

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 Rules

BILL: CS/CS/CS/SB 76

INTRODUCER: Rules Committee; Judiciary Committee; Banking and Insurance Committee; and Senators Boyd and Brandes

SUBJECT: Property Insurance

DATE: March 29, 2021

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Arnold</u>	<u>Knudson</u>	<u>BI</u>	<u>Fav/CS</u>
2.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
3.	<u>Arnold</u>	<u>Phelps</u>	<u>RC</u>	<u>Fav/CS</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/CS/SB 76, in broad terms, revises the statutes that govern property insurance policies including attorney fees, roof coverage provisions, notice periods for bringing claims, alternative dispute resolution, lawsuits involving property insurance policies, consolidation of legal actions, and assignment agreements.

The bill provides that attorney fees will be awarded under a property insurance policy or a surplus lines policy using the “lodestar” calculation, which is determined by multiplying the number of hours reasonably worked by a reasonable hourly rate for an attorney of the insured or beneficiary. The strong presumption that the lodestar fee is sufficient and reasonable may only be rebutted in rare and exceptional circumstances when competent counsel could not be found. Attorney fees will also be awarded to a claimant using the demand-judgment quotient which is determined by dividing the amount of the judgment by the amount of the demand. Award ratios for recovery are stated in statute.

The bill allows an insurer to offer homeowner’s insurance policies that adjust claims on roofs 10-years old or older on the basis of a roof covering reimbursement schedule without also having to offer a policy that provides replacement cost adjustment for such a roof. The roof covering reimbursement schedule must provide for repair, replacement, and installation based on the annual age of the roof and the roof covering type. The insurer may also offer homeowner’s insurance policies that limit coverage for a roof to a stated value sublimit. However, in the event

of a total loss to the primary structure, neither a roof covering reimbursement schedule nor a stated value sublimit of roof coverage will apply, and the insurer's liability will be for the amount of the insured property as specified in the personal lines residential property insurance policy, as provided for in Florida's Valued Policy Law.

The bill reduces from 3 years to 2 years the time allowed for an insured to file a property insurance claim, supplemental claim, or reopened claim including a claim issued by a surplus lines insurer.

A property insurance policy may require the policyholder and an assignee of the policy benefits to participate in mediation, if requested by the insurer.

The bill creates s. 627.70152, F.S., governing suits brought by an insured or assignee arising under a property insurance policy. Claimants must provide notice prior to the filing of a lawsuit and make a presuit demand. Insurers may file to abate proceedings until notice has been perfected or where their rights to inspect are infringed.

When a court receives notice of multiple legal actions arising from the same residential property insurance policy, property, and owners, it may consolidate and transfer jurisdiction to a court having proper jurisdiction based on the total amount in controversy of all of the consolidated claims. The parties have a duty to notify the court of the multiple actions so that consolidation and transfer may occur.

The bill establishes that the provisions of an assignment agreement, while currently provided to the insurer, must also be provided and delivered to the named insured. Additionally, an assignment agreement does not modify or eliminate the right of an insurer to communicate directly with the named insured.

Finally, the bill requests that the Florida Supreme Court adopt a rule that requires plaintiff and defense attorneys to submit itemized closing statements in cases where a recovery is made in residential property litigation.

The bill takes effect July 1, 2021.

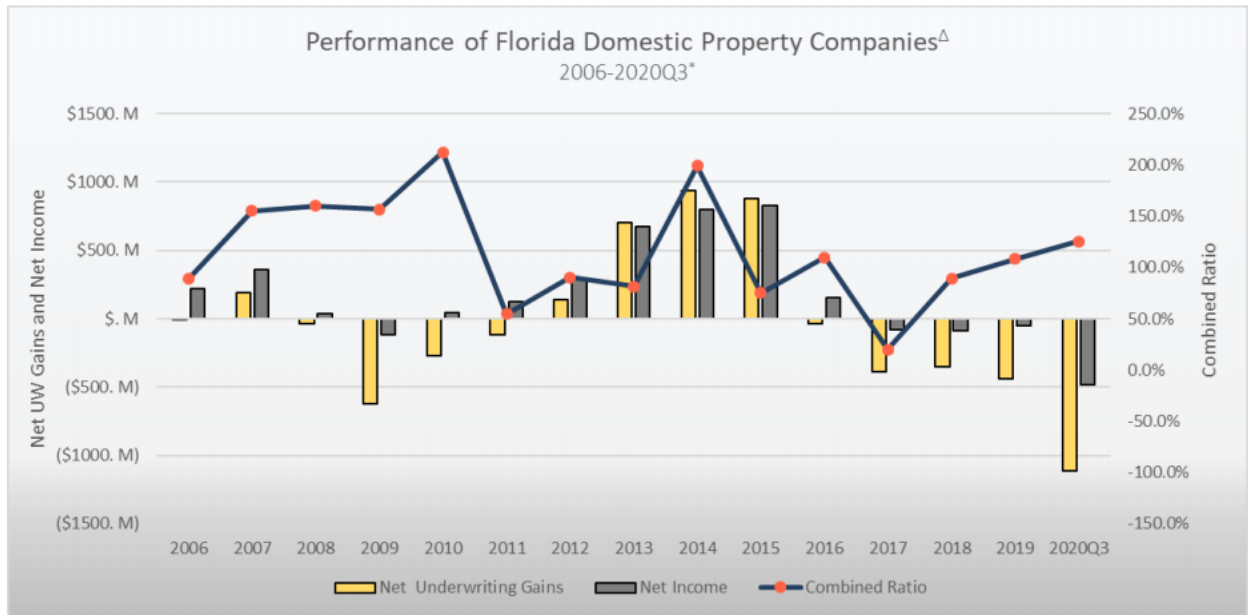
II. Present Situation:

Florida Residential Property Insurance Market Data

According to the Florida Office of Insurance Regulation (OIR), Florida domestic property insurers are likely to double their losses from 2019 to 2020. The resulting combined ratios¹ are near or above 100 percent for the third year since 2017 and net underwriting losses have continued for the fifth year since 2015. Figure 1 below displays both the combined ratios and net underwriting gains (losses) of domestic property insurers between 2006 and the third quarter of 2020.

¹ The combined ratio is the sum of the expense ratio and the loss ratio. A combined ratio below 100 percent indicates underwriting profits, whereas a combined ratio above 100 percent indicates underwriting losses.

Figure 1. Financial Performance of Florida’s Domestic Property Market.²



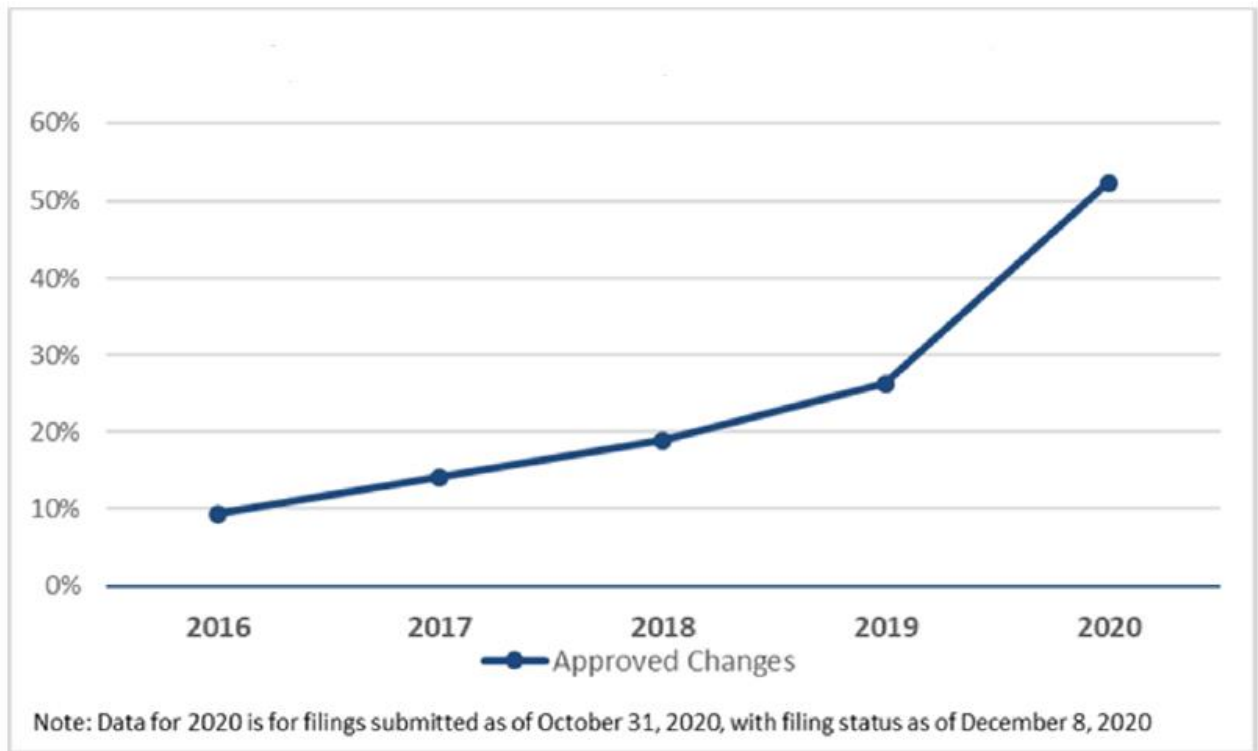
^Δ The domestic companies do not include Citizens Property Insurance Corporation. The data is from financial statements submitted to the National Association of Insurance Commissioners.

OIR similarly reports an increasing trend of domestic property insurers filing for rate increases. Insurers submitted 105 rate filings in 2020 for increases of 10 percent or more, with OIR approving 55 of those filings. In 2016, OIR approved only 6 rate increases of at least 10 percent.³ Figure 2 below displays the percentage of approved filings for rates increases above 10 percent between 2016 and December 8, 2020.

² Data provided by the Florida Office of Insurance Regulation to the Senate Committee on Banking and Insurance on January 12, 2021 (Senate Meeting Packet). https://www.flsenate.gov/Committees/Show/BI/MeetingPacket/4966/8842_MeetingPacket_4966.pdf (last visited Jan. 27, 2021).

³ Florida Senate, *Meeting of the Committee on Banking and Insurance* (January 12, 2021) (statement of David Altmaier, Commissioner, Florida Office of Insurance Regulation).

Figure 2. OIR-Approved Property Insurance Rate Increases Greater than 10 Percent.⁴



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, combined ratios, 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, OIR conducted a data call of Florida’s domestic property insurers.⁶ According to the State Insurance Commissioner, the data call showed that the severity of non-weather water claims with litigation is nearly double claims that are closed without litigation.⁷ Figure 3 below displays the claims severity disparity between non-weather water claims with litigation and such claims without litigation between the fourth quarter of 2017 and the first quarter of 2020.

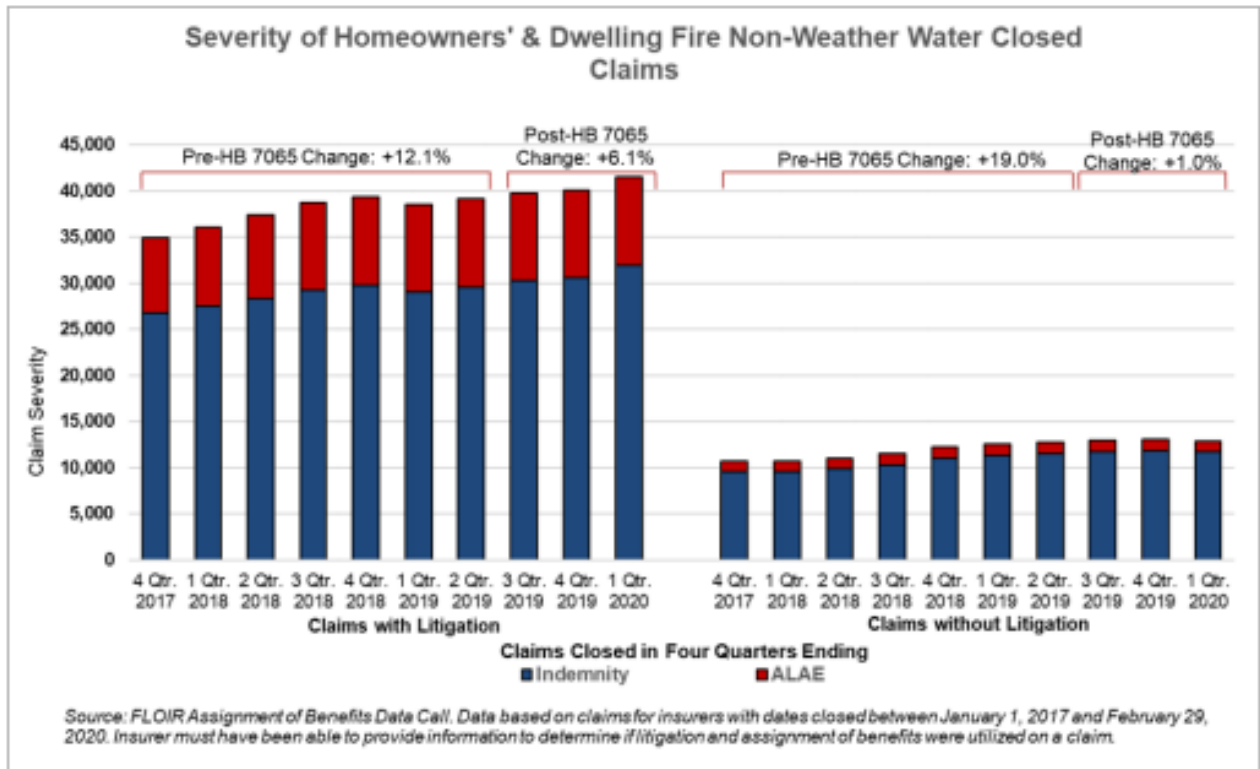
⁴ Data provided by the Florida Office of Insurance Regulation to the Senate Committee on Banking and Insurance on January 12, 2021 (Senate Meeting Packet) https://www.flsenate.gov/Committees/Show/BI/MeetingPacket/4966/8842_MeetingPacket_4966.pdf (last visited Jan. 27, 2021).

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

⁶ <https://www.floir.com/Sections/PandC/AssignmentofBenefits.aspx> (last visited Jan. 27, 2021).

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

Figure 3. Severity of Claims with Litigation versus Claims without Litigation.⁸



According to OIR, the increased severity of claims involving litigation is driving adverse loss reserve development, leading to high rate filings.⁹ 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.¹⁰ When adverse loss reserve development occurs, the claim costs more than its reserve was originally estimated by the insurer. The table below displays the adverse loss reserve development of Florida’s domestic property insurers. The 1-year and 2-year look-backs periods for calendar years 2018 and 2019 show claims costing \$241-\$682 million more than their corresponding loss reserves.

⁸ Data provided by the Florida Office of Insurance Regulation to the Senate Committee on Banking and Insurance on January 12, 2021 (Senate Meeting Packet) https://www.flsenate.gov/Committees/Show/BI/MeetingPacket/4966/8842_MeetingPacket_4966.pdf (last visited Jan. 27, 2021).

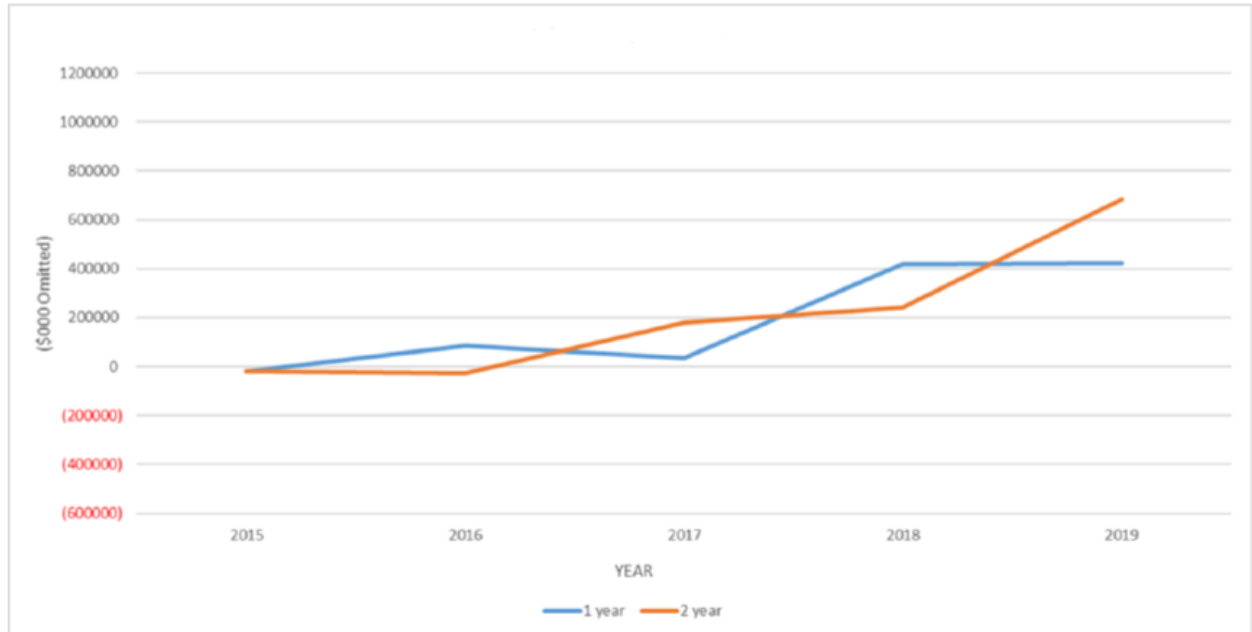
⁹ Florida Senate, *Meeting of the Committee on Banking and Insurance* (January 12, 2021) (statement of David Altmaier, Commissioner, Florida Office of Insurance Regulation)

¹⁰ International Risk Management Institute, *Glossary*, <https://www.irmi.com/term/insurance-definitions/loss-development> (last visited Jan. 27, 2021).

Florida Domestic Property Insurance Market Adverse Loss Reserve Development ¹¹		
Year	1-Year Look-Back	2-Year Look-Back
2018	\$418 million	\$241 million
2019	\$422 million	\$682 million

Figure 4 below provides another look at the increasing multi-year trend, displaying adverse loss reserve development between 2015 and 2019.

Figure 4. Loss Reserve Development in Florida’s Domestic Property Insurance Market¹²



OIR and Citizens Property Insurance Corporation (Citizens) have also analyzed the contribution of claims volume following a loss to the multi-year adverse loss reserve development present in Florida’s domestic property insurance market. Following the expiration of the 3-year claims filing deadline for Hurricane Irma in September 2020, Citizens analyzed the development of claims by Citizens policyholders related to Hurricane Irma.¹³ Citizens’ analysis shows that almost 90 percent of total claims were filed within 2 years after a Hurricane Irma-related loss. The analysis further demonstrates that, as the 3 year claim-filing deadline approached, significantly more claims were filed with legal representation at the first notice of loss. The percentage of claims filed with legal representation at the first notice of loss increased from

¹¹ Florida Senate, *Meeting of the Committee on Banking and Insurance* (January 12, 2021) (statement of David Altmaier, Commissioner, Florida Office of Insurance Regulation).

¹² Data provided by the Florida Office of Insurance Regulation to the Senate Committee on Banking and Insurance on January 12, 2021 (Senate Meeting Packet) https://www.flsenate.gov/Committees/Show/BI/MeetingPacket/4966/8842_MeetingPacket_4966.pdf (last visited Jan. 27, 2021).

¹³ Data provided by Citizens Property Insurance Corporation to the Senate Committee on Banking and Insurance on January 12, 2021 (Senate Meeting Packet) https://www.flsenate.gov/Committees/Show/BI/MeetingPacket/4966/8842_MeetingPacket_4966.pdf (last visited Jan. 14, 2021).

10.3 percent in 2017 to 43.1 percent in 2018. However, the claims increased to 63.3 percent and 64.5 percent in years 2019 and 2020, respectively.

Citizens Hurricane Irma-Related Claims¹⁴				
Year Filed	Total Filed	% of Total Irma Claims Filed	Total Filed w/ Representation at First Notice of Loss	% Filed w/ Representation at First Notice of Loss
2017	61,677	79.8%	6,393	10.3%
2018	7,579	9.8%	3,269	43.1%
2019	4,374	5.7%	2,769	63.3%
2020*	3,645	4.7%	2,352	64.5%
Total	77,275	100.0%	14,783	19.1%

As of October 28, 2020

*The 3-year claims filing deadline for Hurricane Irma occurred in September 2020.

Following the expiration of the 3-year claims filing deadline for Hurricane Irma in September 2020, OIR analyzed the development of claims by all domestic property policyholders related to Hurricane Irma. Similarly to the Citizen’s analysis, OIR shows more than 90 percent of total claims were filed within 2 years of experiencing a Hurricane Irma-related loss.

Hurricane Irma-Related Claims in Florida¹⁵		
Data Call	Total Filed	% of Total Irma Claims Filed
November 2018	1,002,821	89.1%
January 2020	60,014	5.3%
November 2020	62,753	5.6%
Total	1,125,588	100.0%

Awarding Attorney Fees in Litigation

In most United States jurisdictions, each party to the 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.¹⁶ This is often referred to as the “American Rule” for attorney fees, and contravenes the “English Rule” under which English courts generally awarded attorney fees to the prevailing party in litigation.¹⁷

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.¹⁸ 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

¹⁴ Data provided by Citizens Property Insurance Corporation to the Senate Committee on Banking and Insurance on January 12, 2021 (Senate Meeting Packet) https://www.flsenate.gov/Committees/Show/BI/MeetingPacket/4966/8842_MeetingPacket_4966.pdf (last visited Jan. 14, 2021).

¹⁵ Email from Allison Hess Sitte, Director of Government Affairs, Florida Office of Insurance Regulation (January 26, 2021).

¹⁶ *Florida Patient’s Compensation Fund v. Rowe*, 472 So. 2d 1145, 1147-1148, (Fla. 1985).

¹⁷ *Id.*

¹⁸ *Id.*

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. An example is found in the recently enacted s. 627.7152, F.S., which directs 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.

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. Some version of this statute has been the law in Florida since at least 1893.¹⁹ 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.²⁰

The Florida Supreme Court recently explained the purpose of the statute:

The need for fee and cost reimbursement in the realm of insurance litigation is deeply rooted in public policy. Namely, the Legislature recognized that it was essential to “level the playing field” between the economically-advantaged and sophisticated insurance companies and the individual citizen. Most assuredly, the average policyholder has neither the finances nor the expertise to single-handedly take on an insurance carrier. Without the funds necessary to compete with an insurance carrier, often a concerned policyholder's only means to take protective action is to hire that expertise in the form of legal counsel For this reason, the Legislature recognized that an insured is not made whole when an insurer simply grants the previously denied benefits without fees. The reality is that once the benefits have been denied and the plaintiff retains counsel to dispute that denial, additional costs that require relief have been incurred. Section 627.428, F.S., takes these additional costs into consideration and levels the scales of justice for policyholders by providing that the insurer pay the attorney's fees resulting from incorrectly denied benefits.²¹

¹⁹ 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).

²⁰ Section 626.9373, F.S., contains substantially similar language but it applies to surplus lines insurers. Florida courts have interpreted the statutes to have the same meaning.

²¹ *Johnson v. Omega Ins. Co.*, 200 So. 3d 1207, 1215-1216 (Fla. 2016) (internal citations omitted).

Florida courts have broadly interpreted the statute to allow recovery of fees when the insurer ultimately settles the case before trial.²² A finding of bad faith on the part of the insurer is not a necessary precondition for the award of fees under the statute.²³

Lodestar Calculation

Florida courts determine reasonable attorney fees by using the federal “lodestar” calculation. This is computed by multiplying the number of hours reasonably expended on a case by a reasonable hourly rate.²⁴ In adopting a “suitable foundation for an objective structure” for the award of attorney fees, the Court explained in *Fla. Patient’s Comp. Fund v. Rowe*, that:

There is but little analogy between the elements that control the determination of a lawyer’s fee and those which determine the compensation of skilled craftsmen in other fields. Lawyers are officers of the court. The court is an instrument of society for the administration of justice. Justice should be administered economically, efficiently, and expeditiously. The attorney’s fee is, therefore, a very important factor in the administration of justice, and if it is not determined with proper relation to that fact it results in a species of social malpractice that undermines the confidence of the public in the bench and bar. It does more than that. It brings the court into disrepute and destroys its power to perform adequately the function of its creation.²⁵

In calculating the lodestar amount under *Rowe*, courts must consider the following elements:

- The time and labor required, the novelty and difficulty of the question involved, and the skill requisite to perform the legal service.
- The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- The fee customarily charged in the locality for similar legal services.
- The amount involved and the results obtained.
- The time limitations imposed by the client or by the circumstances.
- The nature and length of the professional relationship with the client.
- The experience, reputation, and ability of the lawyer or lawyers performing the services.
- Whether the fee is fixed or contingent.²⁶

²² *Johnson v. Omega Ins. Co.*, 200 So. 3d 1207, 1215 (Fla. 2016) (Noting that “it is well settled that the payment of a previously denied claim following the initiation of an action for recovery, but prior to the issuance of a final judgment, constitutes the functional equivalent of a confession of judgment”).

²³ *Insurance Co. of North America v. Lexow*, 602 So. 2d 528, 531 (Fla. 1992) (“We reject the argument that attorney’s fees should not be assessed against INA because this dispute involved a type of claim which reasonably could be expected to be resolved by a court. INA’s good faith in bringing this suit is irrelevant. If the dispute is within the scope of s. 627.428, F.S., and the insurer loses, the insurer is always obligated for attorney’s fees”).

²⁴ *Fla. Patient’s Comp. Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985).

²⁵ *Id.* at 1149 (quoting *Baruch v. Giblin*, 122 Fla. 59, 63, 164 So. 831, 833 (1935)).

²⁶ *Fla. Patient’s Comp. Fund v. Rowe*, 472 So. 2d 1145, 1150 (Fla. 1985).

Contingency Fee Multipliers – Florida Court Discretion to Apply a Contingency Fee Multiplier and the Contingency Fee Multiplier Schedule

Florida courts have discretion to consider whether applying a contingency fee multiplier to the produced lodestar amount is appropriate.²⁷ However, before determining that a multiplier is warranted, a court must consider whether:

- The relevant legal market requires a contingency fee multiplier for a plaintiff to be able to obtain competent counsel.
- The attorney was able, in any way, to mitigate the risk of nonpayment.
- Any of the factors established in *Rowe* are applicable, particularly the amount involved, the results that were obtained, and the type of fee arrangement agreed to between the client and the attorney.²⁸

When a court concludes that the presented evidence supports utilization of a multiplier, courts may use the following multiplier schedule, established in the 1990 *Quanstrom* ruling.²⁹

Contingency Fee Multiplier	Case’s Likelihood of Success at Outset
1.0 to 1.5	More likely than not.
1.5 to 2.0	Approximately even.
2.0 to 2.5	Unlikely.

After the Florida Supreme Court adopted this approach in *Rowe*, the United States Supreme Court issued decisions rejecting and limiting the use of contingency fee multipliers in federal cases. In response, the Florida Supreme Court has reaffirmed Florida precedent and the underlying public policy reasoning for the use of contingency fee multipliers as articulated in *Rowe* on multiple occasions.

Federal Precedent Limiting the Use of Contingency Fee Multipliers

After the Florida Supreme Court’s 1985 decision in *Rowe*, Justice Scalia, writing the majority opinion in *City of Burlington v. Dague*, couched his disapproval of contingency fee multipliers by reasoning that the multipliers incentivize nonmeritorious claims, so that those claims are effectively raised as often as meritorious claims:

[T]he consequence of awarding contingency enhancement to take account of this “merits” factor would be to provide attorneys with the same incentive to bring relatively meritless claims as relatively meritorious ones. Assume, for example, two claims, one with underlying merit of 20 percent, the other of 80 percent. Absent any contingency enhancement, a contingent-fee attorney would prefer to take the latter, since he is four times more likely to be paid. But with a contingency enhancement, this preference will disappear: the enhancement for the 20 percent claim would be a multiplier of 5 (100/20), which is quadruple the 1.25 multiplier (100/80) that would attach to the 80 percent claim. Thus, enhancement for the

²⁷ *Joyce v. Federated National Insurance Company*, 228 So. 3d 1122, 1124, 1128 (Fla. 2017) (quoting *Standard Guaranty Ins. Co. v. Quanstrom* 555 So. 2d 828, 834 (Fla. 1990)).

²⁸ *Id.*

²⁹ *Joyce*, 228 So. 3d at 1125.

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. We think that an unlikely objective of the “reasonable fees” provisions.³⁰

Building on *Dague*, the U.S. Supreme Court in *Perdue* further limited the use of contingency fee multipliers, reserving them for “rare and exceptional circumstances” in which the lodestar insufficiently accounts for a factor that may properly be considered in determining a reasonable fee.³¹ Such circumstances “require specific evidence that the lodestar fee would not have been ‘adequate to attract competent counsel.’”³²

Florida Precedent Approving the Use of Contingency Fee Multipliers

The Florida Supreme Court has rejected the U.S. Supreme Court’s reasonings in *Dague* and *Perdue* on multiple occasions. Beginning with *Bell*, the Court reaffirmed the *Rowe* rationale for contingency fee multipliers, explaining:

[W]e find that the primary policy that favors the consideration of the multiplier is that it assists parties with legitimate causes of action or defenses in obtaining competent legal representation even if they are unable to pay an attorney on an hourly basis. In this way, the availability of the multiplier levels the playing field between parties with unequal abilities to secure legal representation.³³

In *Lane*, the Court similarly noted the role full contingency fee cases, generally, and partial contingency fee cases, specifically, play in providing access to the court system:

Attorneys should be encouraged to take cases based on a partial contingency-fee arrangement, since this policy also will encourage attorneys to provide services to persons who otherwise could not afford the customary legal fee. No incentive would exist under the approach taken by the district court below, because no “enhancement” of the customary fee would be given to offset losses.³⁴

More recently, the Florida Supreme Court has rejected the “rare and exceptional” standard articulated in *Perdue*. In *Joyce*, the Court held there is no “rare and exceptional” circumstances requirement before a court can apply a contingency fee multiplier.³⁵ *Joyce* also reaffirmed *Rowe*, *Quanstrom*, and *Bell*. Moreover, Justice Pariente, writing for the majority, criticized Justice Scalia’s reasoning from the majority opinion in *Dague*, arguing that Justice Scalia wrongly conflated nonmeritorious claims with claims that are unlikely to prevail in arguing that multipliers incentivize the pursuit of nonmeritorious claims.³⁶

³⁰ *City of Burlington v. Dague*, 505 U.S. 557, 563 (1992).

³¹ *Perdue v. Kenny A. ex rel. Winn*, 559 U.S. 542, 543 (2010).

³² *See id.* at 543.

³³ *Bell v. U.S.B. Acquisition Co. Inc.*, 734 So.2d 403, 411 (Fla. 1999).

³⁴ *Lane v. Head*, 566 So. 2d 508, 511 (Fla. 1990).

³⁵ *Joyce v. Federated National Insurance Company*, 228 So.3d 1122, 1135 (Fla. 2017).

³⁶ *Id.* at 1132-33.

Additional Statutes Applicable to the Award of Attorney Fees in Property Insurance Litigation

Section 627.428, F.S., generally governs the award of attorney fees in civil litigation under a property insurance policy. There are circumstances, however, where the insurer may obtain attorney fees from an insured. These circumstances include when litigation is brought by an assignee of benefits under a residential property insurance policy, when a claimant brings an action that has no good faith legal or genuine factual basis, or in certain circumstances when the insurer's offer of settlement is refused.

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, and instead provides a formulaic means by which either party may recover attorney fees.³⁷ An award of attorney fees is based on the difference between the judgment obtained and the presuit settlement offer. Fees are awarded as follows:

- If the difference between the judgment obtained and the presuit offer is less than 25 percent of the disputed amount, the insurer is entitled to an award of reasonable attorney fees.
- If the difference between the judgment obtained and the presuit offer is at least 25 percent but less than 50 percent of the disputed amount, no party is entitled to an award of attorney fees.
- If the difference between the judgment obtained and the presuit offer is at least 50 percent of the disputed amount, the assignee is entitled to an award of reasonable attorney fees.³⁸

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.³⁹

Attorney Fees Arising from Offers of Judgment

Section 768.79, F.S., provides for attorney's 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

³⁷ Section 627.7152(10)(a), F.S.

³⁸ *Id.*

³⁹ Section 57.105(1) and (2), F.S.

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.⁴⁰

When determining the reasonableness of an award of attorney fees, the court must consider the following factors along with other relevant criteria:

- The then 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.

Section 768.79(7)(a), F.S., allows the court discretion to 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.

Property insurance litigation is subject to both s. 627.428, F.S., and s. 768.79, F.S.⁴¹ Florida courts will apply both statutes to the same litigation with s. 627.428, F.S. governing 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., apply to the award of attorney fees after an offer of judgment is made, depending on how much the insured recovers. The Florida Supreme Court in *State Farm Mut. Auto Ins. Co. v. Nichols* explained how the two statutes interact in different circumstances by including the following chart in its opinion:⁴²

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.

⁴⁰ Section 768.79(2), F.S.

⁴¹ See *Pennsylvania Lumbermans Mut. Ins. Co. v. Sunrise Club Inc.*, 711 So.2d 593 (Fla. 3rd DCA 1998).

⁴² 932 So.2d 1067 at 1074 (Fla. 2006).

Replacement Cost and Actual Cash Value Loss Settlement Provisions

There are two primary settlement options available when purchasing a homeowner's property insurance policy: *replacement cost* and *actual cash value*. Replacement cost is usually defined in the policy as the cost to repair or replace the damaged property with materials of like kind and quality, without any deduction for depreciation.⁴³ Replacement cost is designed to cover the difference between what the property is actually worth and what it would cost to rebuild or repair that property.⁴⁴ Following a covered loss, the insurer assumes the full cost of repairing or replacing the damaged property.⁴⁵

By contrast, actual cash value is the cost to repair or replace the damaged property with material of like kind and quality, minus the cost of depreciation due to use, wear, obsolescence, or age.⁴⁶ Following a covered loss, the insured assumes the cost to cover the difference between the depreciated value of the damaged property and the cost of repairing or replacing it.

Florida law currently requires that insurers writing homeowner's property insurance policies, offer adjustment to the dwelling, including the roof, on the basis of replacement cost.⁴⁷ The Florida Office of Insurance Regulation will approve policy forms that adjust roof losses on the basis of actual cash value, or the depreciated value of the roof. The insurer must, however, also offer replacement cost adjustment on the roof before issuing the policy.

Roof Surface Payment Schedules

Roof surface payment schedules, sometimes referred to in residential property insurance policies as roof surfacing loss percentage tables, are depreciation tables that state upfront in either the individual policy or endorsement the cost the insurers will assume following a covered loss, expressed as a percentage of the loss amount. The depreciation rates in a roof surface payment schedule generally vary by the age of the roof and type of roof to account for differences in estimated roof lifespans based on roof surface material type.

The roof surface payment schedule example below from Nevada demonstrates the variance in depreciation rates between roof surface material type over time.

⁴³ National Association of Insurance Commissioners, *Glossary of Insurance Terms*, https://content.naic.org/consumer_glossary.htm (last visited Mar. 1, 2021).

⁴⁴ See *Trinidad v. Florida Peninsula Ins. Co.*, 121 So.3d 433, 438 (Fla. 2013) (quoting *State Farm Fire & Cas. Co. v. Patrick*, 647 So.2d 983 (Fla. 3d DCA 1994))

⁴⁵ Insureds that elect for adjustment on the basis of replacement cost receive greater coverage than adjustment on the basis of actual cash value because depreciation is not excluded from replacement cost, whereas it is generally excluded from actual cash value. See *Trinidad* at 438 (quoting *Goff v. State Farm Florida Ins. Co.*, 999 So.2d 684, 689 (Fla. 2d DCA 2008))

⁴⁶ National Association of Insurance Commissioner, *Glossary of Insurance Terms*, https://content.naic.org/consumer_glossary.htm (last visited March 1, 2021).

⁴⁷ Section 627.7011(1), F.S.

Roof Surface Payment Schedule ⁴⁸								
The percentages shown for the type of roofing surface are applied to all components and installation including overhead, profit, labor, taxes, and fees associated with the replacement of the roofing system.								
Age of Roof in Years	Roof Surface Material Type							
	Class 3 or 4 Impact Resistant, Synthetic, Plastic, or Architectural Composition Shingles	All Other Composition or Solar Shingles	Wood Shingles or Shakes	Metal Shingles or Panels	Concrete Tile, Fiber Cement Tile, or Clay Tile	Slate	Built-up Tar With or Without Gravel, Rubber, Membrane, or Other Flat Roof Surface	All Other Roof Types
0	100%	100%	100%	100%	100%	100%	100%	100%
1	97%	96%	97%	98%	98%	99%	95%	95%
2	94%	92%	94%	96%	96%	98%	90%	90%
3	91%	88%	91%	94%	94%	97%	85%	85%
4	88%	84%	88%	92%	92%	96%	80%	80%
5	85%	80%	85%	90%	90%	95%	75%	75%
6	82%	76%	82%	88%	88%	94%	70%	70%
7	79%	72%	79%	86%	86%	93%	65%	65%
8	76%	68%	76%	84%	84%	92%	60%	60%
9	73%	64%	73%	82%	82%	91%	55%	55%
10	70%	60%	70%	80%	80%	90%	50%	50%
11	67%	56%	67%	78%	78%	89%	45%	45%
12	64%	52%	64%	76%	76%	88%	40%	40%
13	61%	48%	61%	74%	74%	87%	35%	35%
14	58%	44%	58%	72%	72%	86%	30%	30%
15	55%	40%	55%	70%	70%	85%	*****	*****
16	52%	36%	52%	68%	68%	84%		
17	49%	32%	49%	66%	66%	83%		
18	46%	28%	46%	64%	64%	82%		
19	43%	**	43%	62%	62%	81%		
20	40%		40%	60%	60%	80%		
21	37%		37%	58%	58%	79%		
22	34%		34%	56%	56%	78%		
23	31%		31%	54%	54%	77%		
24	28%		28%	52%	52%	76%		
25	*		*	50%	50%	75%		
26				48%	48%	74%		
27				46%	46%	73%		
28				44%	44%	72%		
29				42%	42%	71%		
30				***	***	****		

* 25% payable for 25 years or over; ** 25% payable for 19 years or over; *** 40% payable for 30 years or over; **** 70% payable for 30 years or over; ***** 25% payable for 15 years or over

⁴⁸ Nevada Division of Insurance, American Family Insurance Group – HO 88 02 01 14: Roof Surface Payment Schedule, http://doi.nv.gov/uploadedFiles/doinvgov/public-documents/Consumers/Home/American_Family/HO_88_02_01_14.pdf (last visited Mar. 1, 2021).

Valued Policy Law

Florida's Valued Policy Law (VPL)⁴⁹ has been in effect since 1899 and requires the insurer to set the value of the insured property in the event of a total loss.⁵⁰ In the event of a total loss caused by a covered peril, where the covered peril alone would have caused the loss, an insurer's liability under a property insurance policy equals the total coverage limit for which a premium was paid.⁵¹ However, in the event of total loss caused in part by a covered peril and in part by a noncovered peril, the insurer's liability is limited to the amount of the loss caused by the covered peril.⁵²

Florida's VPL currently applies to the total loss of buildings, structures, mobile homes, or manufactured buildings located in Florida and insured as to a covered peril. While it does not differentiate between residential and commercial property, it does not cover policies issued by surplus lines insurers.

First-Party and Third-Party Litigation under Residential 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.

Time Limits for Filing Claims and Statute of Limitations

Section 627.70132, F.S., currently requires insureds to notify an insurer of a claim, supplemental claim, or reopened windstorm or hurricane claim within 3 years after the hurricane first made landfall or the windstorm caused the covered damage. 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.

For other types of property insurance claims, Florida law currently places a 5-year statute of limitations for bringing an action for the breach of a property insurance contract that runs from the date of the loss.⁵³

Insurer's Duty to Respond to, Investigate, and Pay or Deny a Filed Claim

The insurer must acknowledge a filed claim within 14 days of its submission.⁵⁴ 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.⁵⁵ 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.⁵⁶

⁴⁹ Section 627.702, F.S.

⁵⁰ *Florida Farm Bureau Cas. Ins. Co. v. Cox*, 967 So. 2d 815, 818 (Fla. 2007).

⁵¹ Section 627.702(1)(a), F.S.

⁵² Section 627.702(1)(b), F.S.

⁵³ Section 95.11(2)(e), F.S.

⁵⁴ Section 627.70131(1)(a), F.S.

⁵⁵ Section 627.7142, F.S.

⁵⁶ Section 627.70131(5)(a), F.S.

Statutory and Common Law Bad Faith

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.⁵⁷ 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 statutorily defined as the commission of any of the following acts by the insurer:

- 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.⁵⁸

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.⁵⁹ Florida courts do not recognize a common law first-party bad faith causes of action by the insured against its own insurer.⁶⁰ Most property insurance claims are first-party claims⁶¹, thus bad faith actions on such claims may proceed only pursuant to s. 624.155, F.S.

Presuit Notice to Initiate 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.⁶² 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

⁵⁷ *Harvey v. GEICO General Insurance Company*, 251 So.3d 1, 6, (Fla. 2018)(quoting *Berges v. Infinity Insurance Company*, 896 So.2d 665 at 682).

⁵⁸ Section 624.155(1)(b)(1)-(3), F.S.

⁵⁹ *Opperman v. Nationwide Mutual Fire Insurance Company*, 515 So.2d 263, 265 (Fla. 5th DCA 1987).

⁶⁰ *State Farm Mut. Auto. Ins. Co. v. Laforet*, 658 So.2d 55, 58-59 (Fla. 1995).

⁶¹ Homeowners insurance provides liability coverage, thus third-party litigation may occur under a property insurance policy.

⁶² Section 624.155(3), F.S.

- 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.⁶³

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.⁶⁴

By contrast, as a condition precedent to bring a third-party cause of action to enforce an assignment agreement against the insurer under s. 627.7152(9), F.S., the assignee must provide the named insured and the assignor a written notice of intent to initiate litigation, delivered at least 10 business days before filing suit, but not before the insurer has made a determination of coverage pursuant to s. 627.70131, F.S.⁶⁵ The notice must also include a detailed written invoice or estimate of services that includes itemized information and proof work was performed in accordance with accepted industry standards. If required by the insurer, the assignee must further submit to reasonably necessary examinations under oath and recorded statements administered by the insurer,⁶⁶ and participate in appraisal or other alternative dispute resolution methods in accordance with the policy terms,⁶⁷ before bringing a third-party cause of action to enforce an assignment agreement.

Response by the Insurer

If the insurer fails to respond to a civil remedy notice under s. 624.155, F.S., within the 60-day window, there is presumption of bad faith sufficient to shift the burden to the insurer to show why it did not respond.⁶⁸ 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.⁶⁹

By contrast, the insurer must respond to a third-party cause of action to enforce an assignment agreement under s. 627.7152, F.S., within 10 business days of receipt of the presuit notice to initiate litigation by making a presuit settlement offer or requiring the assignee to participate in appraisal or other alternative dispute resolution method.⁷⁰

Offer of Settlement

Under Florida law, an insurer must investigate the facts, give fair consideration to a settlement offer that is not unreasonable under the facts, and settle, if possible, where a reasonably prudent person, faced with the prospect of paying the total recovery, would do so.⁷¹ In considering

⁶³ Section 624.155(3)(b)(1)-(5), F.S.

⁶⁴ See *Talat Enterprises, Inc.*, v. Aetna Cas. and Sur. Co, 753 So.2d 1278, 1284.

⁶⁵ Section 627.70131, F.S., requires an insurer to make a coverage determination and pay or deny a claim within 90 days of receipt of the claim

⁶⁶ Section 627.7152(4)(d), F.S.

⁶⁷ Section 627.7152(4)(e), F.S.

⁶⁸ *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).

⁶⁹ *Id.*

⁷⁰ Section 627.7152(9)(b), F.S.

⁷¹ *Boston Old Colony Insurance Company v. Gutierrez*, 386 So.2d 783, 785 (Fla. 1980).

whether the insurer has given fair consideration to a settlement offer that is not unreasonable under the facts, Florida courts look to whether there was a realistic opportunity for settlement.⁷²

Surplus Lines Insurance

Surplus lines insurance refers to a category of insurance for which the admitted market is unable or unwilling to provide coverage.⁷³ There are three basic categories of surplus lines risks:

- Specialty risks that have unusual underwriting characteristics or underwriting characteristics that admitted insurers view as undesirable;
- Niche risks for which admitted carriers do not have a filed policy form or rate; and
- Capacity risks that are risks where an insured needs higher coverage limits than those that are available in the admitted market.

Surplus lines insurers are not “authorized” insurers as defined in the Florida Insurance Code,⁷⁴ which means they do not obtain a certificate of authority from the OIR to transact insurance in Florida.⁷⁵ Rather, surplus lines insurers are “unauthorized” insurers,⁷⁶ but may transact surplus lines insurance if they are made “eligible” by the OIR. Except as specifically stated as applicable, surplus lines insurers are not subject to regulation under ch. 627, F.S., of the Florida Insurance Code, which includes, in part, provisions related to ratings standard, contracts, and attorney fees for authorized insurers.⁷⁷

Under s. 626.9373, F.S., a court may award reasonable attorney fees against a surplus lines insurer in a claims arising under an insurance policy.⁷⁸

Florida Rules of Civil Procedure

The Florida Supreme Court is vested with the exclusive power of adopting rules for the practice and procedure in state courts,⁷⁹ including the Florida Rules of Civil Procedure governing all civil actions and special statutory proceeding in circuit and county courts.⁸⁰ Notwithstanding the separation of judicial and legislative branches,⁸¹ such rules may only be repealed by a general law enacted by a two-thirds vote of each chamber of the Legislature.⁸²

⁷² *Barry v. GEICO General Insurance Company*, 938 So.2d 613, 618 (Fla. 4th DCA 2006).

⁷³ The admitted market is comprised of insurance companies licensed to transact insurance in Florida. The administration of surplus lines insurance business is managed by the Florida Surplus Lines Service Office. S. 626.921, F.S.

⁷⁴ Section 624.01, F.S., provides that the Florida Insurance Code is chapters 624-632, 634, 635, 636, 641, 642, 648, and 651, F.S.

⁷⁵ Section 624.09(1), F.S.

⁷⁶ Section 624.09(2), F.S.

⁷⁷ Section 626.913(4), F.S.

⁷⁸ Section 626.9373, F.S.

⁷⁹ Fla. Const. art. V, s. 2(a) (2020).

⁸⁰ Fla. R. Civ. P. 1.010.

⁸¹ Fla. Const. art. 2, s. 3 (2020).

⁸² See note 79.

III. Effect of Proposed Changes:

Attorney Fees (Sections 1 and 2)

Surplus Lines

Section 1 amends s. 626.9373, F.S., which governs the award of attorney fees against a surplus lines insurer. The bill creates a strong presumption that a lodestar fee is sufficient and reasonable in claims arising under a property insurance policy issued by a surplus lines carrier. (The lodestar fee is the number of hours reasonably expended on the litigation multiplied by a reasonable hourly rate for the services of the attorney.) This presumption may be rebutted in rare and exceptional circumstances when evidence is presented that competent counsel could not be retained in a reasonable manner.

The bill also provides an attorney fee calculation framework, called the demand-judgment quotient, for use in a suit involving a property insurance policy issued by a surplus lines carrier. The demand-judgment quotient is defined as the quotient obtained by dividing the judgment by the demand.

- If the demand-judgment quotient is greater than or equal to 0.8, the full amount of incurred attorney fees may be awarded.
- If the demand-judgment quotient is equal to or greater than 0.2 but less than 0.8, the attorney fees must equal the product of multiplying the incurred attorney fees by the demand-judgment quotient.
- If the demand-judgment quotient is less than 0.2, attorney fees may not be awarded; however, the full amount of attorney fees may be awarded to the insurer if the claimant is an assignee.

The bill states that, notwithstanding any other provision of law, when a suit arises under a residential or commercial property insurance policy, attorney fees and costs may be recovered by a claimant only pursuant to this subsection and s. 57.105, F.S., which governs the award of reasonable attorney fees and awards of prejudgment interest to the prevailing party.

Section 1 also provides definitions for claimant, demand, demand-judgment quotient, incurred attorney fees, and judgment.

Other Property Insurance Policies

Section 2 amends s. 627.428., F.S., to specify that the statute does not apply to judgments against residential or commercial property insurers. The change clarifies that s. 627.70152, F.S., created by Section 6 of the bill, will govern attorney fee awards in commercial and residential property litigation.

Roof Surface Reimbursement Schedules (Section 3)

Section 3 amends s. 627.7011, F.S., to provide for the use of a roof covering reimbursement schedule to limit coverage in a personal lines residential property insurance policy. The roof covering reimbursement schedule must provide for full replacement coverage for any roof surface type less than 10 years old. For roofs 10 years old or older, the roof covering

reimbursement schedule must provide for repair, replacement, and installation based on the annual age of the roof surface type, subject to the following minimum reimbursement amounts, unless otherwise actuarially justified and demonstrated to the Office of Insurance Regulation (OIR):

- 70 percent for a metal roof type;
- 40 percent for a concrete tile and clay tile roof type;
- 40 percent for a wood shake and wood shingle roof type;
- 25 percent for all other roof types.

Roof covering reimbursement schedules must allow for actuarially sound rate standards⁸³ under Florida's Rating Law,⁸⁴ be subject to OIR approval, be furnished along with the personal lines residential property insurance policy at the time of issuance or renewal, and include the following notice in no smaller than 12-point uppercase and boldfaced type:

PLEASE DISCUSS WITH YOUR INSURANCE AGENT. YOU ARE ELECTING TO PURCHASE COVERAGE ON YOUR ROOF ACCORDING TO A ROOF SERVICE REIMBURSEMENT SCHEDULE. IF YOUR ROOF IS DAMAGED BY A COVERED PERIL, YOU WILL RECEIVE A PAYMENT AMOUNT FOR YOUR ROOF ACCORDING TO THE SCHEDULE BELOW. BE ADVISED THIS MAY RESULT IN YOUR HAVING TO PAY SIGNIFICANT COSTS TO REPAIR OR REPLACE YOUR ROOF. PLEASE DISCUSS WITH YOUR INSURANCE AGENT.

The section further provides that, in the event of a total loss caused by a covered peril, actual cash value coverage as determined by the roof covering reimbursement schedule does not apply. The insurer's liability will instead be for the amount of the insured property as specified in the personal lines residential property insurance policy, as provided for in Florida's Valued Policy Law.⁸⁵

Currently, insurers may offer homeowner's insurance policies with roof covering reimbursement schedules approved by the Office of Insurance Regulation, but must also offer policies that provide replacement cost reimbursement. This section removes the requirement to offer replacement cost reimbursement for roofs that are at least 10-years-old.

The bill clarifies that an insurer offering a roof covering reimbursement schedule may also offer roof reimbursement on the basis of replacement costs such that offering one does not preclude the other.

Additionally, the bill allows an insurer to provide coverage to the roof on a stated value basis. It provides the homeowner with the choice of purchasing limited coverage at the stated value of the coverage. For example, instead of expressing the coverage in the form of a depreciating percentage over time, the stated value clearly provides the dollar value of the coverage of the roof. An insurer may limit its offering to the stated value coverage option, but may also offer

⁸³ See ch. 627.062, F.S.

⁸⁴ See ch. 627 pt. I, F.S.

⁸⁵ See s. 627.702, F.S.

replacement cost coverage or a roof reimbursement schedule. In the event of a total loss to the primary structure caused by a covered peril, the stated value of coverage may not be applied.

Notice of Property Insurance Claim (Section 4)

Section 4 amends s. 627.70132, F.S., to require that a claim, supplemental claim, or reopened claim under a property insurance policy must be provided to the insurer within 2 years of the date of the loss. This reduces the existing time frame by 1 year and applies to all property insurance notices. It is no longer limited to windstorm or hurricane loss or damage and includes a property insurance policy issued by an eligible surplus lines insurer.

Alternative Dispute Resolution Procedure (Section 5)

Section 5 amends s. 627.7015(9), F.S., to authorize a property insurance policy to require the policyholder or assignee to participate in the Division of Financial Services property insurance mediation program, if requested by the insurer.

Property Insurance Policy Lawsuits (Section 6)

Section 6 creates s. 627.70152, F.S., creating several provisions governing lawsuits arising under a property insurance policy.

Application

The section defines the scope of the section as applicable to all first-party and third-party actions brought under a property insurance policy, including an assignee.

Definitions

The bill defines:

- “Assignee” to mean a person who is assigned post-loss benefits through an assignment agreement, by cross-reference to s. 627.7152, F.S.
- “Claimant” to mean an insured or assignee who is filing suit under a property insurance policy.
- “Demand” to mean the specific amount alleged to be owed by the insurer to the claimant under the property insurance policy.
- “Demand-judgment quotient” to mean the quotient obtained by dividing the judgment by the demand.
- “Incurred attorney fees” to mean the total amount of attorney fees supported by sufficient evidence and determined by the court to have been incurred by the claimant in bringing the action.
- “Judgment” to mean damages recovered, if any, but does not include any amount awarded for attorney fees, costs, or interest.

Presuit Notice Requirements

The claimant must provide the insurer with a written notice of intent to initiate litigation at least 60 days before filing suit under the property insurance policy. Additionally, the notice may not

be served before the insurer has made a coverage determination pursuant to s. 627.70131, F.S.⁸⁶

The notice must specify:

- That it is being provided pursuant to this section;
- The alleged acts or omissions of the insurance insurer giving rise to the action;
- The demand amount;
- The amount of the claimant's attorney fees, calculated as the product of hours worked multiplied by a reasonable hourly rate; and
- If provided by an attorney or other representative, whether a copy of the notice was provided to the claimant.

The notice of intent to initiate litigation must be accompanied by a detailed written invoice or estimate of services, including itemized information on equipment, materials, and supplies; the number of labor hours; and, in the case of work performed, proof that the work has been performed in accordance with accepted industry standards.⁸⁷

An assignee bringing a third-party claim must also comply with s. 627.7152, F.S., pertaining to assignment agreements.

The claimant must provide the insurer with notice of intent to initiate litigation within the 5-year statute of limitations for property insurance contracts pursuant to s. 95.11, F.S.

Following the insurer's receipt of claimant's notice of intent to initiate litigation, a court must dismiss without prejudice any action commenced by the insurer against the claimant before the expiration of the 60-day notice period.

Admissibility of Notice and Response

Notice and submissions provided pursuant to this section are admissible as evidence in a civil action or alternative dispute resolution proceeding; do not limit the evidence of attorney fees, damages, or loss which may be offered at trial; and do not relieve any obligation that insured or assignee has to give notice under another other provision of law.

Right to Inspect

The insurer may request to inspect, photograph, or evaluate the property that is the subject of the claim in a reasonable manner and at a reasonable time within 30 days of receipt of the notice of intent to initiate litigation. If reasonably possible, the insurer must complete the inspection, photography, and evaluation within 60 days of receipt of the notice of intent to initiate litigation. The insurer must then fairly and promptly evaluate the claim after completing the inspection.

Abatement

The action shall be abated by a court order if the court finds the insurer timely filed a motion to abate proceedings within 30 days after the insurer filed an original answer and the insurer either

⁸⁶ Section 627.70131, F.S., requires an insurer to make a coverage determination and pay or deny a claim within 90 days of receipt of the claim.

⁸⁷ This is a current precondition to an assignee filing suit under s. 627.7152(9), F.S.

did not receive proper notice under this section or was not provided a reasonable opportunity to inspect, photograph, or evaluate the property in question after making such request.

The action is abated without a court order beginning on the 11th day after the motion to abate is filed if the insurer verifies it either did not receive proper notice under this section or was not provided a reasonable opportunity to inspect, photograph, or evaluate the property in question after making such request, and the claimant does not controvert the motion by filed affidavit within 10 days after the insurer filed the motion.

Abatement continues for 60 days after the claimant provides notice of intent to initiate litigation against the insurer in compliance with this section or 50 days after the insurer completes the requested inspection, photography, or evaluation, whichever occurs later.

During abatement, a court may not compel participation in mediation pursuant to s. 627.7015, F.S., or neutral evaluation pursuant to s. 627.7074, F.S.

Attorney Fee Calculation

Attorney fees are awarded in actions arising under property insurance contracts according to the demand-judgment quotient. If the quotient of the judgment obtained by the claimant divided by the demand made by the claimant is:

- Greater than or equal to 0.8, the claimant is entitled to an award of attorney fees in the full amount.
- Equal to or greater than 0.2 but less than 0.8, the claimant is entitled to an award of attorney fees equal to the product of the incurred reasonable attorney fees multiplied by the demand-judgment quotient. For example, if the claimant obtains a judgment of \$20,000 and the claimant's demand was \$40,000, the demand-judgment quotient would be 0.5. If the claimant's reasonable attorney fees were \$10,000, the attorney fees paid by the insurer would be \$5,000, which is the product of multiplying \$10,000 in attorney fees by the demand judgment quotient of 0.5.
- Less than 0.2, the claimant is not entitled to an award of attorney fees; however, the full amount of attorney fees may be awarded to the insurer if the claimant is an assignee

Attorney fees may also be awarded under s. 57.105, F.S., pertaining to unsupported claims, defenses, or delays. An award for attorney fees and cost may only include such fees and costs that are incurred after a suit is filed and may not include such fees and costs incurred while the suit is in abatement.

In an award of attorney fees under a property insurance policy, there is a strong presumption that the lodestar fee is a sufficient and reasonable. This presumption is rebuttable only in rare and exceptional circumstances by evidence that competent counsel could not be retained in a reasonable manner. Only when such evidence is presented to the court could a contingency fee multiplier be applied in property insurance litigation.

A court may deny an award of attorney fees to a claimant that did not comply with the section's presuit notice of intent to initiate litigation requirements, where the insurer pleads insufficient notice by the claimant within 30 days after the insurer files its original answer in court.

The court may order the claimant to pay the insurer's attorney fees resulting from an action previously voluntarily dismissed, if the claimant thereafter commences an action based on or including the same claim against the same insurer that was previously voluntarily dismissed.

Consolidation of Residential Property Insurance Actions (Section 7)

Section 7 creates s. 627.70153, F.S., related to consolidation of residential property insurance actions, to require 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. 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 on which the first case was filed.

Deletion of Conflicting Provisions (Section 8)

Section 8 amends s. 627.7152, F.S., to delete conflicting provisions pertaining to the requirement that assignees provide notice of intent to initiate litigation and the award of attorney fees in property insurance litigation between assignees and insurers. Under the bill, these matters are now subject to Section 8 of the bill which creates s. 627.70152, F.S.

The bill establishes that the provisions of an assignment agreement, while currently provided to the insurer, must also be provided and delivered to the named insured. Additionally, an assignment agreement and this section do not modify or eliminate the right of an insurer to communicate directly with the named insured.

Lawyer Closing Statements for Property Claims (Section 9)

Section 9 requests the Florida Supreme Court to amend the Rules of Professional conduct of the Rules Regulating The Florida Bar. The new rule would require that, when a recovery is awarded in a residential or commercial residential property claim, each plaintiff and defense lawyer or law firm involved in the case provide closing statements to the Department of Financial Services that itemize the amount of the fee received by each participating lawyer or firm, as well as costs and expenses.

Effective Date (Section 10)

Section 10 provides an effective date of July 1, 2021.

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:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 626.9373, 627.428, 627.7011, 627.70132, 627.7015, and 627.7152.

This bill creates section 627.70152 and 627.70153 of the Florida Statutes.

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS/CS by Rules on March 25, 2021:

The committee substitute:

- Requires that all claimants, not just assignee claimants, must provide with the written notice of intent to initiate litigation a detailed, itemized written invoice or estimate of services and, if work has been completed, proof the work was performed in accordance with accepted industry standards;
- Provides that if the claimant is an assignee and recovers less than 20 percent of the claimant's demand, the claimant must pay the full amount of the authorized or surplus lines insurer's attorney fees;
- Prohibits an award of attorney fees for such fees and costs incurred before the lawsuit was filed and provides the attorney fee award may not include such fees and costs incurred while the lawsuit is in abatement;
- Specifies that assignment agreements do not restrict the ability of an insurer to communicate with its insured; and
- Makes additional technical and clarifying changes to the underlying bill.

CS/CS by Judiciary on March 9, 2021:

The committee substitute differs from the underlying bill by: providing a criminal penalty for aiding or abetting unlicensed insurance activity; prohibiting an unauthorized person from providing claims adjusting services; establishing, for purposes of awarding attorney fees in surplus lines cases, that the lodestar attorney fee computation is reasonable and a rebuttable presumption and that the demand-judgment quotient will be used to award attorney fees for a claimant; clarifying that an insurer may offer a roof reimbursement on the basis of replacement costs and may provide coverage to the roof on a stated value basis; establishing that the reduced 2-year claim filing notice provision applies to surplus lines; authorizing a policy to require a policyholder or assignee to participate in DFS mediation; authorizing a court to consolidate and transfer multiple claims that involve the same policy, property, and owners to one court; requesting the Florida Supreme Court to amend rules to require that lawyers and law firms, in property claim litigation, provide closing statements that itemize fees, costs, and expenses to the Department of Financial Services.

CS by Banking and Insurance on February 2, 2021:

The committee substitute clarifies that, notwithstanding s. 627.7011(1)(a), F.S., an insurer may offer a roof surface reimbursement schedule that applies once a roof is at least 10-years old, without also being required to offer replacement cost coverage on a roof of such age.

The committee substitute makes additional technical and clarifying changes to the underlying bill.

B. Amendments:

None.

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