Demotech, Inc.

April 22, 2022

The Honorable Ron DeSantis
Governor of Florida
State of Florida
The Capitol
400 S. Monroe St.
Tallahassee, FL 32399-0001

RE: Follow-up on March 23, 2022 Correspondence Regarding Our Perspective on the State of the Property Insurance Market in Florida and the Necessary Impact of a Special Session

Governor DeSantis:

Thank you for convening a special session on property insurance. We commend your resolve to address the proximate cause of the rate increases facing Floridians – a disparate level of litigation associated with plaintiff attorneys, including certain roofing claims despite roofs having experienced significant albeit normal wear and tear.

As you deliberate how to enact meaningful and significant legislative reform to dampen the trajectory of future rate increases, please take direction from the correspondence presented by Commissioner David Altmaier to Chairman Blaise Ingoglia on April 2, 2021, copy attached.

Commissioner Altmaier's analysis utilized independent information obtained from databases of the National Association of Insurance Commissioners to demonstrate that open (unresolved) Homeowners insurance claims in Florida represented approximately 8% of the national open Homeowners claims in the data, but these Florida claims represented an inordinately disparate 76% of litigated claims.

Given these statistics, Florida has a litigation emergency that the legislature needs to address. The question is, should affordable insurance be readily available to 22 million Floridians or should a small percentage of plaintiffs' law firms and roofing contractors reap windfall profits at the expense of Floridians and Florida's homeowners' insurance marketplace? The information presented by Commissioner Altmaier provides overwhelming objective third party evidence of many of the causes of Florida's litigation problem, while concurrently documenting that carriers and procedures are not part of the problem.

Specifically, as noted in Commissioner Altmaier's correspondence dated April 2, 2021:

The MCAS data also includes a ratio of claims closed without payment to total claims closed and a ratio of suits opened to claims closed without payment. This data allows OIR to observe trends in the context of other states. When comparing the number of claims closed without payment to total claims closed, Florida trends along with the national average.

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What this implies to insurance professionals is that the claims closed without payment in Florida are comparable to the national average. Litigation is NOT being brought against Florida insurers because they are trying to escape liability by closing a meritorious claim without an investigation.

Commissioner Altmaier also wrote:

Next, because Florida's domestic homeowners' insurance market is heavily reliant on Florida-only or regional insurers, we analyzed the litigation to claims ratio of insurers operating in Florida and other states to see if we detected a pattern of these insurers experiencing litigation higher than their peers in other states; a potential indicator of, inter alia, claims handling issues. We did not detect any such systemic pattern that could explain this disparity.

This analysis determines whether insurers focused on Florida's Homeowners insurance marketplace utilize claims handling that could result in higher litigation rates. This did NOT contribute to the disparity of litigation.

In other words, Florida focused residential property insurers are responding to claims in a manner consistent with procedures utilized in the other 47 states in the study, as regards closures. They are not closing claims that should be settled. Furthermore, they are handling claims similarly to insurers in other jurisdictions. It is reasonable to conclude that Florida's disparate litigation originates on the plaintiff side of the equation.

The solutions proposed by Commissioner Altmaier on April 2, 2021 seem appropriate to us as the first steps in remedying some of the issues in the Florida property insurance marketplace. Commissioner Altmaier's correspondence referenced:

1. ***Reform Florida's One-Way Attorney's Fees Statute.***

Floridians who have been wronged by their insurance company should have an avenue to pursue damages via the judicial system. The one-way attorney's fees statute provides an excellent venue for this to occur. However, the current one-way attorney's fees statute provides an incentive for litigation to come before our judicial system that may not always be legitimate. The primary driver of this is the reality that plaintiffs need not necessarily prevail "substantially," but only win at least one penny more than the insurer's initial offer in order to win attorney's fees. We believe that adopting the attorney's fees reforms enacted in 2019 in the AOB legislation preserves important consumer protections, while providing a framework to ensure that litigation brought against insurance companies is legitimate. To ensure consumers continue to enjoy wide access to courts, any such revision, like the AOB reform, must not require claimants to pay attorney's fees in cases not decided in their favor.

2. ***Address the ramifications of the Joyce decision regarding Contingency Fee Multipliers.***

Florida diverges from federal standards in its awarding of contingency fee multipliers. The Joyce decision highlights just how far Florida has diverged from the federal standard. After settling a dispute with their insurance company, Joyce received a settlement in the amount of $23,500. Their attorney calculated their lodestar attorney's fees at over $38,000. On top of that, the trial court

applied a contingency fee multiplier of 2.0. However, as the Fifth District Court of Appeal stated, the Joyce case "…was not a complicated case. There was no esoteric legal issues or complicated factual disputes to resolve." The application of a multiplier in that case that "was not a complicated case" raises significant concerns that contingency fee multipliers will become the normal practice, as opposed to what the Fifth District thought should be "rare and exceptional" cases. As Justice Scalia stated in his majority opinion in Burlington v. Dague, 505 U.S. 557 (1992), the awarding of contingency fee multipliers could incentivize the filing of meritless cases for the sake of receiving a large attorney's fees payout. Legislation that codifies the Fifth District Court of Appeal's decision in Joyce by adopting a ***"rare and exceptional"*** *framework for contingency fee multipliers could be effective in reducing this incentive.*

3. Address the ramifications of the Sebo decision regarding concurrent causation.

The Sebo decision has incentivized roof claim solicitations based on the Florida Supreme Court's holding which applied the concurrent causation doctrine and held that insurance coverage may exist when there are concurrent causes of loss and at least one cause is covered under the policy. Some stakeholders have argued that allowing insurers to mandate actual cash value coverage for roofs could address this incentive. While that is likely true, statutory language that specifically excludes "wear and tear" from concurrent causation could also provide a disincentive for this behavior, while allowing consumers to keep replacement cost coverage for legitimate roof losses.

In our previous communication, dated March 23, 2022, the specificity of these three legislative reforms were collectively referenced as "Legislative reform intended to minimize litigation, including addressing the issue of contingency fee multipliers."

There were two additional matters referenced in our previous communication:

- The Florida Hurricane Catastrophe Fund's suspension of the rapid cash build-up; and
- The Florida Hurricane Catastrophe Fund's capability to provide the lower level attachment points required to maintain the net catastrophe retentions of carriers at a reasonable level.

These two items may have minor financial impact in 2023, as reinsurance renewals for 2022 through 2023 are being negotiated and most will be finalized as of June 1, 2022. Although these matters represent measures that would benefit the Florida property insurance marketplace, neither matter will have impact on the disparate litigation level associated with residential property insurance in Florida.

Meaningful and significant legislative action, which may need to be affirmed by the judicial arm of government, is necessary to address the litigation problem. We wholeheartedly concur with the recommendations presented in the attached correspondence.

Sincerely,

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Vice President and co-founder

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Enclosure

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The Honorable Chris Sprowls
Speaker of the Florida House of Representatives
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OFFICE OF INSURANCE REGULATION

DAVID ALTMAIER
COMMISSIONER

April 2, 2021

Dear Chair Ingoglia,

On February 24, 2021, the Office of Insurance Regulation (OIR) had the opportunity to provide you and your Committee with a report related to the challenges currently facing Florida's property insurance market, and the impact to consumers that depend on that market. We appreciate your ongoing leadership and partnership regarding this critical issue, as well as the opportunity to continue serving as a data-driven resource as you address a topic that affects all Floridians.

National Litigation Statistics

Since our February 24 response, linked here, OIR has mined additional information from the National Association of Insurance Commissioners (NAIC) Market Conduct Annual Statement (MCAS) Data Call to further provide information on litigation trends in the Florida insurance market. By way of background, MCAS is a regulatory tool developed in 2002 by state insurance regulators to collect information from insurers[1] on a uniform basis in order to identify concerns regarding claims and underwriting. In 2019, over 750 homeowners' insurance companies reported data via MCAS[2] using uniform definitions and reporting requirements across all states.[3] While the NAIC makes certain aggregated data available to the public, other information is considered confidential under Florida law.[4]

OIR has aggregated certain MCAS data in a manner compliant with Florida law to provide information regarding the number of suits opened in the United States[5] for the 2016 – 2019 reporting periods, and the ratio of suits opened in each year to the number of claims opened in each year.

Based on the most recent MCAS data available, in 2019, Florida accounted for 8.16% of all homeowners' claims opened by insurance companies in the U.S. However, in 2019, Florida accounted for 76.45% of all homeowners' suits opened against insurance companies in the U.S.

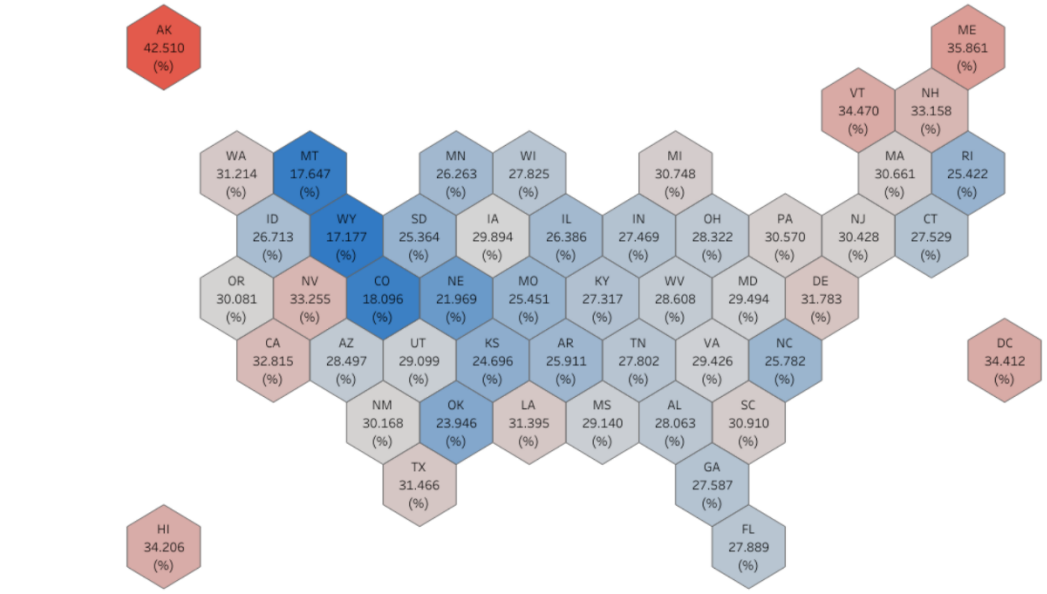
[1] Participation requirements available here: https://content.naic.org/sites/default/files/inline-files/2020%20MCAS%20Part%20Reqmts-Gen%20Info_.pdf
[2] Additional Information regarding MCAS can be found at https://content.naic.org/cipr_topics/topic_market_conduct_annual_statement_mcas.htm.
[3] North Dakota and New York do not participate. Data is collected based on $50,000 premium threshold.
[4] See sections 624.319(3), 624.4212 and 624.4213, Florida Statutes, which provides for the confidentiality of certain information, including but not limited to information in the MCAS.
[5] New York and North Dakota do not participate in MCAS. Therefore, those states are not included in this analysis.

The results for 2019 are not an anomaly. As the chart below depicts, litigation trends in Florida have been consistently many times higher than any other state.

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

The MCAS data also includes a ratio of claims closed without payment to total claims closed and a ratio of suits opened to claims closed without payment. This data allows OIR to observe trends in the context of other states. When comparing the number of claims closed without payment to total claims closed, Florida trends along with the national average.

Homeowners Claims Closed without Payment to Total Claims Closed: 2019

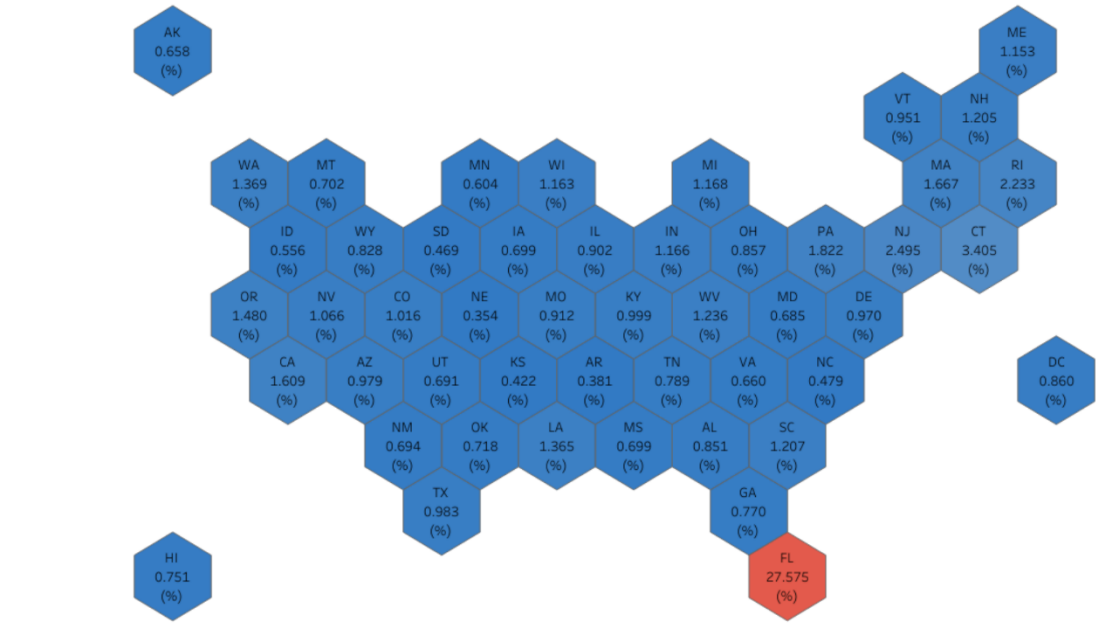


Data does not include Citizens Property Insurance Corporation. Scorecard data can be found at https://content.naic.org/mcas_data_dashboard.htm.

Users of the MCAS Scorecard data should be aware of the following: (1) Only companies that meet the Market Conduct Annual Statement (MCAS) reporting threshold are required to submit MCAS data. (2) Reporting companies may revise their reported data when errors are discovered. Consequently, statewide ratios reported for one year may change as revised data are submitted by reporting companies. (3) While the jurisdictions that participate in the MCAS and the NAIC make every effort to ensure that reporting companies submit compete and accurate data, the NAIC and the jurisdictions that participate in the MCAS make no representations, guarantees or warranties with respect to the accuracy or completeness of the data and statistics in scorecards. (4) The NAIC and the jurisdictions participating in the MCAS are not responsible for any calculations or products based upon the scorecard data and any use of these scorecard data must be accompanied by a statement, 'The NAIC and individual states do not endorse any calculation or subsequent use of the MCAS scorecard data."

However, Florida's ratio of suits opened to claims closed without payment is eight times higher than the next highest state at 27.75%. The state of Connecticut has the second highest ratio of suits opened to claims closed without payment at 3.4%. The next highest three states are New Jersey (2.45%), Rhode Island (2.23%), and Pennsylvania (1.82%).

Homeowners Suits Opened to Claims Closed Without Payment: 2019



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Methodology

To examine the disparity between Florida and the other states, OIR analyzed the data from several perspectives. First, we validated our methodology and results with MCAS staff at the NAIC.

Next, because Florida's domestic homeowners' insurance market is heavily reliant on Florida-only or regional insurers, we analyzed the litigation to claims ratio[6] of insurers operating in Florida and other states to see if we detected a pattern of these insurers experiencing litigation higher than their peers in other states; a potential indicator of, *inter alia,* claims handling issues. We did not detect any such systemic pattern that could explain this disparity.

While we continue to explore these and other possibilities to explain the disparity, OIR does not have a readily available explanation for Florida's outlier status other than to simply state that Florida is experiencing far more claims-related litigation than the 47 other reporting states.

[6] The precise calculation is the "Number of suits opened during the period" divided by "Number of claims opened during the period."

Solutions

We appreciate the work of Chair Rommel on House Bill 305 that addresses property market challenges. To reaffirm and expand on OIR's recommendations from February 24, and in light of the new data included in this report, we encourage the legislature to consider additional tort reform measures, including:

- Reform Florida's One-Way Attorney's Fees Statute[7]. Floridians who have been wronged by their insurance company should have an avenue to pursue damages via the judicial system. The one-way attorney's fees statute provides an excellent venue for this to occur. However, the current one-way attorney's fees statute provides an incentive for litigation to come before our judicial system that may not always be legitimate. The primary driver of this is the reality that plaintiffs need not necessarily prevail "substantially," but only win at least one penny more than the insurer's initial offer in order to win attorney's fees. We believe that adopting the attorney's fees reforms enacted in 2019 in the AOB legislation preserves important consumer protections, while providing a framework to ensure that litigation brought against insurance companies is legitimate. To ensure consumers continue to enjoy wide access to courts, any such revision, like the AOB reform, must not require claimants to pay attorney's fees in cases not decided in their favor.

- Address the ramifications of the *Joyce*[8] decision regarding Contingency Fee Multipliers. Florida diverges from federal standards in its awarding of contingency fee multipliers. The *Joyce* decision highlights just how far Florida has diverged from the federal standard. After settling a dispute with their insurance company, *Joyce* received a settlement in the amount of $23,500. Their attorney calculated their lodestar attorney's fees at over $38,000. On top of that, the trial court applied a contingency fee multiplier of 2.0. However, as the Fifth District Court of Appeal stated, the *Joyce* case "…was not a complicated case. There was no esoteric legal issues or complicated factual disputes to resolve."[9] The application of a multiplier in that case that "was not a complicated case" raises significant concerns that contingency fee multipliers will become the normal practice, as opposed to what the Fifth District thought should be "rare and exceptional" cases. As Justice Scalia stated in his majority opinion in *Burlington v. Dague, 505 U.S. 557 (1992),* the awarding of contingency fee multipliers could incentivize the filing of meritless cases for the sake of receiving a large attorney's fees payout. Legislation that codifies the Fifth District Court of Appeal's decision in *Joyce* by adopting a "rare and exceptional" framework for contingency fee multipliers could be effective in reducing this incentive.

- Address the ramifications of the *Sebo*[10] decision regarding concurrent causation. The *Sebo* decision has incentivized roof claim solicitations based on the Florida Supreme Court's holding which applied the concurrent causation doctrine and held that insurance coverage may exist when there are concurrent causes of loss and at least one cause is

[7] Section 627.428, Florida Statutes.
[8] Joyce v. Federated Nat'l Co., 228 So. 3d 1122 (Fla. 2017)
[9] Joyce v. Federated Nat'l Co. v. Joyce, 179 So. 3d 492, 494 (Fla. 5th DCA 2015), decision quashed sub nom. Joyce v. Federated Nat'l Ins. Co., 228 So. 3d 1122 (Fla. 2017)
[10] Sebo v. Am. Home Assurance Co., Inc., 208 So. 3d 694 (Fla. 2016)

covered under the policy. Some stakeholders have argued that allowing insurers to mandate actual cash value coverage for roofs could address this incentive. While that is likely true, statutory language that specifically excludes "wear and tear" from concurrent causation could also provide a disincentive for this behavior, while allowing consumers to keep replacement cost coverage for legitimate roof losses.

- Include provisions from the legislation recently enacted in the state of Texas. In 2017, the Texas Legislature passed House Bill 1774 broadening pre-suit notice and inspection requirements for property claims and addressing attorney's fees. The law requires a potential claimant to notify its insurer of potential litigation at least 61[11] days before filing suit, regardless of the nature of the claim involved. The amount of attorney's fees set forth in the demand must be based on the hours actually worked by the claimant's attorney, as reflected in contemporaneously kept time records. The new law links recovery of attorney's fees to the claimant's trial recovery and initial demand by limiting an attorney's fees recovery to the lesser of: (1) the amount of fees incurred by the claimant in bringing an action; (2) the fees recoverable under another law; or (3) an amount based on the difference between the demand and the amount awarded in a judgment. Under this final provision, the court would divide the amount to be awarded by the amount of the initial demand to obtain a ratio. This ratio is then multiplied against the amount of fees actually incurred by the claimant. Thus, an excessive demand will result in a substantial reduction of recoverable attorney's fees, or no recovery at all; but a reasonable or even low demand will result in a recovery of attorney's fees in excess of the fees actually incurred. The new law also provides additional and very important restrictions on an attorney's fees recovery. If an insurer is not given notice as required, a court cannot award any attorney's fees incurred after the insurer files a separate pleading with the Court. The separate pleading must be filed within 30 days of the date the insurer filed its original answer. The outright bar on recovering attorney's fees should serve as a substantial incentive to follow the law.

These solutions could substantially reduce the litigation associated with claims, bringing more certainty into Florida's property insurance market. Ultimately this will provide more stability in the market and more rate stability for consumers. We are grateful for your thoughtful consideration of these ideas and we stand ready to assist your committee as you continue to work on this important issue.

Sincerely,

David Altmaier
Insurance Commissioner

[11] Under current Florida law, a claimant may file suit as early as the first notice of loss.