HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for CS/HB 305 Insurance
SPONSOR(S): Commerce Committee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Commerce Committee		Fortenberry	Hamon

SUMMARY ANALYSIS

The bill makes several changes related to insurance:

- **Residential property insurance claims for roof damage –** Establishes contractors or unlicensed persons acting on their behalf may not solicit or incentivize a residential property owner to file a roof damage insurance claim. It also establishes that a public adjuster, a public adjuster apprentice, or unlicensed persons acting on their behalf may not incentivize a residential property owner to file a roof damage insurance claim.
- **Authority to examine managing general agents (MGAs) –** Clarifies that the Office of Insurance Regulation has the authority to examine MGAs, including insurers' affiliates. Examination of affiliates will not extend to passive investors who do not provide services for, or have relationships with, an insurer.
- **Collection of property insurance claims litigation data by OIR –** Establishes that each insurer or insurer group doing business in Florida shall file specific data regarding litigation of personal and commercial residential property insurance claims on with OIR an annual basis.
- **Citizens Property Insurance Corporation (Citizens) –** Makes several changes to the operations of, and requirements for, Citizens, the state-run property insurer:
    - Revises the eligibility for residential property owners to obtain coverage from Citizens so that they are not eligible for Citizens' coverage if they can obtain coverage from private insurers that is less than 20 percent greater than the premium for comparable coverage from Citizens.
    - Establishes that Citizens' may add 1 percent per year to its cap on rate increases until it reaches a maximum of a 15 percent rate cap on increases in 2026.
    - Establishes that if Citizens does not buy reinsurance to cover its projected 100-year probable maximum loss, it must still include the cost of such reinsurance in its rate calculations.
    - Establishes that Citizens must have budget allocations for employee salaries, raises for any individual employee in excess of 10 percent, and an overall employee compensation plan approved by Citizens' Board of Governors.
- **Contingency risk multiplier –** Provides threshold factors, at least one of which must be met, before a court may consider whether to apply a contingency risk multiplier in rare and exceptional circumstances to attorney fees for a suit arising under a property insurance policy.
- **Actual cash value coverage disclosure –** Establishes that when a policyholder accepts a residential property insurance policy containing actual cash value coverage, the insurer must obtain written acceptance, provide the policyholder with a disclosure regarding the coverage, and remind the policyholder of the availability of replacement cost coverage at least once every three years.
- **Notice of property insurance claims –** Changes the notice of claim deadlines in the Insurance Code so that notice of any property insurance claim must be provided to a property insurer within two years of the date of loss.
- **Presuit notice and demand –** Creates new statutory requirements for residential or commercial property suits that are not brought by an assignee, including a ten-day presuit notice and demand, before bringing suit against an insurer. The bill also provides parameters regarding the recovery of attorney fees by claimants' attorneys.

The bill has no impact on state or local government revenues or expenditures. It may have a positive direct economic impact on the private sector.

The bill has an effective date of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Residential Property Insurance Claims for Roof Damage

Background

The Florida Office of Insurance Regulation (OIR) has reported a significant increase in the number of roof damage claims, many of which include litigation.[1] These roof damage claims include claims made by residential property owners after being solicited to file an insurance claim that they may not otherwise have filed but for the promise of a new roof at no cost to the property owner.[2]

Effect of the Bill

The bill limits certain property insurance practices by contractors, public adjusters, public adjuster apprentices, and those unlicensed persons acting on their behalf.

Contractors

The bill establishes that no contractor, including a general, building, residential, or roofing contractors, or someone acting on the contractor's behalf, may:

- Solicit a residential property owner to file an insurance claim.
- Offer an incentive to a residential property owner for allowing the inspection of the residential property owner's roof or for making an insurance claim for roof damage.
- Offer or accept any compensation or reward for referral of services for which property insurance proceeds are payable.
- Interpret policy provisions, advise an insured about policy provisions, or adjust claims on behalf of an insurer unless licensed as a public adjuster.
- Provide an insured with an agreement authorizing repairs without providing a good faith estimate of the cost of repairs.

The bill establishes that a contractor may not enter into a contract with a residential property owner to repair or replace a roof without including notice in the contract that the contractor is prohibited from engaging in the above acts. If the contractor fails to include the notice in the contract, the property owner may void the contract within 10 days of its execution.

Public Adjusters

The bill establishes that a public adjuster, public adjuster apprentice, or those acting on their behalf may not:

- Offer an incentive to a residential property owner for allowing the inspection of the residential property owner's roof or for making an insurance claim for roof damage.
- Offer or receive compensation or a reward for referral of any services for which property insurance proceeds would be used for roofing repairs or replacement.

Penalties

[1] Report from David Altmaier, Florida Insurance Commissioner, to Chair Blaise Ingoglia, Commerce Committee, regarding cost drivers affecting Florida's insurance rates, p. 7 (Feb. 24, 2021).
[2] *Id.* A "free" roof replacement may be achieved by giving a residential property owner whose policy provides for replacement cost coverage for a roof a gift card or something else valued at the amount of the deductible under the policy so that the entire cost of a new roof is paid by the insurer and the individual soliciting the residential property owner.

The bill provides that any contractor, public adjuster, public adjuster apprentice, or unlicensed person acting on their behalf may be subject to a fine of up to $10,000 per violation for each of the statutory prohibitions established. Finally, the bill provides that any unlicensed person who engages in the prohibited acts shall be guilty of unlicensed contracting or public adjusting, as applicable.

OIR – Authority to Examine Managing General Agents (MGAs)

Background

MGAs

Some insurance companies operate within a holding company system that includes an MGA.[3] An MGA is a specialized type of insurance agent or broker that has underwriting authority from an insurer.[4] MGAs can perform certain functions that insurers typically handle, including binding coverage, underwriting and pricing, agent appointments, and claims adjusting and settlement.[5] An MGA may be an affiliate of an insurer. Section 624.10(1), F.S., defines an affiliate as an entity that exercises control over or is directly or indirectly controlled by an insurer. Under current law, MGAs must enter into contracts with insurers with which they do business unless the MGA is a controlled or controlling person of the insurer (i.e., an affiliate).[6] These contracts must specify the division of responsibilities between the insurer and the MGA.[7]

Examination of Insurers and MGAs

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.[8] Examination authority extends to the examination of MGAs[9] unless the MGA solely represents a single domestic insurer.[10] With certain exceptions, OIR must examine domestic insurers[11] at least once every five years and the exam shall cover the preceding five fiscal years.[12]

As part of the examination process, all persons being examined must make available to OIR the accounts, records, documents, files, information, assets, and matters in their possession or control that relate to the subject of the examination.[13] As part of an examination, OIR reviews contracts between insurers and MGAs, so that it can determine how much an insurer is paying its MGA and what services the insurer is receiving for the fee it pays. However, the lack of contracts between insurers and their affiliate MGAs sometimes makes it difficult to determine how much the insurer is paying and what services it is receiving from the MGA.

Effect of the Bill

The bill clarifies that OIR has the same authority to examine MGAs as it has to examine insurers, whether or not an MGA is an affiliate of an insurer. This authority applies even if the MGA solely

[3] *See s. 628.801, F.S.* An "insurance holding company system" consists of two or more affiliated persons, one or more of which is an insurer. National Association of Insurance Commissioners, https://content.naic.org/sites/default/files/inline-files/MDL-440.pdf (last visited Apr. 18, 2021).
[4] IRMI, https://www.irmi.com/term/insurance-definitions/managing-general-agent (last visited Apr. 2, 2021).
[5] *Id.*
[6] S. 626.7451, F.S.
[7] *Id.*
[8] S. 624.316(1)(a), F.S.
[9] *Id.*
[10] S. 626.7452, F.S.
[11] A domestic insurer is one formed under the laws of Florida. S. 624.06(1), F.S.
[12] S. 624.316(2)(a), F.S. While s. 624.316(1)(a), F.S., clearly states that OIR may examine MGAs, because some MGAs are considered affiliates of insurers, and s. 624.316(2)(a), F.S., does not specify that OIR may examine affiliates in the same way as insurers, OIR has indicated that some MGAs have not been completely cooperative with the examination process.
[13] S. 624.318(2), F.S.

represents a single domestic insurer. The bill also requires each insurer paying an affiliate to produce information regarding the fee paid to the affiliate upon request by OIR. OIR may determine whether the fee an insurer pays to an affiliate is fair and reasonable and, in so doing, may consider the actual cost of the services being provided in exchange for the fee. The bill establishes that all MGAs must execute contracts with the insurers that they do business with, even if they are MGAs that control, or are controlled by, an insurer. Further, the bill establishes that the scope of the examination of insurer's affiliates in a holding company system will be limited to information reasonably necessary to ascertain an insurer's financial condition. OIR's examination of an insurer's affiliate will not extend to the passive investors of affiliates within the holding company system which do not provide services directly or indirectly to the insurer or do not have direct or indirect relationships with the insurer unless reasonably necessary.

Collection of Property Insurance Claims Litigation Data by OIR

Background

All insurers with a Florida certificate of authority to transact insurance business must file quarterly and annual reports with OIR containing various financial data and actuarial opinions.[14] However, the law does not currently specify that insurers must report data regarding the litigation of claims.

OIR recently conducted a data survey of property insurers to gather information regarding the litigation of personal or commercial residential property insurance claims.[15] In response to this survey, several insurers indicated that they could not provide OIR with answers to questions related to litigation trends because they did not collect the requested data as part of their claims evaluation and adjusting process.[16]

Effect of the Bill

The bill establishes that beginning on January 1, 2022, each insurer or insurer group doing business in Florida must provide specific pieces of data regarding litigation of personal and commercial residential property insurance claims to OIR on an annual basis. This data includes, but is not limited to, the following information on a per claim basis:

- Type of policy;
- Date, location, and type of loss;
- Name and type of vendors utilized for mitigation, repair, or replacement;
- Dates on which the claim was reported to the insurer, closed by the insurer, and reopened by the insurer;
- Dates on which a supplemental claim was made;
- Whether the claimant had a public adjuster or an attorney;
- Total amounts that the insurer paid for indemnity, loss adjustment expenses,[17] and insured's attorney fees;
- Whether the insured's attorney requested that a contingency risk multiplier (CRM)[18] be applied to the attorney fees calculation and, if so, what CRM was applied.

If insurers collect and report this data, OIR and the Legislature should be able to more effectively identify current and emerging property insurance litigation trends that may be affecting insurance rates.[19]

Citizens Property Insurance Corporation (Citizens)

[14] S. 624.424, F.S.
[15] Altmaier, *supra*, note 1, at 12.
[16] *Id.*
[17] Loss adjustment expenses are the costs associated with investigating and adjusting losses or insurance claims. IRMI, https://www.irmi.com/term/insurance-definitions/loss-adjustment-expense (last visited Apr. 2, 2021).
[18] 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).
[19] Altmaier, *supra*, note 1, at 12.

Citizens is a state-created, not-for-profit, tax-exempt government entity that is an integral part of the state, whose public purpose is to provide property insurance to those unable to find affordable coverage in the private market.[20]

Eligibility and Rates

Background

New applicants are eligible for coverage from Citizens if no private carrier will write them a policy for a premium that is less than 15 percent greater than what Citizens would offer them for comparable coverage.[21] The rate cap, also known as the "glide path," is not closing the gap between Citizens rates and private market rates. Instead, because of the rate cap and the increasing rates of private property insurance, the gap is growing and making Citizens more like a competitor to private insurers than an insurer of last resort. Annual rate increases for existing Citizens' policyholders are capped at no more than 10 percent for any single policy.[22] It is unclear if, or how, the law allows OIR to approve a rate reduction for Citizens.

Because Citizens' rates are often well below those of private carriers, Citizens may be more competitive than otherwise intended. Due to Citizens' structure, its rates do not contain certain elements that the rates of private insurers contain. Citizens does not pay taxes like private carriers do and does not need to purchase as much reinsurance as private carriers do due to higher levels of capital and surplus.

Current law also requires that Citizens make its best efforts to procure catastrophe reinsurance at reasonable rates to cover its projected 100-year probable maximum loss.[23] Due to the high cost of reinsurance over the recent years, Citizens has determined that it is not available at reasonable rates and has not purchased it. This lack of purchase has contributed to its rates remaining more competitive and more consumers being eligible for coverage from Citizens.

Effect of the Bill

The bill establishes that residential property owners are not eligible for coverage from Citizens if they can obtain coverage from private insurers that is less than 20 percent greater than the premium for comparable coverage from Citizens.

The bill also establishes that on or after January 1, 2022, Citizens must implement rate increases that do not exceed the following percentages for any single policy that it issues:

- Eleven percent for 2022;
- Twelve percent for 2023;
- Thirteen percent for 2024;
- Fourteen percent for 2025;
- Fifteen percent for 2026 and all subsequent years.

The bill also clarifies that Citizens need not purchase catastrophe reinsurance to cover its projected 100-year probable maximum loss if it is not available at reasonable rates. However, Citizens must include the cost of this reinsurance in its rate calculations even if it does not purchase the reinsurance.

[20] S. 627.351(6)(a)1., F.S.
[21] S. 627.351(6)(c)5.a., F.S.
[22] S. 627.351(6)(n)6., F.S.
[23] S. 627.351(6)(c)9., F.S. "Probable maximum loss" refers to the value that may be reasonably expected to be lost in a single casualty. IRMI, https://www.irmi.com/term/insurance-definitions/probable-maximum-loss (last visited Apr. 2, 2021). If an insurer is buying reinsurance to cover its 100-year probable maximum loss, it is purchasing reinsurance to cover the maximum loss that has a chance of occurring once in 100 years.

Salaries of Citizens' Personnel

Background

Citizens operates pursuant to a plan of operation (plan) that is approved by the Financial Services Commission (FSC).[24] Pursuant to the applicable statute, the plan may contain certain criteria regarding Citizens' employees.[25] Additionally, the applicable statute specifies that candidates for senior management positions with Citizens must undergo background checks, that employees must attest annually that they do not have any conflicts of interests with their employment, and that certain employees of Citizens are subject to ethics disclosures.[26] However, neither the statute nor the plan provide any parameters for the salaries that Citizens may pay its employees.

Effect of the Bill

The bill provides that Citizens' Board of Governors must approve all of the following:

- Budget allocations for the compensation of all Citizens' employees.
- Any proposed raise for an individual employee exceeding 10 percent of that employee's current salary.
- An overall employee compensation plan.

Attorney Fees Awarded in Property Insurance Litigation

Background

In certain situations, a court may require one party to pay the opposing party's attorney fees. The traditional English Rule entitled a prevailing party to attorney fees as a matter of right. Florida, however, with a majority of other U.S. jurisdictions, adopted the American Rule, under which each party is responsible for its own attorney fees unless a statute provides an entitlement to fees.

A contingency fee is an attorney fee that is charged only if the lawsuit is successful or favorably settled out of court.[27] An attorney and a client may enter into a contingency fee contract, agreeing that the client will pay the attorney a fee only if the attorney successfully recovers for the client.

The Florida Supreme Court, through its Rules Regulating the Florida Bar, allows contingency fee contracts but restricts their use.[28] Rule 4-1.5(f) prohibits contingency fees in criminal defense and certain family law proceedings.[29] The rule also requires a contingency fee agreement to:

- Be in writing;
- State the method by which the fee is to be determined;
- State whether expenses are to be deducted before or after the contingency fee is calculated; and
- In certain types of cases, include other provisions ensuring the client is aware of the agreement's terms.[30]

Upon conclusion of a contingency fee case, the attorney must provide the client with a written statement stating the outcome of the case, the amount remitted to the client, and how the attorney calculated the amount.[31]

Statutorily Provided Attorney Fees

[24] S 627.351(6)(a)2., F.S. The FSC is composed of the Governor, Attorney General, Chief Financial Officer, and Commissioner of Agriculture. S. 20.121(3), F.S.
[25] S. 627.351(6)(c)3., F.S.
[26] S. 627.351(6)(d), F.S.
[27] *See* Black's Law Dictionary 338 (8th ed. 2004).
[28] R. Regulating Fla. Bar 4-1.5(f).
[29] R. Regulating Fla. Bar 4-1.5(f)(3).
[30] R. Regulating Fla. Bar 4-1.5(f)(1) and (4).
[31] R. Regulating Fla. Bar 4-1.5(f)(1).

Several state and federal statutes known as “fee-shifting statutes” state that a prevailing party in court proceedings is entitled to reasonable attorney fees as a matter of right.[32] When a fee-shifting statute applies, the court must determine and calculate what constitutes reasonable attorney fees.

Lodestar Approach

In *Fla. Patient’s Comp. Fund v. Rowe,* a 1985 case, the Florida Supreme Court held that courts should calculate the amount of statutorily-authorized attorney fees using the "lodestar approach."[33] Applying this approach requires the court to determine the number of hours reasonably expended on the case and to determine a reasonable hourly rate for the attorney to have charged. Then the number of hours reasonably expended, multiplied by the reasonable hourly rate, produces the "lodestar amount," which is considered an objective basis for what the attorney fee amount should be.

Contingency Risk Multiplier

In certain cases, the court increases the attorney fees awarded by applying a contingency risk multiplier (CRM) to the lodestar amount.[34] The concept of the CRM arose from judicial interpretations of statutory authorization of attorney fees in particular cases,[35] but the Legislature also expressly provides for the use of a CRM in certain cases.[36] In 1990, the Florida Supreme Court discussed three different types of cases and whether a CRM should be applied in each case, as follows:

- *Public policy enforcement cases.* These cases may involve discrimination, environmental issues, and consumer protection issues. In these cases, a CRM is usually inappropriate.
- *Family law, eminent domain, estate, and trust cases*. In these cases, a CRM is usually inappropriate.
- *Tort and contract claims, including insurance cases*. In these cases, a CRM may be applied if the plaintiff can demonstrate the following factors show a need for the multiplier:
    - Whether the relevant market requires a CRM to obtain counsel;
    - Whether the attorney can mitigate the risk of nonpayment; and
    - Whether any other factors established in *Rowe*[37] support the use of the multiplier.[38]

Further, in the same decision, the Court noted that the size of the CRM varies from 1.0 to 2.5 based on the likelihood of success at the outset of the case, as follows:

- 1.0 to 1.5, if the trial court determines that success was more likely than not at the outset;

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[32] *See, e.g.,* s. 627.428, F.S., which is often referred to as the “one-way attorney fees statute” (providing that an insured who prevails against an insurer is entitled to "a reasonable sum" of attorney fees); s. 501.2105, F.S. (providing that the prevailing party in an action under the Florida Deceptive and Unfair Trade Practices Act (FDUTPA) is entitled to "a reasonable legal fee"); 42 U.S.C. s. 1988(b) (providing that a prevailing party seeking to enforce specified civil rights statutes may recover "a reasonable attorney's fee").

[33] *Fla. Patient's Comp. Fund v. Rowe*, 472 So. 2d 1145 (Fla. 1985).

[34] The Court may also adjust the amount based on the results obtained by the attorney. *Standard Guar. Ins. Co. v. Quanstrom*, 555 So. 2d 828, 830-31 (Fla. 1990). CRMs are also referred to as contingency fee multipliers.

[35] The rationale for using a CRM to increase an attorney fee award is that plaintiffs and plaintiffs' attorneys generally do not recover any money unless they prevail. The attorney fee multiplier induces attorneys to take a risk on cases they might not otherwise take, allowing would-be plaintiffs to find attorneys willing to represent them.

[36] *See* s. 790.33(3)(f)1, F.S. (explicitly authorizing a contingency fee multiplier in certain cases relating to the preemption of firearm and ammunition regulation).

[37] The *Rowe* factors were based upon Disciplinary Rule 2-106(b) of the Florida Bar (which is now Rule of Professional Conduct 4-1.5), and were as follows:

- Time and labor required, novelty and difficulty of the question involved, and the skill and requisite to perform the legal service properly.
- Likelihood, if apparent to the client, that the acceptance of employment would preclude other employment by the lawyer.
- Fee customarily charged in the locality for similar legal services.
- Amount involved and results obtained.
- Time limitations imposed by the client and circumstances.
- Nature and length of the professional relationship with the client.
- Experience, reputation, and ability of the lawyer(s) providing services.
- Whether the fee is a fixed or contingency fee.

Rowe, 472 So. 2d at 1150–1151.

[38] *Quanstrom*, 555 So. 2d at 833-35.

- 1.5 to 2.0, if the trial court determines that the likelihood of success was approximately even at the outset;
- 2.0 to 2.5, if the trial court determines that success was unlikely at the outset.[39]

Therefore, under current law, an attorney is more likely to receive a higher CRM—and thus a higher attorney risk award—if he or she takes a case that at the outset seems unlikely to succeed.

Federal Court Treatment of the Contingency Risk Multiplier

Part of the Florida Supreme Court's rationale for adopting the CRM framework in 1985 was the application of CRMs in federal courts.[40] However, in *Burlington v. Dague,* the U.S. Supreme Court decided and rejected the use of a CRM under certain federal risk-shifting statutes. In that case the Supreme Court signaled that it was closing the door on the CRM's use in most, if not all, federal cases.[41]

In *Perdue v. Kenny A. ex. rel. Winn,* a 2010 case involving a class action lawsuit filed on behalf of 3,000 children in the Georgia foster care system, the U.S. Supreme Court again addressed the CRM issue.[42] The plaintiffs argued in the underlying case that the foster care system in two counties was constitutionally deficient. The case was mediated and the parties entered a consent decree resolving all issues. Subsequently, the plaintiffs' attorneys sought attorney fees under 42 U.S.C. s. 1988.[43]

The federal district court calculated the fees using the lodestar approach, arriving at a $6 million figure, and then applied a 1.75 CRM, for a total attorney fee of $10.5 million. The district court justified the CRM by finding that the attorneys had:

- Advanced $1.7 million with no ongoing reimbursement.
- Worked on a contingency basis, and therefore were not guaranteed payment.
- Displayed a high degree of skill, commitment, dedication, and professionalism.
- Achieved extraordinary results.[44]

On review, the U.S. Supreme Court reversed the district court's calculation of attorney fees, remanding the case because the district court did not provide adequate justification for the 75 percent increase. The Court reiterated that "there is a strong presumption that the lodestar figure is reasonable," but that such presumption "may be overcome in those *rare circumstances* in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee."[45] The Court also determined that a CRM may be applicable in “exceptional” circumstances.[46]

The Court determined that the application of CRMs may sometimes be appropriate, while also issuing several warnings about CRMs, as follows:

- When a trial court fails to give detailed explanations for why it applies a CRM, "widely disparate awards may be made, and awards may be influenced . . . by a judge's subjective opinion regarding particular attorneys or the importance of the case."[47]
- "[U]njustified enhancements that serve only to enrich attorneys are not consistent" with the aims of a statute that seek to compensate plaintiffs.[48]
- In many cases, attorney fees "are not paid by the individuals responsible for the constitutional or statutory violations on which the judgment is based . . . . Instead, the fees are paid . . . by state and local taxpayers," resulting in a diversion of funds from other government programs.[49]

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[39] *Id.* at 834.
[40] *See Rowe*, 472 So. 2d at 1146 ("[W]e . . . adopt the federal lodestar approach for computing reasonable attorney fees").
[41] *See City of Burlington v. Dague*, 112 S. Ct. 2638 (1992) ("Thus, enhancement for the contingency risk posed by each case would encourage meritorious claims to be brought, but only at the social cost of indiscriminately encouraging nonmeritorious claims to be brought as well . . . [W]e hold that enhancement for contingency is not permitted under the fee-shifting statutes at issue").
[42] *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2010).
[43] 42 U.S.C. s. 1988(b) allows the court to award attorney fees to the prevailing party in certain civil rights actions.
[44] *Perdue*, 130 S. Ct. at 1670.
[45] *Id.* at 1673 (emphasis added).
[46] *Id.*
[47] *See id.* at 1676.
[48] *See id.*

Recent Florida Supreme Court Treatment of the Contingency Risk Multiplier

In 2017, in the case of *Joyce v. Federated Nat'l Ins. Co.,* the Florida Supreme Court rejected the U.S. Supreme Court's *Dague* decision, instead holding that the CRM in Florida courts is not subject to the "rare and exceptional circumstances" requirement.[50] The Court acknowledged that, based upon its decision to maintain the applicability of the CRM without the restrictions implemented by the *Dague* decision, Florida "separat[ed] from federal precedent in this area."[51]

In *Joyce*, an elderly couple who sustained water damage to their home, filed a claim with their insurer, who subsequently denied coverage on the basis of alleged material misrepresentations on the part of the Joyces during their application for insurance.[52] The Joyces hired an attorney on a contingency fee basis and sued their insurer, but eventually settled the case.[53] The parties agreed that the Joyces were entitled to attorney fees and a fee hearing occurred in which the trial court applied a 2.0 CRM to the lodestar attorney fee amount previously calculated.[54] The insurer appealed the case to the district court of appeal, which affirmed the lodestar amount, but reversed the application of the CRM.[55] The Joyces then appealed to the Florida Supreme Court, which accepted review and ruled in the Joyces' favor.[56] In his dissent to the *Joyce* opinion, however, Justice Canady stated that the case "illustrates the arbitrary results that can flow from application of the contingency risk multiplier….[which] have previously been exposed."[57]

Attorney Fees Applicable to Property Insurance Litigation ("One-way Attorney Fees")

Current Florida law provides that when a court issues a judgment against an insurer, and in favor of an insured who is represented by an attorney, the court shall order that the insurer pay a reasonable amount of attorney fees to an insured's attorney.[58] This provision regarding attorney fees is applicable to various insurance claim disputes, including property insurance claim disputes.[59]

Effect of the Bill

Contingency Risk Multiplier

For property insurance litigation, the bill establishes that, upon a request by the insurer, a court may consider applying a contingency risk multiplier only in rare and exceptional circumstances after making a written finding that at least one of the following factors has been met:

- The type of property insurance claim in dispute is complex in nature and uncommon in occurrence.
- The insurer has denied coverage for the claim.
- The insured cannot find competent counsel without a reasonable distance from the location of the property that is the subject of the claim. Reasonable distance includes, at a minimum, the counties contiguous to the county where that property is located.

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[49] *See id.* at 1677.
[50] *See Joyce v. Federated Nat'l Ins. Co.*, 228 So. 3d 1122 (Fla. 2017) ("[W]ith all due deference to the United States Supreme Court, we do not accept the *Dague* majority's rationale for rejecting contingency fee multipliers").
[51] *Id. at* 1132.
[52] *Id.* at 1123.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.* at 1132.
[58] S. 627.428, F.S.
[59] Of note, the Florida legislature has expressly prohibited the use of contingency risk multipliers for personal injury protection cases. *See* s. 627.736(8)(c), F.S.

- The difference between the insurer's initial offer and the insured's initial demand for damages to settle the loss was at least $5,000 or at least 15 percent of the difference, whichever is greater, and the insured recovered more than the initial offer.
- The amount of damages that the insured recovered for the claim exceed the insurer's initial offer by at least 200 percent.

One-way Attorney Fees

The bill also modifies current one-way attorney fee statute for property insurance litigation as follows:

- If the difference between the judgment obtained by the claimant and the presuit settlement offer by the insurer, excluding reasonable attorney fees and costs, is less than 20 percent of the disputed amount, each party pays their own attorney fees and costs.
- If the difference between the judgment obtained by the claimant and the presuit settlement offer by the insurer, excluding reasonable attorney fees and costs, is at least 20 percent but under 50 percent of the disputed amount, the insurer pays the claimant's attorney fees and costs equal to the percentage of the disputed amount obtained times the total attorney fees and costs.
- If the difference between the judgment obtained by the claimant and the presuit settlement offer by the insurer, excluding reasonable attorney fees and costs, is at least 50 percent of the disputed amount, the insurer pays the claimant's full attorney fees and costs.

The bill defines the disputed amount as the difference between the claimant's presuit settlement demand, not including attorney fees and costs and the insurer's presuit settlement offer, not including attorney fees and costs.

Informed Acceptance of Actual Cash Value Coverage (ACV)

Background

Property insurance claims are adjusted on the basis of replacement cost or actual cash value (ACV), depending on which type of coverage a policyholder purchased. When claims are adjusted on a replacement cost basis, the insurer will pay for the entire cost of repair or replacement without a reduction for depreciation.[60] However, when claims are adjusted on an ACV basis, the insurer pays the policyholder the depreciated value of the property damage or loss that is being replaced or repaired.[61] Property insurers must offer policyholders the option to purchase replacement cost coverage for all portions of their property.[62] Concerns have arisen that policyholders who choose to purchase property insurance policies that contain ACV coverage have not been adequately informed about what they are giving up by not purchasing replacement cost coverage.

Effect of the Bill

The bill requires that an insurer issuing a homeowner's policy or schedule providing actual cash value coverage must:

- Provide a policyholder with a form that the policyholder must sign at initial policy or schedule issuance, and must fully advise the policyholder of the nature of the coverage being accepted.
- Include with the policy or schedule at initial issuance and every renewal, a statement indicating that ACV coverage may result in significant costs to the policyholder.

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[60] For example, if a roof is destroyed beyond repair, and a policyholder has replacement cost coverage, the insurer will pay to replace the entire roof, minute the deductible, regardless of the age or condition of the roof at the time of the loss.

[61] If a roof damage claim is adjusted on the basis of ACV rather than replacement cost, this would mean that the cost of replacing an entire roof when the roof has been damaged beyond repair may not be covered. There is a concern that policies that contain ACV coverage for roofs will not comply with the requirements of Fannie Mae and Freddie Mac, which require insurance to be placed at 100 percent replacement cost of the dwelling for homes that are in catastrophe areas. *See Multifamily Selling and Servicing Guide*, (effective Feb. 4, 2019), at 272-273, https://multifamily.fanniemae.com/sites/g/files/koqyhd161/files/migrated-files/content/guide/multifamily-selling-servicing-guide.pdf (last visited Mar. 13, 2021).

[62] S. 627.7011, F.S.

- At least once every 3 years, provide a policyholder with a reminder that replacement cost coverage is available.

Notice of Property Insurance Claims

Background

Until 2011, the Florida Insurance Code (Code)[63] did not contain a time limit for giving notice of any type of property insurance claim. Section 95.11, F.S., requires that actions on contracts be brought within five years. Because an insurance policy is a contract, the five-year statute of limitations for contract actions generally applied to claims under insurance policies. Since a claim must have been made before a policyholder could sue for breach of contract, and a policyholder had five years to sue for breach of contract, the claim must have been made within five years of the date of loss.

Section 627.70132, F.S., enacted in 2011, established that notice of any hurricane or windstorm claim, supplemental claim, or reopened claim[64] under a property insurance policy must be provided to an insurer within three years after the hurricane made landfall or the windstorm caused the covered damage. Any claim for which notice is not given within the three-year timeframe is barred.[65] The three-year time limit for providing notice of a hurricane or windstorm claim does not affect the five-year statute of limitations for bringing suit under s. 95.11, F.S.[66] This means that while notice of a windstorm or hurricane claim must be provided to an insurer within three years of the date of loss, suit may still be brought for an additional two years past the notice deadline.[67] The time limit for notice of all other property insurance claims besides hurricane and windstorm claims has remained equal to the five-year statute of limitations because statutes do not specify otherwise.

Effect of the Bill

The bill changes the notice of claim deadlines in the Code so that notice of any property insurance claim, including a claim made under a property insurance policy issued by an eligible surplus lines insurer, must be provided to a property insurer within two years of the date of loss.

The bill redefines reopened and supplemental claims so that these terms have separate meanings. A reopened claim is defined 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. A supplemental claim is defined as a claim for additional loss or damage from the same peril which the insurer has previously adjusted that was discovered while completing repairs or replacement pursuant to an open claim. The bill establishes that reopened claims are subject to the requirement that a policyholder give notice of loss within two years after the date of loss, but supplemental claims are not barred as long as notice is given to the insurer while the claim to which they are related remains open.

The bill establishes that, for the purposes of s. 627.70132, F.S., a claim that an insurer has closed without providing an insured with the total amount due for the loss or damage is not considered a closed claim. It also makes technical changes to the statute regarding alternative dispute resolution of property insurance claims so that the changes to the notice of claim statute do not conflict with that statute.[68]

Presuit Notice and Demand Requirements for Property Insurance Claims

Background

[63] The Florida Insurance Code is comprised of chapters 624-632, 634-636, 641, 642, 648, and 651, F.S.
[64] S. 627.70132, F.S., defines both "supplemental claim" and "reopened claim" as "any additional claim for recovery from the insurer for losses from the same hurricane or windstorm which the insurer has previously adjusted pursuant to the initial claim." Because these terms have the same definition, it is unclear why the statute uses both of them.
[65] S. 627.70132, F.S.
[66] *Id.*
[67] Often, the type of suit that an insured brings against an insurer is a breach of contract suit based upon a denial of a claim.
[68] S. 627.7015, F.S.

Under existing law, within 90 days after a residential property insurer receives a notice of an initial, reopened, or supplemental property insurance claim from a policyholder, the insurer must pay or deny the claim or a portion of the claim, unless the failure to pay is due to circumstances beyond the insurer's control which reasonably prevent payment.[69] In some circumstances, a claimant will hire an attorney and file suit against an insurer before the expiration of the allotted time for the insurer to pay or deny a claim. In contrast, as a condition precedent to bringing a third-party cause of action to enforce an assignment agreement against an insurer, the assignee must provide the name insured and the assignor a written notice of intent to initiate litigation, delivered at least ten business days before filing suit, but not before the insurer has made a determination of coverage.[70]

Effect of the Bill

The bill creates a new statutory section which applies to all residential and commercial property suits not brought by an assignee. Under that section, a claimant must:

- Cooperate with the insurer in the claim investigation.
- Provide the insurer with requested records and documents related to any services that have been provided.
- Provide the insurer with estimates of the scope of work needing to be performed.
- Allow the insurer to inspect, photograph, or evaluate the property that is the subject of the claim.

As a condition precedent to filing suit under a property insurance policy, a claimant must provide the Department of Financial Services (DFS) with a written notice of intent to initiate litigation on a form provided by DFS at least 10 business days prior to filing suit, but not before the earlier of the expiration of the 90-day period for the insurer to determine coverage or denial of coverage by the insurer.[71] DFS will provide the insurer with the notice by delivering it to a designated email on file with DFS.

The notice of intent to initiate litigation must include insurer's acts or omissions that give rise to the suit, which may include a denial of coverage. If the notice is being provided to an insurer following a denial of coverage, the notice must also include an estimate of damages, if known. If the notice is being provided to an insurer following any other act or omission by the insurer, it must include both of the following:

- A presuit settlement demand that must itemize damages, attorney fees, and costs.
- The disputed amount, which is defined as the difference between the claimant's presuit settlement demand, not including attorney fees and costs, and the insurer's presuit settlement offer, not including attorney fees and costs.

Pursuant to the bill, an insurer served with a presuit notice must respond to the notice in writing within ten business days after receiving the notice. If an insurer is responding to a notice served on it following a denial of coverage, the insurer must respond by: (1) accepting coverage; (2) denying coverage; or (3) asserting the right to reinspect the damaged property. If an insurer responds by asserting the right to reinspect the damaged property, it has 14 business days from the response asserting that right, to reinspect the property and accept or continue to deny coverage. If the insurer continues to deny coverage, the claimant may file suit without providing additional notice to the insurer.

If an insurer is responding to a notice served on it following any act or omission other than a coverage denial, the insurer must respond by making a settlement offer or by requiring the claimant to participate in appraisal or another form of alternative dispute resolution as provided for under the insurance policy. The time limits for filing a suit under s. 95.11, F.S., are tolled during the ten-day period for the insurer to respond to the presuit notice and while appraisal or alternative dispute resolution is ongoing. However, if appraisal or alternative dispute resolution have not been concluded within 90 days after the expiration of the ten-day notice of intent to initiate litigation, the claimant or claimant's attorney may immediately file suit without providing the insurer additional notice.

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[69] S. 627.70131, F.S. This statute is sometimes referred to as the "prompt pay" statute for property insurance claims.
[70] An assignee is someone who receives policy rights through an assignment by a policyholder (assignor). IRMI, https://www.irmi.com/term/insurance-definitions/assignee (last visited April 2, 2021). *See* s. 627.7152, F.S., for presuit requirements placed on assignees.
[71] S. 627.70131, F.S.

The bill also requires that a court dismiss without prejudice any claimant's suit relating to a claim for which presuit notice is given if the suit is commenced before the expiration of the ten-day period for the insurer to respond. If a court dismissed a claimant's suit under these circumstances, the claimant's attorney is not entitled to an award of attorney fees for services rendered before the suit's dismissal.

Finally, the bill:

- Establishes that presuit notice is admissible as evidence in a civil suit or an alternative dispute resolution proceeding relating to the claim in which the notice is given;
- Provides that the presuit notice does not limit the evidence of attorney fees or costs, damages, or loss, which may be offered at trial; and
- Provides that the presuit notice does not relieve the insured or an assignee of the burden of providing any other notices required by law.

B. SECTION DIRECTORY:

Section 1. Creates s. 489.147, F.S., relating to prohibited property insurance practices.

Section 2. Amends s. 624.316, F.S., relating to examination of insurers.

Section 3. Amends s. 624.318, F.S., relating to conduct of examination or investigation; access to records; correction of accounts; appraisals.

Section 4. Amends s. 624.424, F.S., relating to annual statement and other information.

Section 5. Amends s. 626.7451, F.S., relating to managing general agents; required contract provisions.

Section 6. Amends s. 626.7452, F.S., relating to managing general agents; examination authority.

Section 7. Amends s. 626.854, F.S., relating to "public adjuster" defined; prohibitions.

Section 8. Amends s. 627.351, F.S., relating to insurance risk reapportionment plans.

Section 9. Amends s. 627.3518, F.S., relating to Citizens Property Insurance Corporation policyholder eligibility clearinghouse program.

Section 10. Amends s. 627.428, F.S., relating to attorney fees.

Section 11. Amends s. 627.7011, relating to homeowners' policies; offer of replacement cost coverage and law and ordinance coverage.

Section 12. Amends s. 627.70132, F.S., relating to notice of windstorm or hurricane claim.

Section 13. Amends s. 627.7015, F.S., relating to alternative procedure for resolution of disputed property insurance claims.

Section 14. Creates s. 627.70152, F.S., relating to suits arising under a property insurance policy.

Section 15. Amends s. 628.801, F.S., relating to insurance holding companies; registration; regulation.

Section 16. Provides an effective date of July 1, 2021.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

To the extent the bill reduces property insurance rates and claims litigation, the bill may have a positive indeterminate impact on the private sector.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill requires no additional rulemaking authority for OIR or DFS. While the bill requires the adoption of a form prescribed by the FSC on which insurers will report their property insurance claims litigation data, the Florida Insurance Code contains existing authority for the promulgation of such forms by the FSC. The bill also requires DFS to adopt a form for presuit notice. However, DFS has existing authority for the promulgation of such forms, as well.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 23, 2021, the Insurance & Banking Subcommittee considered a proposed committee substitute (PCS) along with one amendment to the committee substitute and reported the bill favorably as a committee substitute. The PCS:

- Removed the contingency risk multiplier provision.

- Removed the portion that clarified that that insurers are authorized to provide limited roof coverage in personal lines residential property insurance policies by including a roof surface reimbursement schedule.
- Clarified that OIR has the same authority to examine MGAs that it has to examine insurers.
- Established that each insurer or insurer group doing business in Florida must provide specific pieces of data regarding litigation of personal and residential property insurance claims to OIR on a quarterly basis.
- Modified certain rating and eligibility requirements for Citizens.
- Placed salary limits on Citizens' employees.
- Added presuit notice requirements for all residential and commercial property suits not brought by an assignee.

The amendment to the PCS made the following changes:

- Established that no contractor, including a general, building, residential, or roofing contractor, or someone acting on the contractor's behalf may:
    - Solicit a residential property owner to file an insurance claim.
    - Offer an incentive to a residential homeowner for allowing the inspection of the residential property owner's roof or for making an insurance claim for roof damage.
    - Offer or accept any compensation or reward for referral of services for which property insurance proceeds are payable.
    - Interpret policy provisions, advise an insured about policy provisions, or adjust claims on behalf of an insured unless licensed as a public adjuster.
    - Provide an insured with an agreement authorizing repairs without providing a good faith estimate of the cost of the repairs.
- Established that a contractor may not enter into a contract with a residential property owner to repair or replace a roof without including notice that the contractor is prohibited from engaging in certain acts.
- Established that a public adjuster, public adjuster apprentice, or those acting on their behalf may not:
    - Offer an incentive to a residential homeowner for allowing the inspection of the residential property owner's roof or for making an insurance claim for roof damage.
    - Offer or receive any compensation or reward for referral of any services for which property insurance proceeds would be used for roofing repairs or replacement.
- Provided that any contractor, public adjuster, public adjuster apprentice, or person acting on their behalf may be subject to a fine of $10,000 per violation for each of the statutory prohibitions.
- Provided that any unlicensed person who engages in the prohibited acts shall be guilty of unlicensed contracting or public adjusting, as applicable, and is subject to a fine of $10,000 per violation for each of the statutory prohibitions.