section 627.422(2), F.S.

¹³² Section 1, ch. 2019-57, Laws of Fla.

¹³³ Section 627.7152(1)(b), F.S.

¹³⁴ *Id.*

¹³⁵ Section 627.7152(2)(a)7., F.S.

¹³⁶ Section 18, ch. 2022-268, Laws of Fla.

- Eliminate the provision providing for attorney fees to the prevailing party.

The Legislature, in 2019,¹³⁷ created s. 627.7153, F.S., providing that property insurers may offer a policy prohibiting or restricting assignment of benefits, including post-loss benefits, under certain terms. To do so, the insurer must make available to the insured or potential insured at the same time the same coverage under a policy that does not restrict the right to execute an assignment agreement.¹³⁸

The Legislature, in 2022,¹³⁹ amended 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, assignment agreements may occur, but the assignee vendor will no longer be able to recover attorney fees in suits against an insurer.

In recent years, insurers have complained of abuse of the assignment of benefits process. An insurance company described the issue in a court filing:

The typical scenario surrounding the use of an “assignment of benefits” involved vendors and contractors, mostly water remediation companies, who were called by an insured immediately after a loss to perform emergency remediation services, such as water extraction. The vendor came to the insured’s home and, before performing any work, required the insured to sign an “assignment of benefits” – when the insured would be most vulnerable to fraud and price gouging. Vendors advised the insured, “We’ll take care of everything for you.” The vendor then submitted its bill to the insurer that was, on average, nearly 30 percent higher than comparative estimates from vendors without an assignment of benefits. Some vendors added to the invoice an additional 20 percent for “overhead and profit,” even though a general contractor would not be required or hired to oversee the work. Vendors used these inflated invoices to extract higher settlements from insurers. This, in turn, significantly increases litigation over the vendors’ invoices.¹⁴⁰

In a court filing in a different case, a company that provides emergency repair and construction services explained the rationale behind assignments of insurance benefits:

As a practical matter, a homeowner often will not be able to afford or hire a contractor immediately following a loss unless the contractor accepts an assignment of benefits to ensure payment. A homeowner may be unable to comply with the ... provision requiring the homeowner to protect and repair the premises unless the remediation contractor accepts an assignment of benefits,

¹³⁷ Section 2, ch. 2019-57, Laws of Fla.

¹³⁸ Section 627.7153(2), F.S.

¹³⁹ Sections 11 and 12, ch. 2022-268, Laws of Fla.

¹⁴⁰ *Security First Insurance Company v. State of Florida, Office of Insurance Regulation*, Case No. 1D14-1864 (Fla. 1st DCA 2015), Appellant’s Initial Brief at pp. 3-4 (appellate record citations omitted).

however, contractors will become unwilling to accept payments by assignment if court decisions render the assignments unenforceable ...

Whether the repair invoice is routed through the insured or submitted by the service provider directly by assignment, the service provider's repair invoice is submitted to the insurer for coverage and reviewed by an adjuster. The only difference an assignment makes is that, if an insurance company wishes to partially deny coverage or contest an invoice as unreasonable, the insured policyholder is not mired in litigation in which he or she has no stake.¹⁴¹

Citizens Property Insurance Corporation—Overview

Citizens Property Insurance Corporation (Citizens or corporation) is a state-created, not-for-profit, tax-exempt governmental entity whose public purpose is to provide property insurance coverage to those unable to find affordable coverage in the voluntary admitted market.¹⁴² Citizens is not a private insurance company.¹⁴³ Citizens was statutorily created in 2002 when the Florida Legislature combined the state's two insurers of last resort, the Florida Residential Property and Casualty Joint Underwriting Association (RPCJUA) and the Florida Windstorm Underwriting Association (FWUA).¹⁴⁴

Citizens operates in accordance with the provisions in s. 627.351(6), F.S., and is governed by an eight member Board of Governors (board) that administers its Plan of Operations. The Plan of Operations is reviewed and approved by the Financial Services Commission.¹⁴⁵ The Governor, President of the Senate, Speaker of the House of Representatives, and Chief Financial Officer each appoint two members to the board.¹⁴⁶ Citizens is subject to regulation by the OIR.

Citizens has three different accounts through which it offers property insurance: a personal lines account, a commercial lines account, and a coastal account.

Citizens' Accounts

The Personal Lines Account (PLA) offers personal lines residential policies that provide comprehensive, multi-peril coverage statewide, except for those areas contained in the Coastal Account. The PLA also writes policies that exclude coverage for wind in areas contained within the Coastal Account. Personal lines residential coverage consists of the types of coverage provided to homeowners, mobile home owners, dwellings, tenants, and condominium unit owner's policies.¹⁴⁷

¹⁴¹ *One Call Property Services, Inc. v. Security First Insurance Company*, Case No. 4D14-0424 (Fla. 4th DCA 2015), Appellant's Initial Brief at 46-48.

¹⁴² Admitted market means insurance companies licensed to transact insurance in Florida.

¹⁴³ Section 627.351(6)(a)1., F.S.

¹⁴⁴ Section 2, ch. 2002-240, Laws of Fla.

¹⁴⁵ Section 627.351(6)(a)2., F.S.

¹⁴⁶ Section 627.351(6)(c)4.a., F.S.

¹⁴⁷ See s. 627.351(6)(b)2.a., F.S.; Citizens, *Account History and Characteristics*, <https://www.citizensfla.com/documents/20702/1183352/20160315+05A+Citizens+Account+History.pdf/31f51358-7105-40e9-aa75-597f51a99563> (Mar. 2016) (last visited Dec. 4, 2022).

The *Commercial Lines Account (CLA)* offers commercial lines residential and non-residential policies that provide basic perils coverage statewide, except for those areas contained in the Coastal Account. The CLA also writes policies that exclude coverage for wind in areas contained within the Coastal Account. Commercial lines coverage includes commercial residential policies covering condominium associations, homeowners’ associations, and apartment buildings. The coverage also includes commercial non-residential policies covering business properties.¹⁴⁸

The *Coastal Account* offers personal residential, commercial residential, and commercial non-residential policies in coastal areas of the state. Citizens must offer policies that solely cover the peril of wind (wind only policies) and may offer multi-peril policies.¹⁴⁹

The Citizens policyholder eligibility clearinghouse program was established by the Legislature in 2013.¹⁵⁰ Under the program, new and renewal policies for Citizens are placed into the clearinghouse where participating private insurers can review and decide to make offers of coverage before policies are placed or renewed with Citizens.¹⁵¹ An applicant for new coverage, or an insured for renewed coverage, is not eligible for coverage from Citizens if the premium offered from an authorized insurer is at or below the eligibility threshold for new personal lines residential risks of more than 20 percent.¹⁵² An applicant for coverage who was declared ineligible for coverage at renewal by Citizens in the previous 36 months must be considered a renewal under the Citizens’ clearinghouse statute if the authorized insurer making the offer continues to insure the applicant and increased the rate higher than allowed under s. 627.351(6)(n)5., F.S.¹⁵³

Current Policies

As of December 31, 2021, Citizens reports 759,305 policies in-force with a total exposure of \$232,502,323,529.¹⁵⁴ As of October 31, 2022, Citizens reports 1,111,283 policies in-force with a total exposure of \$398,857,062,260 and premium with surcharges of \$3,023,462,297.¹⁵⁵ The chart below outlines Citizens account, number of policies in-force, total exposure and premium with surcharges.

Account	Policies In-Force	Total Exposure	Premium with Surcharges
PLA	885,505	\$298,071,397,688	\$2,155,714,380
Coastal	224,815	\$91,079,016,012	\$818,528,543
CLA	963	\$9,706,648,560	\$49,219,374
	1,111,283	\$398,857,062,260	\$3,023,462,297

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ Section 10, ch. 2013-60, Laws of Fla.

¹⁵¹ Section 627.3518(2)-(3), F.S.

¹⁵² Section 627.3518(5), F.S.

¹⁵³ *Id.*

¹⁵⁴ Citizens, *About Us, Snapshot*, Dec. 31, 2021, <https://www.citizensfla.com/-/20211231-policies-in-force> (last visited Dec. 4, 2022).

¹⁵⁵ Citizens, *Detail by Account*, Nov. 13, 2022, [356cef06-df92-a6e5-6001-d2b8e1573430 \(citizensfla.com\)](https://www.citizensfla.com/356cef06-df92-a6e5-6001-d2b8e1573430) (last visited Dec. 7, 2022).

Source: Citizens Property Insurance¹⁵⁶

From December 31, 2021 to October 31, 2022, Citizens' policy count grew by over 45 percent, adding 51,978 total policies in-force, and its total exposure has risen by \$166,354,738,731.

Eligibility for Insurance in Citizens

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.¹⁵⁷ 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 set out in Citizens' underwriting manuals.¹⁵⁸

Eligibility Based on Premium Amount

An applicant for residential insurance cannot buy insurance in Citizens if an authorized insurer in the private market offers the applicant insurance for a premium that does not exceed the Citizens premium by 20 percent or more.¹⁵⁹ In addition, the coverage offered by the private insurer must be comparable to Citizens' coverage.

A residential policyholder cannot renew insurance in Citizens if an authorized insurer offers to insure the property at a premium equal to or less than the Citizens' renewal premium. The insurance from the private market insurer must be comparable to the insurance from Citizens in order for the eligibility requirement for renewal premium to apply.¹⁶⁰

Eligibility Based on Value of Property Insured

In addition to the eligibility restrictions based on premium amount, current law provides eligibility restrictions for homes and condominium units based on the value of the property insured.¹⁶¹ Structures with a dwelling replacement cost of \$700,000 or more, or a single condominium unit that has a combined dwelling and contents replacement cost of \$700,000 or more, are not eligible for coverage with Citizens.¹⁶² However, Citizens is allowed to insure structures with a dwelling replacement cost or a condominium unit with a dwelling and contents replacement cost of one million dollars or less in Miami-Dade and Monroe counties, after the OIR determined these counties to be non-competitive.¹⁶³

¹⁵⁶ *Id.*

¹⁵⁷ Section 627.351(6)(c)5., F.S.

¹⁵⁸ See Citizens, *Revised Underwriting Manuals*, <https://www.citizensfla.com/-/20160329-revised-underwriting-manuals> (last visited Dec. 5, 2022).

¹⁵⁹ Section 627.351(6)(c)5., F.S.

¹⁶⁰ Section 627.351(6)(c)5., F.S.

¹⁶¹ Section 627.351(6)(a)3., F.S.

¹⁶² Section 627.351(6)(a)3.d., F.S.

¹⁶³ The OIR, Final Order Case No: 165625-14, Dec. 22, 2014, <https://www.floir.com/siteDocuments/Citizens165625-14-O.pdf>; See also Section 627.351(6)(a)3.d., F.S., and Citizens, *Update to Maximum Coverage Limits*, Nov. 12, 2019, <https://www.citizensfla.com/-/2019-roof-permits-acceptable-for-fbc-credits> (all sites last visited Dec. 5, 2022).

Citizens Glidepath Rates

From 2007 until 2010, Citizens' rates were frozen by statute at the level that had been established in 2006.¹⁶⁴ In 2010, the Legislature established a "glidepath" to impose annual rate increases up to a level that is actuarially sound. Under the original established glidepath, Citizens had to implement an annual rate increase which, except for sinkhole coverage, does not exceed 10 percent above the previous year for any individual policyholder, adjusted for coverage changes and surcharges.¹⁶⁵ In 2021, the Legislature revised this glidepath to increase it one percent per year to up to 15 percent, as follows:¹⁶⁶

- 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.¹⁶⁷ In addition to the overall glidepath 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.¹⁶⁸

Citizens Financial Resources

Citizens' financial resources include insurance premiums, investment income, and operating surplus from prior years, Florida Hurricane Catastrophe Fund (FHCF) reimbursements, private reinsurance, policyholder surcharges, and regular and emergency assessments. Non-weather water losses, reinsurance costs and litigation are currently the major determinants of insurance rates.¹⁶⁹ In the event of a catastrophic storm or series of smaller storms, reserves could be exhausted, leaving Citizens unable to pay all claims.¹⁷⁰ Under Florida law, if the Citizens' Board of Directors determines a Citizens' account has a projected deficit, Citizens is authorized to levy assessments¹⁷¹ on its policyholders and on each line of property and casualty line of business other than workers' compensation insurance and medical malpractice insurance.¹⁷² Citizens may impose three assessment tiers and their sequence is as follows:¹⁷³

¹⁶⁴ Section 15, ch. 2006-12, Laws of Fla.

¹⁶⁵ Section 10, ch. 2009-87, Laws of Fla.

¹⁶⁶ Section 627.351(6)(n)5., F.S.

¹⁶⁷ Section 627.351(6)(n)7., F.S.

¹⁶⁸ Section 627.351(6)(n)6., F.S.

¹⁶⁹ Citizens, *2022 Rate Kit, Citizens 2021 Rates, Frequently Asked Questions*,

<https://www.citizensfla.com/documents/20702/15725518/20211213+2022+Rate+Kit.pdf/328181e5-1c41-a28d-76ea-b7d911462c6a?t=1639433573548> (last visited Dec. 5, 2022).

¹⁷⁰ Citizens, *Insurance/Insurance 101/Assessments*, <https://www.citizensfla.com/assessments> (last visited Dec. 5, 2022) (hereinafter cited as "Citizens' Assessments").

¹⁷¹ Assessments are charges that Citizens and non-Citizens policyholders can be required to pay, in addition to their regular policy premiums.

¹⁷² Accident and health insurance 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.

¹⁷³ Citizens' Assessment.

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.¹⁷⁴

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.¹⁷⁵ 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.¹⁷⁶

Citizens Depopulation

Florida law requires Citizens to create programs to help return Citizens policies to the private market and reduce the risk of additional assessments for all Floridians.¹⁷⁷ In 2016, the Legislature passed requirements that Citizens, by January 1, 2017, amend its operations relating to take-out agreements.¹⁷⁸ As part of these updated requirements, codified under s. 627.351(6)(ii), F.S., a policy may not be taken out of Citizens unless Citizens:

- Publishes a periodic schedule of cycles during which an insurer may identify, and notify Citizens of, policies the insurer is requesting to take out;¹⁷⁹
- Maintains and makes available to the agent of record a consolidated list of all insurers requesting a take-out policy; such list must include a description of the coverage offered and the estimated premium for each take-out request; and
- Provides written notice to the policyholder and agent regarding all insurers requesting to take out the policy and the policyholder's option to accept a take-out offer or to reject all take out offers and to remain with the corporation. The notice must be in a format prescribed by the corporation and include, for each take-out offer:
 - The amount of the estimated premium;
 - A description of the coverage; and

¹⁷⁴ Sections 627.351.(6)(b)3.i.(I) and 627.351.(6)(c)21., F.S. *See also*, Citizens' Assessments.

¹⁷⁵ Section 627.351.(6)(b)3.a., F.S.

¹⁷⁶ Section 627.351(6)(b)3.d., F.S.

¹⁷⁷ Section 627.351(6)(q)3.a., F.S.

¹⁷⁸ Chapter 2016-229, Laws of Fla.

¹⁷⁹ Such requests from insurers must include a description of the coverage offered and an estimated premium and must be submitted to the corporation in a form and manner prescribed by the corporation.

- A comparison of the estimated premium and coverage offered by the insurer to the estimated premium and coverage provided by the corporation.

Flood Insurance

The Flood Disaster Protection Act of 1973 (FDPA) prohibits lending institutions from making, increasing, extending, or renewing any loan secured by improved real estate or a mobile home located in special flood hazard areas and in which flood insurance has been made available under federal law unless the building or mobile home is covered by flood insurance in an amount equal to the outstanding principal balance of the loan or the maximum limit of coverage available.¹⁸⁰

Under Florida law, an authorized insurer may issue a policy for flood insurance coverage,¹⁸¹ however homeowners' insurance policies typically do not cover flood losses.¹⁸² Although private flood insurance may be obtained by endorsement or a separate policy, this requirement is generally satisfied with coverage obtained through the National Flood Insurance Program (NFIP) which is managed by Federal Emergency Management Agency (FEMA).¹⁸³ The NFIP offers flood insurance coverage for buildings and content which must be purchased separately and have separate deductibles. For residential property, the maximum coverage amount is \$250,000 for the building and \$100,000 for the content and, for commercial property, the maximum coverage for building and building content is \$500,000 each.¹⁸⁴

Citizens does not require proof of flood insurance as a condition of coverage provided the insured or applicant executes an the OIR approved form affirming that flood insurance is not provided by Citizens and that if flood insurance is not secured by the applicant or insured in addition to coverage by Citizens, the risk will not be covered for flood damage.¹⁸⁵ A Citizens' policyholder that elects not to purchase flood insurance and executes the form has the burden of proving that any claim for water damage was not caused by flooding.¹⁸⁶

According to U.S. Census Bureau "2020 Population and Housing State Data", there are 9,865,350 houses in Florida with only 1,714,008 NFIP active policies or approximately 17.37% homes insured for flood damage.¹⁸⁷ Only about 18.5% of homeowners who were ordered to evacuate the evening before Hurricane Ian made landfall had a flood insurance policy with

¹⁸⁰ 42 U.S.C. s. 4012a.(b). See The FEMA, *FEMA Flood Map Service Center: Welcome!*, [FEMA Flood Map Service Center | Search All Products](#).

¹⁸¹ Section 627.715(1), F.S.

¹⁸² Disaster Rally, *National Flood Insurance Program – How to Be Eligible*, [National Flood Insurance Program - How to Be Eligible \(disasterrally.com\)](#) (last visited Dec. 5, 2022).

¹⁸³ The Office of the Comptroller of the Currency, *Flood Disaster Protection Act: Guidance Regarding Lapse and Extension of FEMA's Authority to Issue Flood Insurance Contracts*, Jun. 9, 2010, [Flood Disaster Protection Act: Guidance Regarding Lapse and Extension of FEMA's Authority to Issue Flood Insurance Contracts | OCC \(ots.gov\)](#) (last visited Dec. 6, 2022).

¹⁸⁴ The FEMA, *National Flood Insurance Program, Understanding Your Policy Terms*, [Flood Insurance Coverage, Deductibles Explained \(floodsmart.gov\)](#) (last visited Dec. 5, 2022).

¹⁸⁵ Section 627.351(6)(aa), F.S.

¹⁸⁶ *Id.*

¹⁸⁷ Howard, P., Policygenius, *Flood Insurance Statistics in 2022*, Jul. 1, 2022, [Flood Insurance Statistics \[UPDATED for 2022\] - Policygenius](#) (last visited Dec. 5, 2022) (noting that data was analyzed to calculate the percentage of homes in each state with flood insurance policies with NFIP).

NFIP.¹⁸⁸ Even though the vast majority of flood insurance coverage is secured through the NFIP, the Florida private flood insurance market has grown more than 300% from 2017-2020.¹⁸⁹ Notwithstanding this growth, the OIR has collected data on an ad hoc basis that, as of Jun. 1, 2020, there were only 89,505 primary personal residential private flood policies in-force.¹⁹⁰

Flood Notice

An insurer that issues or renews a homeowner's insurance policy without flood coverage must include the following statement with the policy documents:

“FLOOD INSURANCE: YOU MAY ALSO NEED TO CONSIDER THE PURCHASE OF FLOOD INSURANCE. YOUR HOMEOWNER’S INSURANCE POLICY DOES NOT INCLUDE COVERAGE FOR DAMAGE RESULTING FROM FLOOD EVEN IF HURRICANE WINDS AND RAIN CAUSED THE FLOOD TO OCCUR. WITHOUT SEPARATE FLOOD INSURANCE COVERAGE, YOU MAY HAVE UNCOVERED LOSSES CAUSED BY FLOOD. PLEASE DISCUSS THE NEED TO PURCHASE SEPARATE FLOOD INSURANCE COVERAGE WITH YOUR INSURANCE AGENT.”

Arbitration

Arbitration Generally

Arbitration is an out-of-court alternative dispute resolution process whereby the parties to an agreement submit the dispute for resolution to one or more impartial persons for a final and binding decision.¹⁹¹ Arbitration is intended to be a speedy and economical alternative to court litigation, which is often slow, time-consuming, and expensive.¹⁹² Parties to arbitration may give up safeguards that litigants in court proceedings enjoy, such as a jury trial and the rules of evidence.¹⁹³

Federal Arbitration Act

Congress enacted the Federal Arbitration Act (FAA) in 1925 to establish, in part, the enforceability of pre-dispute arbitration agreements involving interstate commerce.¹⁹⁴ The United States Supreme Court has recognized that with the passage of the FAA, Congress expressed intent for courts to enforce arbitration agreements and to place these agreements on an

¹⁸⁸ McCausland, P., MSN, *Hurricane Ian Exposed a Flood Insurance Nightmare for Homeowners in Florida*, Oct. 14, 2022, [Hurricane Ian exposed a flood insurance nightmare for homeowners in Florida \(msn.com\)](https://www.msn.com/en-us/news/national/hurricane-ian-exposed-a-flood-insurance-nightmare-for-homeowners-in-florida) (last visited Dec. 5, 2022).

¹⁸⁹ Marante, S., electronic mail to Jacqueline M. Moody, *Re: Private flood insurance*, Dec. 7, 2022 (on file with the Senate Committee on Banking & Insurance) (noting that the OIR has received notice from two insurers that they may no longer offer private flood insurance).

¹⁹⁰ *Id.*

¹⁹¹ The American Arbitration Association, *Arbitration*, <https://www.adr.org/Arbitration> (last visited Dec. 5, 2022).

¹⁹² *ManorCare Health Services, Inc. v. Stiehl*, 22 So.3d 96, 105 (Judge Altenbernd concurring) (Fla. 2d DCA 2009).

¹⁹³ *United Ins. Co. of America v. Office of Ins. Regulation*, 985 So.2d 665, 668 (Fla. 1st DCA 2008).

¹⁹⁴ See 9 U.S.C.A. ss. 1-16.

equal footing with other contracts.¹⁹⁵ The FAA evidences a federal policy that favors and encourages the use of arbitration to resolve disputes.

Florida Arbitration Code

Florida traditionally has favored arbitration. In 1957, the Legislature enacted the Florida Arbitration Code¹⁹⁶ (FAC), which prescribed a framework governing the rights and procedures under arbitration agreements, including the enforceability of arbitration agreements.¹⁹⁷ The FAC was subsequently amended in 1967,¹⁹⁸ and remained largely unchanged until 2013. The FAC governs the arbitration process in its entirety, including, but not limited to the scope and enforceability of arbitration agreements, appointment of arbitrators, arbitration hearing process and procedure, entry and enforcement of arbitration awards, and appeals.

Revised Florida Arbitration Code

During the 2013 Legislative Session, the Legislature passed CS/SB 530 that substantially revised the then existing arbitration code and replaced it with the “Revised Florida Arbitration Code.”¹⁹⁹ The Revised Code is substantially based on the 2000 revision of the Uniform Arbitration Act by the National Conference of Commissioners on Uniform State Laws.²⁰⁰

Among its various provisions, the Revised Code authorizes an arbitrator to award provisional remedies before a final award is made to protect the effectiveness of the arbitration proceeding.²⁰¹ An arbitrator may award exemplary relief and other remedies that the arbitrator considers just and appropriate.²⁰² A party awarded a provisional remedy or final award may enforce the award by having it confirmed by a court.²⁰³

The revised arbitration code generally allows parties to an arbitration agreement to waive or vary the effect of the code’s requirements. However, the code lists a number of provisions that the parties to an agreement may not waive until a controversy arises and provisions that may not be waived at all.²⁰⁴ Parties may not waive the right to judicial relief, the right to a provisional remedy, jurisdiction of the courts, the right to appeal, the right to notice, the right to disclosure, or the right to an attorney, before a controversy arises. Parties may not waive other requirements at any time which would fundamentally undermine the arbitration agreement.

¹⁹⁵ *Allied-Bruce Terminix Cos, Inc. v. Dobson*, 513 U.S. 265, 270-271 (1995).

¹⁹⁶ Chapter 682, F.S.

¹⁹⁷ Chapter 57-402, Laws of Fla.

¹⁹⁸ Chapter 67-254, Laws of Fla.

¹⁹⁹ Chapter 2013-232, Laws of Fla.

²⁰⁰ <https://www.uniformlaws.org/committees/community-home/librarydocuments?LibraryKey=ba0e5b1d-67c0-4292-95e4-7a4157c6d2e1> (last visited Dec. 5, 2022).

²⁰¹ Section 682.031, F.S.

²⁰² Section 682.11, F.S.

²⁰³ Sections 682.081 and 682.11, F.S.

²⁰⁴ Section 682.013, F.S.

Regulation of Insurance in Florida

The OIR regulates specified insurance products, insurers and other risk bearing entities in Florida.²⁰⁵ As part of their regulatory oversight, the OIR may suspend or revoke an insurer's certificate of authority under certain conditions.²⁰⁶ 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.²⁰⁷ As part of the examination process, all persons being examined must make available to the OIR the accounts, records, documents, files, information, assets, and matters in their possession or control that relate to the subject of the examination.²⁰⁸ The OIR is also authorized to conduct market conduct examinations to determine compliance with applicable provisions of the Insurance Code.²⁰⁹

Each insurer must file with the OIR their basic insurance policy or annuity contract forms and any application form that is to be made a part of the policy or contract.²¹⁰ These forms may not be delivered or issued for delivery unless the form has been filed with the office.²¹¹

Insurer Reporting of Property Insurance Data and other Information to the Office of Insurance Regulation

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, actuarial opinions, and certain claims data.²¹² Each year, insurers must file an annual statement covering the preceding calendar year on or before March 1. Quarterly statements covering each period ending on March 31, June 30, and September 30 must be filed within 45 days after each such date.²¹³

In 2021, the Legislature enacted legislation²¹⁴ to assist the OIR and the Legislature in identifying current and emerging property insurance litigation trends that are cost drivers adversely affecting insurance rates. As of 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 the OIR on an annual basis.²¹⁵ 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;

²⁰⁵ 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.

²⁰⁶ Section 624.418, F.S.

²⁰⁷ Section 624.316(1)(a), F.S.

²⁰⁸ Section 624.318(2), F.S.

²⁰⁹ Section 624.3161, F.S.

²¹⁰ Section 627.410, F.S.

²¹¹ *Id.*

²¹² Section 624.424, F.S.

²¹³ Section 624.424(1)(a), F.S.

²¹⁴ Chapter 2021-77, Laws of Fla.

²¹⁵ Section 624.424(11), F.S.

- 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;
- Total amounts that the insurer paid for indemnity, loss adjustment expenses,²¹⁶ and insured's attorney fees;
- Whether the insured's attorney requested that a contingency risk multiplier (CRM)²¹⁷ be applied to the attorney fees calculation and, if so, what CRM was applied.

Section 624.424(10), F.S., requires insurers and insurer groups doing business in Florida to file quarterly reports with the 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.

The OIR must 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.²¹⁸ The information must be published on the OIR website within one month after each quarterly and annual filing.²¹⁹ This 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.²²⁰

Office of Insurance Regulation Insurer Stability Unit

Section 627.7154, F.S., establishes a property insurer stability unit (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 suggest said insurer may be in an unsound financial condition.
- Monitor closely all risk-based capital reports, own-risked solvency assessments, reinsurance agreements, and financial statements filed by insurers.

²¹⁶ 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 Dec. 8, 2022).

²¹⁷ 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).

²¹⁸ Section 624.424(10)(b), F.S.

²¹⁹ *Id.*

²²⁰ *Id.*

- 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 the DFS, and make recommendations to prevent future occurrences of such insurers.
- 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.²²¹

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 examination or targeted market examination be conducted, the reasonable cost of the examination shall be paid by the person examined.²²²

Market Conduct Examinations

The OIR is authorized to perform a market conduct examination of, among other entities, any authorized insurer.²²³ The purpose of the examination is to determine the entity's compliance with Florida law.²²⁴ The costs of the examination are to be paid by the subject entity.²²⁵

If the examination reveals that the "insurer has exhibited a pattern or practice of willful violations of an unfair insurance trade practice related to claims-handling which caused harm to policyholders," the OIR may order the insurer to file its claims-handling practices and procedures with the OIR for review and inspection.²²⁶ The practices and procedures are to be held by the OIR for 36 months and are considered public records, not trade secrets, during the 36-month period.²²⁷ The term, "claims-handling practices and procedures," is defined as "any policies, guidelines, rules, protocols, standard operating procedures, instructions, or directives that govern or guide how and the manner in which an insured's claims for benefits under any policy will be processed."²²⁸

Continuation of Coverage

Chapter 631, F.S., provides direction for the handling of insurers that have become insolvent. Part I of the Chapter provides specifically for the rehabilitation and liquidation of insolvent

²²¹ Section 627.7154(3), F.S.

²²² Section 627.7154(4), F.S.

²²³ Section 624.3161(1), F.S.

²²⁴ *Id.*

²²⁵ Section 624.3161(4), F.S.

²²⁶ Section 624.3161(6), F.S.

²²⁷ *Id.*

²²⁸ *Id.*

insurers. Section 631.252(1), F.S., requires policies of the insolvent insurer be canceled upon the earliest of:

- (a) The date of entry of the liquidation or, if the court so provides in its order, the expiration of 30 days from the date of entry of the liquidation order;
- (b) The normal expiration of the policy or contract coverage;
- (c) The replacement of the coverage by the insured, or the replacement of the policy or contract of coverage, with a policy or contract acceptable to the insured by the receiver with another insurer; or
- (d) The termination of the coverage by the insured.

Other than for certain life or health insurance coverages, claims made during the 30-day period under paragraph (1)(a) are handled as if the claim was made prior to the date of the insurer's liquidation.²²⁹ The 30-day coverage period may not be extended.²³⁰

III. Effect of Proposed Changes:

Florida Optional Reinsurance Assistance Program

Section 1 of the bill creates s. 215.5552, F.S., establishing the Florida Optional Reinsurance Assistance (FORA) Program for the 2023 hurricane season within the State Board of Administration (board). The bill authorizes cumulative transfers not to exceed \$1 billion from the General Revenue Fund to the program for the 2022-23 contract term beginning June 1, 2023. The FORA program statute expires June 30, 2026, if no general revenue funds have been transferred to fund the FORA program. If such funds are transferred, the statute expires July 1, 2030, and all unencumbered FORA program funds must be transferred back to the General Revenue Fund. The bill gives the board rulemaking authority, including emergency rulemaking authority, to adopt rules as necessary to implement the FORA program.

The bill authorizes the purchase of multiple reimbursement layers of reinsurance for hurricane losses directly below the mandatory layer of the Florida Hurricane Catastrophe Fund (FHCF). The FHCF mandatory retention is expected to be approximately \$9 billion for the 2022-2023 contract year. The FORA program provides potentially four optional layers below the FHCF retention prior to the third event dropdown of the FHCF retention set forth in s. 215.555(2)(e). The availability of the four potential layers will be based on the monies available – the \$1 billion dollar appropriation, plus the premiums collected by the FORA program participants. The Layers will be determined by the board, but are set prior to insurer selections at:

- The Layer 1 limit is \$1 billion.
- The Layer 2 limit is \$1 billion.
- The Layer 3 limit is \$2 billion divided by the RAP qualification ratio minus \$2 billion.
- The Layer 4 limit is \$1 billion minus the total FORA program industry limit selected for FORA program layers 1, 2 and 3, plus the total FORA program premium collected for FORA program layers 1, 2, and 3.

²²⁹ Section 631.252(2), F.S.

²³⁰ Section 631.252(3), F.S.

Participation in the FORA program is optional, but is available to insurers that participate in FHCF as of November 30, 2022. Qualifying Reinsurance to Assist Policyholders (RAP) insurers that are required to defer participation in RAP to the 2023-2024 contract year are excluded from purchasing FORA program layers 1 through 3. Qualifying RAP insurers required to participate in the 2022-2023 contract year may select FORA program layers 1 through 3. All FORA program eligible insurers may select FORA layer 4. Layers 1 through 4 cannot be purchased separately. All FORA program eligible insurers may purchase Layer 4. If a FORA program insurer chooses to purchase layers 2, 3, or 4, it must purchase all layers sequentially up to the selected layer. Citizens Property Insurance Corporation is excluded from participating in FORA.

FORA Program Reimbursement Contracts

The FORA program coverage reimburses 100 percent of each insurer's covered losses up to each individual insurer's limit of coverage for the two hurricanes causing the largest losses for that insurer during the contract year. A FORA program reimbursement contract effective June 1, 2023, must be executed by April 15, 2023, for layers 1 through 3, and by May 30, 2023, for layer 4. The contract must:

- Contain a promise to reimburse the FORA program insurer for 100 percent of its losses from each covered event in excess of the lowest selected FORA program layer's retention. The sum of the FORA program insurer's covered losses may not exceed the FORA insurer's combined selected FORA program layer limits.
- Provide that reimbursement amounts may not be reduced by reinsurance payable to the insurer from other sources.

FORA Premiums

The FORA program premiums will be:

- FORA layer 1 premium is 50 percent Rate on Line multiplied by the FORA insurer's FORA layer 1 limit.
- FORA layer 2 premium is 55 percent Rate on Line multiplied by the FORA insurer's FORA layer 2 limit.
- FORA layer 3 premium is 60 percent Rate on Line multiplied by the FORA insurer's FORA layer 3 limit.
- FORA layer 4 premium is 65 percent Rate on Line multiplied by the FORA insurer's FORA layer 4 limit.

Initial FORA premiums will be based on the 2023 FHCF projected industry retention, FHCF retention multiples, 2022 RAP Qualification Ratio and insurers' 2022 FHCF premiums. Final FORA premiums will be adjusted after December 31, 2023, based on December 31, 2023, FHCF premiums, FHCF industry retention, the 2023 RAP qualification ratio and insurers' 2023 FHCF premiums. Failure to pay the initial FORA premium in full by July 1, 2023, will result in disqualification as a FORA insurer. The final FORA premium will be due no later than March 1, 2024.

The FORA program is funded through a combination of insurer premiums collected for FORA coverage and the authorization of the transfer of up to \$1 billion in general revenue funds.

Bad Faith Failure to Settle Actions against Property Insurers

Section 2 amends s. 624.1551, F.S., to provide that bad faith litigation for failure to settle a property insurance claim may not be filed until after the insured has established through adverse adjudication by a court that the insurer breached the insurance contract and a final judgment or decree has been rendered against the insurer. The bill provides that acceptance of an offer of judgment or the payment of an appraisal award does not constitute an adverse adjudication. This is intended to have the effect of prohibiting a bad faith failure to settle action solely on the basis of the policyholder's successful recovery of additional claim proceeds through the insurance contract's appraisal process or acceptance of an offer of judgment. The bill also provides that the difference between an insurer's appraiser's final estimate and the appraisal award may be evidence of bad faith but is not considered an adverse adjudication and does not on its own give rise to a cause of action for bad faith.

Regulation of Insurance in Florida

Section 3 amends s. 624.3161, F.S., to authorize the Office of Insurance Regulation (OIR) to subject any authorized insurer to a market conduct examination after a hurricane if the insurer:

- Is among the top 20 percent of insurers based upon a calculation of the ratio of hurricane-related property insurance claims filed to the number of property insurance policies in force;
- Is among the top 20 percent of insurers based upon a calculation of the ratio of consumer complaints made to DFS to hurricane-related claims;
- Has made significant payments to its managing general agent since the hurricane; or
- Is identified by OIR as necessitating a market conduct exam for any other reason.

The relevant criteria under ss. 624.3161 and s. 624.316, F.S.²³¹, are to be applied to the market conduct examination. The market conduct examination, if any, must be started within 18 months after the landfall of the related hurricane. The insurer's managing general agent must be included in the market conduct examination as if it were the insurer.

Section 4 amends s. 624.418(2), F.S., relating to the OIR's authority to suspend or revoke an insurer's certificate of authority. The bill adds an additional condition for the OIR to use this authority where the insurer engages in a general business practice of, without just cause, compelling insureds to participate in appraisal in order for the insured to secure the full payment or settlement of a property insurance claims. The OIR may, instead of suspending or revoking the insurer's certificate of authority, choose to impose administrative fines and restitution or seek to reach a consent order with the insurer.

Section 5 amends s. 624.424(10)(a), F.S., to add additional elements to the mandated insurer's quarterly reports filed with the OIR to include the number of claims opened, closed, and pending each month; the number of claims where the insurer invoked any form of alternative dispute resolution (ADR) and which form of ADR was used.

²³¹ This section is entitled "Examination of Insurers."

Section 12 amends s. 627.410(3), F.S., relating to the required filing of forms by insurers with the OIR. The bill adds the authority of the OIR to, based on a finding from a market conduct examination that the insurer had exhibited a pattern or practice of one or more willful unfair insurance trade practice violations with regard to its use of appraisal, to withdraw OIR approval of the forms and, in addition to any other authorized regulatory action, issue an order that prohibits the insurer from invoking appraisal for up to two years.

Section 22 amends s. 627.7154(3)(f), F.S., relating to the Property Insurer Stability Unit (unit) within the OIR. The bill adds an element to the unit's required semiannual report on the status of the homeowners' and condominium homeowners' insurance market to include the name of any insurer, as a result of a market conduct examination, found to have exhibited a pattern or practice of one or more willful unfair insurance trade practice violations with regard to its use of appraisal compelling insureds to participate in appraisal in order for the insured to secure the full payment or settlement of a property insurance claims, in addition to the findings of the examination. The bill requires the OIR to publish this same information on its internet webpage.

Attorney Fees Awards in Property Insurance Litigation

Section 6 amends s. 626.9373, F.S., and **section 13** amends s. 627.428, F.S., to provide that the one-way attorney fee provisions of each statute are not applicable in a suit arising under a residential or commercial property insurance policy issued by an authorized insurer. Section 627.428 applies to authorized insurers, while s. 626.9373, F.S., applies to surplus lines insurers.

Section 17 of the bill also deletes the attorney fee provisions of s. 627.70152(8), F.S., currently used to award fees under s. 627.428, F.S., and s. 626.9373, F.S. The deletion of subsection (8) repeals language limiting fees to awards under that subsection and court sanctions, which has the effect of reinstating the offer of judgment process in s. 768.79, F.S., for property insurance claims. Technical changes are also made to this section.

Section 24 amends s. 768.79, F.S., regarding offers of judgment, to allow a property insurer to, for a breach of contract action, make a joint offer of settlement that is conditioned on the mutual acceptance of all joint offerees. This is designed to prevent a scenario where, for instance, a husband and wife both jointly own property, and an offer of judgment is made to each spouse that results in one spouse accepting the offer but the other declining and going on to bring a lawsuit.

Section 19 amends s. 627.7074, F.S., to repeal language that awards an attorney fee to an insured that prevails in neutral evaluation. The bill also makes conforming change related to the elimination of attorney fee awards under s. 627.428, F.S., in property insurance litigation.

Unfair Insurance Claim Settlement Practices

Section 8 amends s. 626.9541(1)(i), F.S., of the Unfair Insurance Trade Practices Act to conform changes made by the section 15 of the bill to s. 627.70131, F.S., which provides timelines regarding property insurance claim adjustment and claim payments. Specifically, the bill reduces the requirement to pay undisputed amounts of benefits from 90 days to 60 days. The bill revises the factors that excuse an insurer's failure to perform to "factors beyond the control of the insurer

as defined in s. 627.70131(5), F.S.” rather than acts of God, the impossibility of performance, or the other claimant actions specified under current law.

Prompt Pay Laws for Property Insurance

Section 15 amends s. 627.70131, F.S., which sets forth requirements for insurers to timely communicate with claimants, timely investigate the claim, and timely pay or deny the claim. The bill requires insurers to more quickly communicate with claimants, adjust the claim, and pay or deny the claim by:

- Reducing the time for insurers to acknowledge a claim or respond to communication from 14 days to 7 days.
- Reducing the time for insurers to begin an investigation, if reasonably necessary, from 14 days to 7 days after the proof-of-loss statement is received.
- Reducing the time for insurers to conduct a physical inspection from 45 days to 30 days and applies this provision to hurricane claims.
- Requiring insurers to provide to policyholders a copy of any adjuster’s report estimating the loss within 7 days after it is created.
- Reducing the time for insurers to pay or deny a claim, or a portion of the claim, from 90 days to 60 days, which may be extended 30 days (for payment to be made within a total of 90 days) by an the OIR order finding the delay is caused by factors beyond the control of the insurer.

The bill allows the OIR to extend the deadlines that are required of insurers under the prompt pay laws for up to 30 additional days if the failure is caused by “factors beyond the control of the insurer,” which is newly defined in s. 627.70131(5)(a), F.S., as any of the following events that is the basis for the OIR issuing an order finding that such event renders all or specified residential property insurers reasonably unable to meet the requirements of this section in specified locations, and ordering that such insurer or insurers may have additional time as specified by the office to comply with the requirements of this section:

- A state of emergency declared by the Governor under s. 252.36,
- A breach of security that must be reported under s. 501.171(3), or
- An information technology issue.

The office may not extend the period for payment or denial of a claim for more than 30 additional days.

The requirements of the section also do not apply if actions by the policyholder or the policyholder’s representative which constitute fraud, lack of cooperation, or intentional misrepresentation regarding the claim for which benefits are owed, reasonably prevent the insurer from complying with any requirement of this section.

Section 627.70131(1)(d), F.S., is created to authorize insurers to use electronic methods to investigate the loss that is reported in a claim. Methods that may be used include, but are not limited to:

- Electronic photographs;
- Video recordings of the loss;

- Video conferencing between the adjuster and the policyholder which includes video recording of the loss; and
- Video recordings or photographs of the loss using a drone, driverless vehicle, or other machine that can move independently or through remote control.

An insurer may allow the policyholder to use such electronic methods to assist in the investigation. An insurer may void the insurance policy if the policyholder or any other person at the direction of the policyholder, with intent to injure, defraud, or deceive any insurer, uses electronic methods to commit insurance fraud by providing false, incomplete, or misleading information concerning any material fact to a claim. An insurer may assign a licensed adjuster to physically inspect the property even if electronic methods are used to investigate the loss.

Section 627.70131(4)(b), F.S., is created to require an insurer to maintain the following records, including dates:

- Any claim-related communication made between the insurer and the policyholder or the policyholder's representative;
- The insurer's receipt of the policyholder's proof-of-loss statement;
- Any claim-related request for information made by the insurer to the policyholder or the policyholder's representative;
- Any claim-related inspection of the property made by the insurer;
- Any detailed estimate of the amount of the loss generated by the insurer's adjuster;
- The beginning and end of any tolling period; and
- The insurer's payment or denial of the claim.

The bill creates section 627.70131(8), F.S., which tolls the requirements of the section as follows:

- During the pendency of any mediation proceeding or any alternative dispute resolution provided for in the insurance contract. The tolling period ends upon completion of the proceeding.
- Upon the failure of a policyholder or a policyholder's representative to provide material claims information requested by the insurer within 10 days after the request was received until the insurer receives such information. This tolling period applies only to requests sent by the insurer to the policyholder or a policyholder's representative at least 15 days before the insurer is required to make a payment or deny the claim.

Citizens Property Insurance Corporation

Section 8 amends s. 627.351, F.S., with the effect of changing the structure of Citizens, eligibility criteria, and criteria for setting rates.

Citizens' Accounts

Effective July 1, 2023, upon eliminating all outstanding financing obligations, Citizens may consolidate the personal lines account, commercial lines account, and coastal account into one account, known as the Citizens account, for all of its revenues, assets, liabilities, losses, and expenses. A single account will allow Citizens to access its entire surplus to pay claims. If

established, the Citizens account is authorized to provide coverage to the same extent each of the three separate accounts may provide coverage under current law.

Citizens is not authorized to levy regular assessments if the three separate accounts are consolidated into the Citizens account, but any outstanding balance owed for regular assessments that are levied before the Citizens account is established remain payable to Citizens. Citizens must, however, levy the following assessments upon determination that the Citizens account has a projected deficit:

- A surcharge of up to 15 percent against all of Citizens' policyholders; and
- For any remaining projected deficit, an emergency assessment on all insurance policyholders (except medical malpractice and workers' compensation) which 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 the Citizens account for the prior year, plus interest, fees, commissions, required reserves, and other costs associated with financing the deficit.

Provisions under current law [s. 627.351(6)(b)2. and (b)3., F.S.,] regarding coverage and any deficits incurred in the three separate accounts will be replaced with new and substantially similar provisions regarding coverage and any deficits incurred in the Citizens account [under s. 627.351(6)(b)4. and 5., F.S.].

The bill also revises the acknowledgment that an applicant for Citizens coverage will have to sign after the single Citizens account is established.

Eligibility

The bill increases the eligibility threshold for renewal coverage from Citizens. Citizens renewal policyholders for personal and commercial lines residential risks, and take-out offers, are eligible for coverage if the premium for coverage from the authorized insurer is more than 20 percent greater than the renewal premium for comparable coverage from Citizens, including any surcharges or assessments. This increased eligibility threshold applies to renewal policies for personal lines residential risks on or after April 1, 2023. A policyholder that is removed from Citizens through an assumption agreement does not remain eligible for coverage from Citizens beyond the end of the policy term, but remains on Citizens' policy forms through the end of the policy term.

Citizens' eligibility threshold for new commercial lines residential risk is increased to make such applicants ineligible for coverage unless the premium from the authorized insurer is more than 20 percent, as opposed to more than 15 percent, of the premium for comparable coverage from Citizens. This change is consistent with the eligibility threshold for new personal lines residential risk coverage.

The bill removes language suggesting that the notice from Citizens to policyholders and the agent of record regarding take-out offers should include notice that the policyholder has an option to accept or reject the offer and remain with Citizens.

Rates

Section 8 maintains Citizens' requirement for its rates to be actuarially sound and adds a requirement that the rates not be competitive with the approved rates charged in the admitted market. The bill notes that this provision is added to ensure that Citizens functions as a residual market mechanism and provides insurance only when insurance cannot be procured in the voluntary market.

The bill removes the glidepath rate limitations for any new or renewal personal lines policy for non-primary residences written on or after November 1, 2023, and sets the rate to no more than 50% above, but not less than, the established rate for Citizens which was in effect 1 year before the date of the application. The term "primary residence" is defined as the dwelling that is the policyholder's primary home or is a rental property that is the primary home of the tenant and which the policyholder or tenant occupies for more than 9 months of each year.

Flood Insurance

The bill requires an applicant or insured of Citizens for personal lines residential coverage (for example, homeowner's coverage) to obtain flood insurance as a condition of coverage which must be at least equivalent to the coverage available from the National Flood Insurance Program or certain private market flood products authorized by s. 627.715(1), F.S., that provide coverage that is not below NFIP coverage. The limits for such coverage must be the lesser of the policy limit on the Citizens policy or the coverage limits under NFIP flood coverage. The applicant or insured must execute a form that is approved by the OIR which affirms that flood insurance is not provided by Citizens, and that the risk will not be eligible for coverage by Citizens if flood insurance is not secured. Policyholders' requirement to obtain flood insurance must be implemented as follows:

- Personal lines residential Citizens policyholders whose property is located within special hazard flood zones defined by the FEMA, must have flood coverage by:
 - April 1, 2023 for Citizens' new policies.
 - July 1, 2023 for Citizens' renewal policies.
- For all other risks, the requirement to flood insurance must be implemented for specified Citizens' policyholders as follows:
 - March 1, 2024, for policies insuring property to a limit of \$600,000 or more.
 - March 1, 2025, for policies insuring property to a limit of at least \$500,000 but less than \$600,000.
 - March 1, 2026, for policies insuring property to a limit of at least \$400,000 but less than \$500,000.
 - March 1, 2027, for all other policyholders.

Conforming Changes

Section 9 amends s. 627.351(6)(s), F.S., to provide a conforming change to the elimination of attorney fee awards under s. 627.428, F.S., for property insurance litigation.

Section 10 amends s. 627.3511, F.S. to conform cross references.

Section 11 of the bill amends s. 627.3518, F.S., the Citizens' clearinghouse statute to incorporate the revisions made in the bill to the Citizens eligibility standard. The bill repeals language which that requires an applicant for coverage who was declared ineligible for coverage at renewal by Citizens in the previous 36 months be considered a renewal under the Citizens' clearinghouse statute if the authorized insurer continues to insure the applicant and increased the rate higher than allowed under Citizens' eligibility standard.

Flood Notice

Section 14 amends s. 627.7011, F.S., to require that the mandatory flood insurance notice be included on the declarations page, rather than with the policy documents, at initial issuance and every renewal. The bill also revises the notice to specify that policyholders' flood losses will be uncovered if they do not purchase flood insurance, and to state that the policyholder should consider purchasing flood insurance.

Claim Filing Deadline

Section 16 amends s. 627.70132, F.S., to reduce the deadline for policyholders to report a property insurance claim under the policy from 2 years to 1 year for a new or reopened claim, and from 3 years to 18 months for a supplemental claim.

Mandatory Binding Arbitration Provisions in Property Insurance Contracts

Section 18 creates s. 627.70154, F.S., providing conditions whereby an insurer may include mandatory binding arbitration in its policies. The insurer may not require a policyholder to participate in mandatory binding arbitration unless:

- The mandatory binding arbitration requirements are contained in a separate endorsement attached to the property insurance policy;
- The premium for the policy includes an actuarially sound credit or premium discount for the mandatory binding arbitration endorsement;
- The policyholder signs a form accepting mandatory binding arbitration and which form must notify the policyholder of the rights given up in exchange for the credit or premium discount, including, but not limited to, the right to a trial by jury; and
- The endorsement requires that the insurer will comply with the mediation provisions in s. 627.7015, F.S., before the initiation of arbitration.

Homeowner Claim Bill of Rights

Section 20 amends s. 627.7142, F.S., the Homeowner Claim Bill of Rights to conform to the bill's amendments to s. 627.70131, F.S.

Assignment of Benefits

Section 21 amends s. 627.7152, F.S., to prohibit the assignment, in whole or in part, of any post-loss insurance benefit under any residential property insurance policy or under any commercial property insurance policy issued on or after January 1, 2023. The bill specifies that assignment agreements under a residential property insurance policy or

under a commercial property insurance policy are only valid on policies issued on or after July 1, 2019, and before January 1, 2023.

Continuation of Coverage

Section 23 amends s. 631.252(3), F.S., to allow the OIR to extend the 30-day coverage period for policies of insolvent insurers by an additional 15 days if the OIR reasonably believes that market conditions are such that the policies cannot be placed with an authorized insurer within the 30-day period.

Appropriation

Section 25 provides that for the 2022-2023 fiscal year, the sum of \$1,757,982 in recurring funds is appropriated from the Insurance Regulatory Trust Fund to the Office of Insurance Regulation with associated salary rate of \$844,464. From these funds, \$1,356,615 is appropriated in the Salaries and Benefits appropriation category, \$400,000 is appropriated in the Other Personal Services appropriation category, and \$1,367 is appropriated in the Transfer to Department of Management Services - Human Resources Services Purchased Per Statewide Contract appropriation category. The funds shall be utilized for the recruitment and retention of personnel within the office to ensure the ongoing monitoring of insurance company products and services, as well as the financial condition of licensed insurance companies.

Effective Dates

Section 26 provides that the bill takes effect upon becoming law, except as otherwise expressly provided. Bill sections with alternative effective dates are:

- **Section 8 and Section 11**, which are effective January 1, 2023.
- **Section 15**, which is effective March 1, 2023.

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 identified.

V. Fiscal Impact Statement:

A. **Tax/Fee Issues:**

None.

B. **Private Sector Impact:**

The bill appropriates for 2022-2023 fiscal year, \$1,757,982 in recurring funds from the Insurance Regulatory Trust Fund to the OIR with an associated salary rate of \$844,464. The funds will be allocated as follows: \$1,356,615 for Salaries and Benefits, \$400,000 for Other Personal Services Category, and \$1,367 to DMS. Funds also will be used for recruitment and retention of personnel within the OIR.

C. **Government Sector Impact:**

The bill authorizes cumulative transfers not to exceed \$1 billion from the General Revenue Fund to the Florida Optional Reinsurance Assistance (FORA) Program for the 2022-23 contract term beginning June 1, 2023. The FORA program statute expires June 30, 2026, if no general revenue funds have been transferred to fund the FORA program. If such funds are transferred, the statute expires July 1, 2030, and all unencumbered FORA program funds must be transferred back to the General Revenue Fund.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends ss. 624.1551, 624.3161, 626.9373, 626.9541, 627.351, 627.3511, 627.3518, 627.428, 627.7011, 627.70131, 627.70132, 627.70152, 627.7074, 627.7142, 627.7152, 631.252, and 768.79 of the Florida Statutes.

This bill creates s. 215.5552 and s. 627.70154 of the Florida Statutes.

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.

This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.
