

Florida's Special Session on Property Insurance



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It is no secret that Florida's property insurance market is in dire straits. For several years Floridians have been faced with fewer property insurance options, and those insurers that have managed to continue doing business in the Sunshine State have been forced to endure skyrocketing litigation costs and a hardening reinsurance market. Despite the enactment of laws in 2019 and 2021, which were aimed at addressing loopholes in the Florida Insurance Code that were being exploited by unscrupulous contractors and their attorneys, recent headlines have highlighted

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the insolvencies of multiple Florida property and casualty insurers. Hundreds of thousands of Florida policyholders have been left with no choice but to seek coverage from Citizens Property Insurance Corporation (Citizens) — Florida's insurer of last resort. Florida policyholders have also seen property insurance premiums rise at alarming rates, which has dramatically increased the cost of owning and maintaining a home or business in the Sunshine State.

Many hoped that lawmakers would enact additional measures during the 2022 regular legislative session to help stem the unsettling rise in litigation related to questionable

roof damage claims. Yet, despite the dire circumstances faced by so many Floridians, and notwithstanding the insolvencies of two more Florida insurers in March, the Legislature wrapped up the regular session in March 2022 without taking action to address the crisis. Several lawmakers and industry representatives continued to voice concerns that the Florida market would not be able to withstand another active Atlantic hurricane season.

Given the state of play, it was of little surprise when Gov. Ron DeSantis announced that he was calling a special session of the Florida Legislature, which was to run from May 23, 2022 until May 27, 2022, to address the growing property insurance crisis. In this article, we examine the special session and the two pieces of legislation that were ultimately passed by the Legislature and signed by the governor on May 26, 2022.

What Happened

On April 26, 2022, Gov. DeSantis signed a proclamation calling on the Florida Legislature to convene for a special session. The formal call was to consider legislation related to property insurance, reinsurance, changes to the Florida building code to improve affordability of property insurance, the Florida Office of Insurance Regulation (OIR), civil remedies, and appropriations.

On Friday, May 20, 2022, the House and Senate released their respective proposals, which included measures related to reinsurance, roof solicitation, roof underwriting, bad faith, attorney fees, insurer regulation and transparency, and building codes. House Appropriations Chairman Rep. Jay Trumbull (R-Panama City) sponsored the House measures. In a memo to legislators, Representative Trumbull stated that the policies they developed would help curb abuses in the market without creating unintended consequences. Senate Banking and Insurance Committee Chairman Sen. Jim Boyd



(R-Bradenton) sponsored the Senate bills. Boyd explained to members in a memo that the proposals were intended to balance fair costs and protections for consumers while creating reasonable guardrails to protect insurance companies against frivolous litigation and fraudulent claims that would continue to drive up rates for all Florida policyholders.

On the second day of the special session, Speaker of the House Chris Sprowls (R-Clearwater) announced that an agreement was reached between the House and Senate to expand the call of the special session to include legislation relating to building safety. The legislation was aimed at reforming laws governing condominiums and cooperative associations in the wake of the collapse of the Champlain Towers condominium complex in Surfside, Florida on June 24, 2021.

The Senate passed CS/SB 2D relating to property insurance and SB 4D on building safety on Tuesday, May 24, 2022. The House subsequently passed both bills on Wednesday, May 25, 2022. Each is explored further below.

The Key Reforms Contained in the Bills

SB 2D seeks to provide stability to the property insurance marketplace with a reinsurance program to provide much needed capacity, antifraud measures aimed at reducing frivolous roof claims, attorney fee reforms intended to reduce excess litigation, and provisions to assist consumers in maintaining coverage.

SB 2D created the Reinsurance to Assist Policyholders (RAP) Program, a \$2 billion reimbursement layer of reinsurance for hurricane losses directly below the mandatory layer of the Florida Hurricane

Rep. Fiona McFarland (R-Sarasota) introduced legislation that, if signed into law, would give consumers the right to decide what information is collected on them, delete or correct the data, and opt out of the sharing of that information.

Catastrophe Fund (the CAT Fund). The CAT Fund's mandatory retention for the 2022-2023 contract year is \$8.5 billion. Each insurer participating in the CAT Fund as of June 1, 2022 is considered eligible for the RAP Program. Insurers determined to be in "unsound financial condition" by the Insurance Commissioner are prohibited from participation. Importantly, Citizens joint underwriting associations are ineligible to participate in the RAP Program.

The RAP program will reimburse 90 percent of each insurer's covered losses and 10 percent of their loss adjustment expenses up to each individual insurer's limit of coverage for the two hurricanes causing the largest losses for that insurer during the contract year. Insurers will not be charged a premium for RAP Program coverage but must make a filing with OIR which, it is hoped, will demonstrate the savings to policyholders created by the RAP coverage.



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Each insurer's limit of the \$2 billion in RAP coverage will be its pro-rata market share among all insurers that participate in the RAP program. For example, an insurer with 5 percent of the risk reinsured by RAP coverage would have a limit of coverage of \$100 million.

All eligible insurers must participate in the RAP program for one year. Insurers that do not have private reinsurance within the RAP layer of coverage for the 2022-2023 contract year must participate during the 2022-2023 contract year. An eligible insurer with private reinsurance that duplicates RAP coverage for the 2022-2023 contract year must notify the State Board of Administration of the private reinsurance and must defer participation in the RAP program until the 2023-2024 contract year.

But the measures passed by the Legislature did not only focus on reinsurance as a means to prop up the Florida market. Solicitation of policyholders by unscrupulous contractors to file unnecessary roof claims was also identified as a major driver of losses. To address the problem, SD 2D now prohibits contractors from making written or electronic communications which encourage or induce a consumer to contact a contractor or public adjuster for the purposes of making a property insurance claim for roof damage unless the solicitation provides specified notices providing information about insurance fraud.

Litigation cost, particularly one-way attorney fees paid by insurers to the plaintiff's lawyers, has been a significant driver of loss costs in the Florida marketplace. SB 2D continued the Legislature's work of addressing attorney fee reform that was started in 2019 with AOB reform and in 2021 with first party claims in SB 76. SB 2D addressed bad

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faith claims by requiring that a policyholder must establish that a property insurer breached the insurance contract in order to prevail in a bad faith claim.

SB 2D continued reforms related to litigation brought by vendors that have entered into an Assignment of Benefits ("AOB") agreement with a policyholder. The bill prohibits an AOB vendor from recovering one-way attorney fees. Further, the bill amends the definition of "assignment

agreement" to include assignments executed by a party that inspects the property and specifies that public adjuster fees are not an assignment agreement. The bill further clarifies the requirement to provide a Notice of Intent to Initiate Litigation before filing suit related to an AOB. Finally, the bill requires that a valid AOB must specify that the assignee will hold harmless the assignor from all liabilities, including attorney fees. It is believed by many in the industry that these reforms are an important step in reducing frivolous AOB litigation and the associated loss costs.

SB 2D also creates a new standard for the award of an attorney fee multiplier in property insurance litigation. The bill creates a presumption that in property insurance cases, attorney fee awards based on the Lodestar methodology are sufficient and reasonable. Attorney fee multipliers may now only be awarded under rare and exceptional circumstances with evidence that competent counsel could not be hired in a reasonable manner.

Additionally, SB 2D provides insurers recourse when a claimant fails to file a Notice of Intent to Litigate prior to filing a lawsuit against the insurer. The bill provides that courts may now award attorney fees to an insurer when a first-party claimant's property insurance suit is dismissed without prejudice for failure to provide a Notice of Intent to Initiate Litigation.

SB 2D contains provisions that will assist policyholders in maintaining private market property insurance coverage. Property insurers may now offer consumers an optional separate roof deductible of up to 2 percent of the Coverage A limit of the policy or 50 percent of the cost to replace the roof. Policyholders that select the roof deductible must receive a premium credit or discount. The roof deductible will not apply to a total loss, a loss caused by a hurricane, a loss resulting from the puncture of a roof deck or a roof loss requiring the repair of less than 50 percent of the roof.

Further, consumers are receiving protections from strict roof underwriting guidelines. SB 2D prohibits insurers from canceling or non-renewing policies solely due to the roof being 15 years old or older. In addition, if consumers with roofs that are 15 years old or older obtain an inspection from an authorized provider showing their roof has at least 5 years of life an insurer cannot cancel or non-renew their policy due solely to the age of their roofs.

New claims handling mandates related to insurer communication have been adopted in SB 2D. The bill provides that for claims other than those subject to a hurricane deductible, an insurer must conduct any physical inspection within 45 days after its receipt of the proof of loss statements. Insurers must now notify policyholders of their right to receive any detailed



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report created by an adjuster that estimates the amount of the loss. Further, insurers must provide a reasonable explanation of the claim decision in relation to the insurance policy, facts, and law. If the insurer makes a claim payment that is less than the amount contained in an adjuster's estimate of the loss, the insurer must explain the discrepancy in the amounts.

To assist consumers in maintaining their home in an insurable condition, SB 2D appropriates \$150 million to the My Safe Florida Home Program to provide hurricane mitigation inspections and matching grants for the performance of hurricane retrofitting on homestead single family homes located in the wind-borne debris region set forth in the Florida Building Code with a value of \$500,000 or less. The My Safe Florida Home Program will also provide financial incentives for Florida residents to obtain free home inspections to identify mitigation measures.

Additionally, SB 2D creates the Property Insurer Stability Unit within the Office of Insurance Regulation (OIR) to aid in the detection and prevention of insurer insolvencies in the homeowners and condominium unit owners insurance market. The unit will:

- Provide enhanced monitoring when the OIR identifies significant concerns about the condition of the insurer.
- Conduct targeted market conduct exams when there is reason to believe an insurer may be in an unsound financial condition.
- Closely monitor insurer financial data.
- Conduct annual catastrophe stress tests of domestic insurers.
- Update wind mitigation credits.
- Review the causes of insolvency and business practices of insurers referred to the Division of Rehabilitation and Liquidation within the Department of Financial Services.

- Twice annually, provide a report on the status of the homeowner and condominium unit owner insurance market.

In addition, in the event of an insolvency involving a domestic property insurer, the Department of Financial Services must:

- Begin an analysis of the history and causes of the insolvency no later than the initiation of delinquency proceedings against the insurer.
- Review the OIR's regulatory oversight of the insurer.
- Submit an initial report analyzing the history and causes of the insolvency no later than two months after the initiation of the delinquency proceeding.
- Provide a special report within 10 days of identifying any condition or practice that may lead to insolvency in the property insurance marketplace.
- Submit a final report analyzing the history and causes of the insolvency and the OIR's regulatory oversight within 30 days of the conclusion of the insolvency proceeding.

SB 4D contains provisions to address the cost of roof claims and roof replacement. Prior to the adoption of this bill, the Florida Building Code required that not more than 25 percent of the total roof area of any existing building or structure could be repaired, replaced, or recovered in any 12-month period unless the entire existing roofing system was replaced to conform to most recent requirements of the building code. This requirement led to the unnecessary full replacement of roofs in many instances. The bill creates an exception to this provision. SB 4D requires that when 25 percent or more of a roofing system or roof section is being repaired, replaced, or recovered, only the portion of the roofing system or roof section undergoing such work must be constructed in accordance with the current Florida Building Code in effect at that time. It is believed that this provision will allow for more roof repairs and fewer full roof replacements, which should ultimately reduce insurer loss cost related to roofing claims.

Judicial Challenges

Both SB 2D and SB 4D have been challenged in the courts on constitutional grounds. The Restoration Association of Florida and Air Quality Assessors LLC, an Orlando firm that performs mold testing and leak detection, filed a challenge on May 31 in Leon County Circuit Court that targets the attorney fee reforms.

The challenge focuses on the provision in SB 2D that removes AOB contractors' ability to recover one-way attorney fees in a lawsuit against a property insurer.

The lawsuit alleges that prohibiting AOB contractors from recovering one-way attorney fees violates equal-protection and due-process rights, as well as denies contractors access to courts. "Claims submitted to insurers for work performed by contractors under an AOB (assignment of benefit) are generally not large in monetary amount," the lawsuit said. "When the insurer delays, underpays or does not pay a claim at all, contractors are forced to commence an action against the insurer to recover the full amount due for the work performed. Without the corresponding right to recover prevailing party fees, SB 2-D makes it economically unfeasible for the contractor to pursue its lawful rights and remedies in court. Invoices for work performed by contractors under AOBs are generally not significant enough for a lawyer to agree to represent the contractor on a contingency fee basis and it is not economically reasonable for the contractor to ... pay a lawyer on an hourly basis to recover the amount(s) owed."

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The challenge to SB 4D was filed in the Leon County Circuit Court on June 2, 2022 by the Restoration Association of Florida and Florida Premier Roofing LLC. The lawsuit contends that the revisions to roof replacement requirements in the Florida Building Code violates due-process rights because it conflicts with another state law that requires roofing materials to match in quality, color, and size when repairs are made, and that the bill violates the Florida Constitution's "single subject" requirement for legislation.

The plaintiffs contend SB 4D violates a constitutional requirement that legislation deal with single subjects. The

Florida Constitution requires that legislation only address a single subject. The plaintiffs contend that the provisions added to the bill to address condominium reforms in the wake of the tragic collapse of the Champlain Towers condominium complex have no relation to the roof replacement reforms, therefore violating the single subject requirement.

At the date of publication, the state had not responded to the challenges, nor had any hearing dates been set.

Impact to Florida's Insurance Marketplace

The Florida Legislature went a long way to try to stabilize the insurance market by creating the RAP program in an effort to sustain the struggling market. However, make no mistake, the RAP program is not a panacea. Major market disruptions are still possible. Indeed, despite the passage of these reforms a Florida domestic property insurer was subsequently placed into liquidation due to its inability to secure reinsurance and, even more concerning still, it was announced that Citizens was unable to complete its reinsurance program. Reinsurers are hesitant to provide capacity below the RAP layer, which has the potential to be a major problem. The attorney fee reforms contained in SB 2D, especially the bad faith reform and elimination of one-way attorney fees for AOB claims, are a continued step in the right direction to contain litigation costs, but there is more work to do.

The implementation of optional roof deductibles will allow consumers to determine how they will mitigate risks while also permitting insurers to reduce exposure to unnecessary roof claims. Such improvements in consumer and insurer choice in the market will increase the availability of coverage in the private market. Coupled with the expansion of the My Safe Florida Home Program, which encourages Floridians to repair and improve their homes, as well as the claims handling and underwriting mandates contained in SB 2D, the actions taken by the Legislature in May have the potential of scoring big wins for policyholders. But there is still work to be done.

A Look to Later in 2022 and 2023 Regular Legislative Session

Attorney fees continue to be a significant issue in Florida, but attorney fee reform is the type of issue that requires incremental progress. The Legislature made progress with respect to a narrow subset of attorney fees related to AOB claims in 2019, and first-party claims with the passage of Senate Bill 76 in 2021. While the Legislature also made progress during the 2022 Special Session, Florida must keep working on this issue to show the capital markets that we understand the problem and are willing to improve the business environment in Florida.

The FHCF has been a helpful mechanism in stabilizing the Florida market for several decades. However, the current crisis has demonstrated that some flexibility is needed. Florida must continue to evaluate the operations of the FHCF, including the Rapid Cash Build Up program, the manner in which rates are set, and how retention is viewed.

Given that Florida sits in one of the most storm-prone regions of the world, there will always be a certain level of risk that the private market will not insure, making Citizens necessary in the state of Florida. However, Citizens is growing at an unsustainable rate. Citizens' policy count was at a historic high in late 2012 with an in-force policy count of nearly 1.5 million. In 2018, Citizens reached a near term low count of just over 400,000 policies. Since 2020, the policy count has continued to rise and recently reached nearly 900,000 through the end of May 2022 with significant continued growth anticipated. Further exacerbating the problem, Citizens' rates are far too competitive with the private market, which can make it an attractive option even for those homeowners who may have potential offers from other carriers.

In the coming months, legislators will focus on campaigning, and property insurance reform will likely be a hot-button issue. In March 2023, a set of newly elected legislators will return to Tallahassee for the start of the regular legislative session where any action will depend, in large part, on the impacts of the 2022 hurricane season. While it remains to be seen exactly what reforms, if any, are in store for 2023, one

thing is for certain: the Florida property insurance market is in grave need of support from Florida lawmakers. 🌊

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