



The Incentive to Sue: *How a Handful of Attorneys Are Profiting at the Expense of Florida Homeowners*

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Executive Summary

Florida's insurance market finds itself facing almost certain financial collapse, and consumers are literally paying the price. In the wake of the devastation from Hurricane Ian's landfall, Florida Governor Ron DeSantis has again announced bold plans for a special session of the state legislature to address the ongoing insurance crisis.¹ But it is not the recent hurricanes that have put the insurance market in financial peril; it is costly litigation that has persisted for the last several years. In the upcoming weeks, the governor will consider fixing a number of Florida statutes that encourage and enable frivolous lawsuits. Those lawsuits produce excessively large payouts to plaintiffs' attorneys, effectively leading to high costs for insurers and skyrocketing homeowner premiums for consumers.

The problem involves what is referred to as *assignment of benefits* (AOB) lawsuits – lawsuits that materialize when homeowners sign over their policy rights to contractors who handle their claims, make repairs, and are reimbursed by insurers. The incidence of these lawsuits has grown tremendously in recent years, only adding to the sense of urgency surrounding the problem. For instance, annual AOB lawsuits were a mere 1,300 in 2010, but

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¹ Jim Turner, DeSantis Plans Special Session for Ian Tax Relief, Property Insurance," Sun Sentinel, October 20, 2022, <https://www.sun-sentinel.com/news/weather/hurricane/os-ne-desantis-special-session-insurance-20221020-sh2et2kkvfemnhgbwdhs4tl7yi-story.html>.

jumped 104 times to 135,000 by 2018.² In recent years, AOB lawsuits have significantly driven up insurers' operating costs, thereby leading to increased financial losses, including six insolvencies this year alone. That increase in costs has, in turn, had a devastating impact on homeowners as insurers have been forced to raise premiums to stay afloat – doubling homeowner premiums in just the last three years.

In an earlier attempt to rein in the skyrocketing number of lawsuits and alleviate the sharp increase in consumer prices, a special session of the state legislature led to the passage of Senate Bill 2-D (SB 2-D).³ That law targets the immediate problem by prohibiting persons other than the insureds from receiving attorney fees in AOB cases, effectively limiting lucrative *one-way attorney fees* in these instances.⁴ Among the law's other provisions, it also prohibits additional attorney fees, referred to as *fee multipliers*, except in cases of rare and exceptional circumstances.⁵

While SB 2-D should be hailed as an achievement in that it should slow the increase in insurance lawsuits and premiums, it has not completely eliminated the problem. Some attorneys are figuring out new ways to garner exorbitant payouts, such as using directions to pay as a substitute for AOBs.⁶ Because attorneys are finding new avenues to circumvent SB 2-D, there has been significant upward pressure on already high consumer premiums in the wake of Hurricane Ian and most recently Hurricane Nicole.

One new avenue that sidesteps the new law involves AOB assignees who file Civil Remedy Notices (CRNs) against insurers using the Civil Remedy Statute 624.155(4). That statute

² Mark Vallet, "Florida up 70% in the number of AOB Filings Over the Past Decade," Home Insurance King, April 5, 2019, <https://www.homeinsuranceking.com/blog/florida-up-70-in-the-number-of-aob-filings-over-the-past-decade/>.

³ Proclamation from Governor Ron DeSantis to the Florida members of the Senate and House of Representatives calling for a special session, April 19, 2022, <https://www.flgov.com/2022/04/19/memo-amending-the-call-for-a-special-session/>.

⁴ As will be explained in detail later, SB 2-D attempts to end in one-way attorney fees in these instances, which previously allowed prevailing claimants to recover fees while preventing insurers from doing the same.

⁵ Again, as will be discussed later, a contingency fee multiplier, also referred to as a *lodestar fee*, is a factor that may increase and even more than double these attorney fees.

⁶ Somewhat similar to an AOB, directions to pay are agreements that sign over rights to contractors to bill insurers for reimbursement, but, unlike an AOB, these agreements may leave consumers on the hook to pay for any shortfalls in repair costs not covered by insurers. To see an actual example of a direction to pay form recently used in Florida, contact us at Research@TheAmericanConsumer.Org.

allows a claimant to sue an insurer when it is believed the insurer has failed to make a “good faith” attempt to settle a claim. In this case, if an AOB vendor is able to get the insurer to pay anything after a 60-day safe harbor period, whether it be due to a late appraisal from the vendor, a simple mistake, delay, settlement or litigation, the vendor/attorney can then sue the insurer for bad faith. This allows for the reimbursement of attorney fees, which are often inflated with hourly rates in the range of \$600 an hour, and it also provides an opportunity for these legal fees to be multiplied by more than two times. There are currently around 5,000 CRNs filed against insurers each month.

Based on this report’s analysis, we recommend the Florida State Legislature work with the governor’s office to:

- End or significantly restrict the one-way attorney fee statute; and
- Remove the ability of AOB vendors in first-party claim matters from being able to file CRNs against insurers.

Ending costly and frivolous lawsuits is essential – including ending Florida’s “fee-shifting” statutes and considering ways to restrict AOB and bad faith lawsuits. These recommendations would prevent the bypassing of SB 2-D, end frivolous lawsuits, and reduce the upward pressure on consumer premiums. These recommendations are also completely consistent with the spirit of the current law. While there may be other policy considerations, the recommendations here should be considered a priority for this special session.

We strongly urge the governor, Senate, and the House of Representatives to consider these changes and end the costly litigation that is harming Florida homeowners. While the Sunshine State has worked to rein in runaway lawsuits, several major problems persist that would substantially undermine SB 2-D. As attorneys and contractors look for new ways to exploit loopholes in these state statutes, if left unchecked, Florida homeowners will continue to lose.

Florida is quickly barreling toward the point of no return, as insurers find themselves on the brink of financial ruin and consumers are increasingly unable to afford insuring their property in a state with extensive coastal exposure. Policymakers must work quickly if they are

to enact lasting reforms. For the sake of all Floridians, we strongly recommend immediate action on these critical issues.

The Incentive to Sue:

How a Handful of Attorneys are Profiting at the Expense of Florida Homeowners

Introduction

Over the next five years, it is estimated that Florida’s population will increase by 294,756, equivalent to 808 new residents each day.⁷ As Americans trade urban centers in the north for Florida’s world-famous beaches and tropical climate, they face a threat more dangerous than an average hurricane – namely, a property insurance market on the verge of collapse. For Floridians, given their coastal exposure,⁸ a functioning insurance market is a critical line of defense against catastrophic storms that meteorologists expect will become more frequent and powerful.⁹

In this report, we will outline the problems facing Florida’s property insurance market, how these problems negatively impact Floridians, and what lawmakers in Tallahassee have done so far to resolve the issues facing the state’s insurance industry. This report comes on the heels of the Florida Governor’s recent announcement calling for a special legislative session to fix the spiking homeowner insurance costs and bolster a failing insurance market.¹⁰ In this vein, this report will provide policy recommendations that will support state lawmakers looking to bring stability to the market and make property insurance more affordable than it is today.

⁷ Jim Turner, “Florida Population Growth Slows a Tad as COVID Migration Wanes,” *Orlando Sentinel*, July 26, 2022, <https://www.orlandosentinel.com/news/florida/os-ne-florida-population-growth-slows-20220726-q3z kf2bxd5fu3miaksvnsiapm-story.html>.

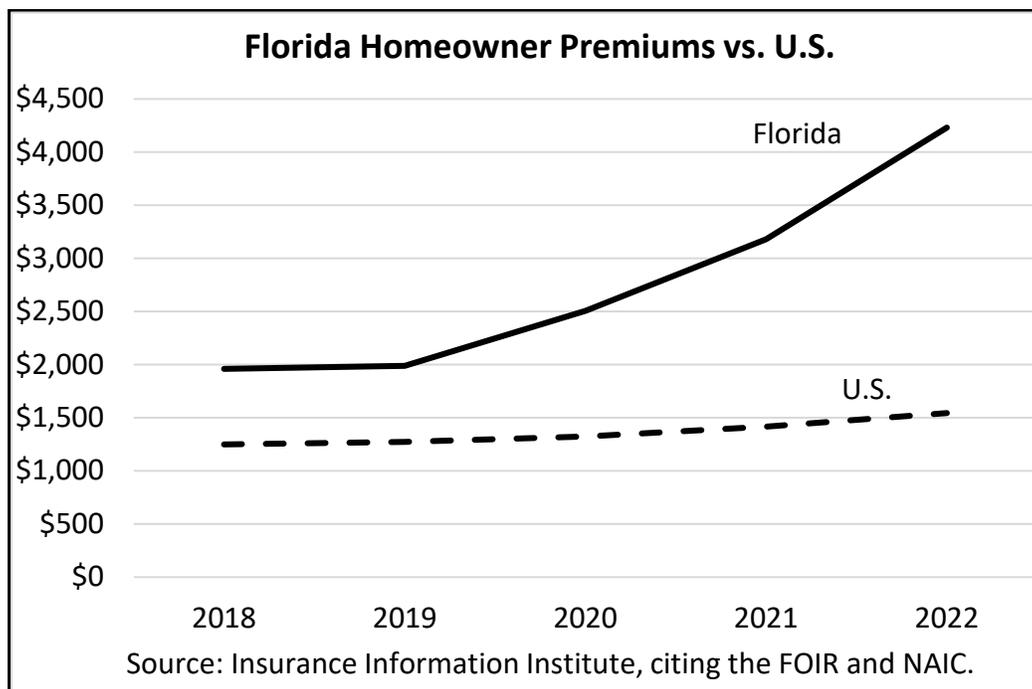
⁸ “The Hurricane Report 2022,” CoreLogic, June 22, 2022, https://www.corelogic.com/wp-content/uploads/sites/4/2022/06/CL_Hurricane-Report2022.pdf.

⁹ Angela Colbert, “A Force of Nature: Hurricanes in a Changing Climate,” National Aeronautical and Space Administration, June 1, 2022, <https://climate.nasa.gov/news/3184/a-force-of-nature-hurricanes-in-a-changing-climate/>.

¹⁰ Jim Turner, DeSantis Plans Special Session for Ian Tax Relief, Property Insurance,” *Sun Sentinel*, October 20, 2022, <https://www.sun-sentinel.com/news/weather/hurricane/os-ne-desantis-special-session-insurance-20221020-sh2et2kkvfemnhgbwdhs4tl7yi-story.html>.

Highest Insurance Prices in the Nation

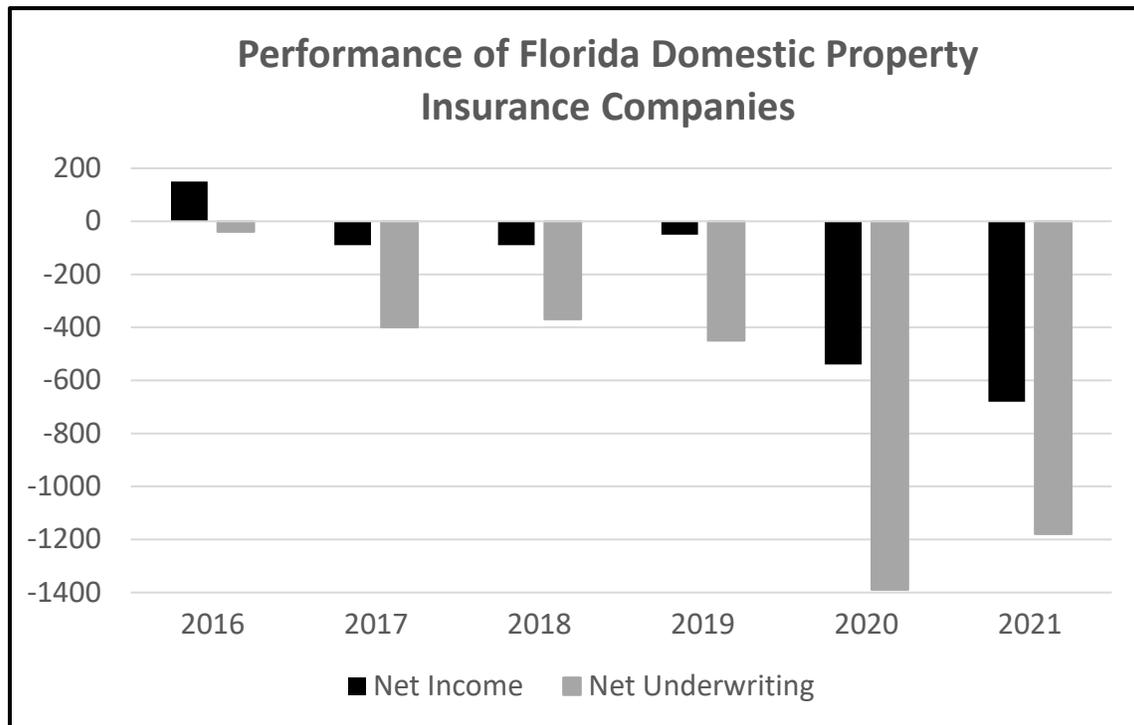
Nicknamed the *Sunshine State*, Florida’s tropical climate and unique geography can subject it to major storms, including hurricanes that come with high winds and devastating floods. The added risk associated with this coastal exposure explains why Florida’s insurance rates are typically higher than the national average. However, as depicted in the chart below, homeowners have recently seen skyrocketing insurance rates, estimated to be \$2,600 higher in 2022 than the national average. Prior to Hurricane Ian’s and Nicole’s destruction, the surge in prices comes despite only two hurricanes making landfall in Florida in the last 17 years.¹¹



¹¹ Stassy Olmos, “Florida Homeowners Pay Nearly 3x National Average for Homeowners Insurance,” *ABC Action News*, June 23, 2022, <https://www.abcactionnews.com/news/price-of-paradise/florida-homeowners-pay-nearly-3x-national-average-for-homeowners-insurance>; and “Trends and Insights: Florida Homeowners’ Insurance Crisis,” Insurance Information Institute, https://www.iii.org/sites/default/files/docs/pdf/triple-i_trends_and_insights_florida_issues_brief_08082022.pdf.

Indeed, unlike in previous years, insurers are now filing for significantly higher increases in premiums and are doing so more frequently than in the past.¹² In the months prior to Hurricane Ian, homeowner insurance premiums were already increasing at rates above 20% including some insurers that filed for rate increases three or even four times in a single year.¹³

However, while homeowner premiums have accelerated, the additional revenue from price increases did not line the pockets of insurers. As the chart below shows, Florida’s private insurers have seen their earnings fall in recent years, despite higher prices, with the industry losing over \$1 billion in the last two years alone.¹⁴



¹² Barry Gilway, Testimony Before the Senate Banking and Insurance Committee, October 19, 2021.

¹³ Ibid.

¹⁴ Ibid., using Florida Office of Insurance Regulation data. Also see Governor DeSantis, “Proclamation, State of Florida, Executive Office of the Governor, April 26, 2022, https://www.flgov.com/wp-content/uploads/2022/04/SKM_C750i22042614070.pdf.

Symptomatic of a greater problem, Florida’s insurance market finds itself facing financial collapse. Since January 2022, six insurers have become insolvent, resulting in both receiverships and liquidations.¹⁵ In July, 17 Florida insurers were warned of possible downgrades, and in August, three significant domestic insurers had their ratings lowered.¹⁶

Because Citizens Property Insurance Corporation, the state-operated insurer of last resort, has restrictions on its ability to raise rates, it now finds 99% of its homeowner policies below the average rate of private insurers.¹⁷ Industry financial losses, coupled with Citizens Insurance’s artificially lower rates, have led many private insurers to pull away from the market¹⁸ and refuse to renew hundreds of thousands of policies.¹⁹ As a result, Citizens has grown from 414,000 homeowner policies to 1.1 million policies in just over three years.²⁰ As consumers switch from private insurers to the state-backed entity, financial risks shift from the private sector to Citizens, exposing the state to potentially significant losses from hurricanes, as well as posing added risks for taxpayers.²¹

The fact is that homeowners in Florida are facing a property insurance crisis.²² However, the state’s coastal exposure to storms does not explain the almost three-fold price difference between the premiums paid by Floridians and their national counterparts. While insurers are reaching the point where they can no longer do business in Florida and are ratcheting up premiums, consumers are paying for it – all of it. The next section will discuss what is behind these skyrocketing consumer prices.

¹⁵ “Sixth Florida Property Insurer Declared Insolvent,” CBS Miami, September 26, 2022, <https://www.cbsnews.com/miami/news/sixth-florida-property-insurer-declared-insolvent/>.

¹⁶ William Rabb, “Demotech Downgrades Three in Florida; AM Best, KBRA Say They’re Available,” *Insurance Journal*, August 2, 2022, <https://www.insurancejournal.com/news/southeast/2022/08/02/678316.htm>.

¹⁷ Gilway, op. cit. This figure is for HO-3 policies, the most common homeowner policies on the market.

¹⁸ Mike Trim, “Florida Homeowner Insurance Crisis Could Worsen as More Companies Downgraded,” *WPTV*, July 26, 2022, <https://www.wptv.com/money/real-estate-news/florida-homeowner-insurance-crisis-could-worsen-as-more-companies-downgraded>.

¹⁹ “Citizens Insurance Surpasses 1 Million Policies,” *WJCT News*, August 12, 2022.

²⁰ Historical reports are available at the Citizens website at <https://www.citizensfla.com/-/20220930-policies-in-force> and <https://www.citizensfla.com/-/20190831-policies-in-force>.

²¹ Ibid.

²² Cate Deventer, “Will 2022 Bring the Collapse of the Florida Homeowners Insurance Market,” *Bankrate*, August 5, 2022. Available Online: <https://www.bankrate.com/insurance/homeowners-insurance/florida-homeowners-insurance-crisis/>.

Motivation and Litigation

While storm risks lead to higher prices, ongoing reports of insurance scams and increased litigation have made it almost impossible for insurance companies to operate in the Sunshine State. This has resulted in significant market instability.

As noted by Sean Kevelighan of the Insurance Information Institute, “Floridians are seeing homeowners insurance become costlier and scarcer because for years, the state has been the home of too much litigation and too many fraudulent roof replacement schemes. These factors contributed enormously to the net underwriting losses that Florida’s insurers have incurred between 2016 and 2021.”²³

In recent years, many lawsuits have originated from Assignment of Benefits (AOB) agreements, where a homeowner incurs an insurable loss and – rather than filing an insurance claim and managing the repairs and reimbursement on their own – they sign over their rights to a contractor who does the repair and files an insurance claim for reimbursement. During the process, some contractors have been known to exaggerate the cost of repairs, contributing to disputes over the amount of reimbursement. No matter how small these disputes are, they can lead to costly litigation, where the contractor’s lawyers will sue the insurer on behalf of the homeowner, often without the homeowner’s knowledge.

If there is a lawsuit, attorneys representing contractors in AOB lawsuits can take advantage of Florida’s generous one-way attorney fees (Florida Statute 627.428). The Florida one-way attorney fee statute works like this:

- If an AOB contractor wins in their lawsuit against an insurer, or if the insurer settles the lawsuit to avoid additional costs of litigation, the contractor’s attorneys can have their legal fees completely reimbursed by the insurer, as well as pay the contractor for any disputed amounts; and
- If the insurer wins, the insurer’s legal fees are not reimbursed.

²³ Mark Friedlander, “Triple-I: Extreme Fraud and Litigation Causing Florida’s Homeowners Insurance Market’s Demise,” Insurance Information Institute, June 23, 2022, <https://www.iii.org/press-release/triple-i-extreme-fraud-and-litigation-causing-floridas-homeowners-insurance-markets-demise-062322>.

Because of the one-way attorney fee statute, these lawsuits impose significant costs on insurers regardless of the weaknesses or strengths of the merits of any legal dispute. This unlevel playing field encourages insurers to settle exaggerated claims in order to minimize their losses, which only fuels more lawsuits.

Florida's one-way attorney fee system is outdated and in need of repeal. Statute 627.428, and predecessor statutes, originated almost 130 years ago when it was believed that some consumers had difficulty finding competent legal assistance to represent them in insurance disputes and this would encourage fair claims handling.²⁴ Today, however, this is far from the case with widespread availability of legal assistance throughout the state. Yet, the statute remains in effect and serves as the prime motivation for costly litigation.

In particular, one-way attorney fees create a strong incentive for lawyers to sue insurers and inflate their prices, just as some contractors have done. In some instances, attorneys have recouped fees at an hourly rate of \$700 per billable hour,²⁵ a figure significantly above the \$48.28 median hourly rate for attorneys in the Sunshine State, according to occupational statistics published by the U.S. Bureau of Labor Statistics.²⁶ However, overbilling by contractors and the one-way attorney fees statute explains only one part of the incentive to sue.

Fee-Shifting Benefits Attorneys, Not Consumers

Another issue with one-way fees is that they can easily be inflated and result in even greater settlements for attorneys suing insurers. In some instances, one-way fees allow prevailing attorneys to collect a lodestar fee (Florida Statute 57.105, as noted earlier, referred to as *contingency fee multipliers*). Essentially, the court can award an attorney an additional factor of 1.5 to 2.5 times their attorney fees, representing additional damages, penalties, and sanctions. While SD 2-D prohibits fee multipliers in AOB cases, except for rare and exceptional

²⁴ Christine Renella, William Zieden-Weber, "New Fla. Atty Fee Law May be a Boon to Property Insurers," Insurance Law360, September 2, 2021, <https://www.jdsupra.com/legalnews/new-fla-atty-fee-law-may-be-boon-to-1131099/>; and see *Tillis v. Liverpool & London & Globe Insurance*, 46 Fla. 268 (1903).

²⁵ Scott Johnson, "Litigation Reality Check," December 11, 2020.

²⁶ According to the U.S. Bureau of Labor Statistics, Occupational Employment and Wage Statistics, for lawyers (code 231011) in Florida, as of May 2021, see <https://data.bls.gov/oes/#/home>.

circumstances, as will be discussed later, attorneys have found new ways to circumvent this prohibition.

Historically, one-way fees allowed an attorney to sue an insurer for as little as one dollar on a home repair dispute and, if the attorney wins at trial or the insurer agrees to a settlement, the attorney can recover fees worth tens of thousands of dollars. In turn, a fee multiplier could be applied to this recovery amount. In the end, insurers were paying considerably more for legal fees, costs which were passed on to consumers in the form of higher premiums.

A quick look at other states reveals that the excessive litigation described here is clearly a problem unique to Florida. According to the Florida Governor's Office and the Office of Insurance Regulation, the Sunshine State "accounted for 76% of the nation's homeowner insurance lawsuits over claims filed while making up only 7% of the nation's homeowners insurance claims."²⁷ Such a litigious environment has been shaped by one-way attorney fees, AOB abuse, and attorney fee multipliers. Each has incentivized unnecessary and frivolous claims against insurance companies and contributed to premium price hikes.

Lopsided awards received by these attorneys reveal the tragedy of Florida's current litigious environment. In one example, a court awarded the consumer \$790. Then, the court allowed the suing attorney to recoup their fees and, additionally, granted an increased attorney fee payout by a fee multiplier. In this example, the consumer received the disputed \$790 award, while the attorney received \$40,000 in fees, all paid for by the insurer. As these legal costs grow, so do premiums.

With the proliferation of lawsuits targeting insurers and given the potential payout, due to one-way attorney fees and the possibility that litigants can also garner up to 2.5 times more in legal fees due to fee multipliers, there is clearly an incentive to sue. The table below lists a number of lawsuits brought by litigants against Florida insurers and demonstrates the potential for lucrative payouts.

²⁷ David Altmaier, "Property insurance Stability Report," Florida Office of Insurance Regulation, July 1, 2022, p. 3.

**Suing Insurers Means Big Paydays for Attorneys,
But Not Homeowners**

Source/Case	Settled Amount	Final Legal Fees	Ratio
The Dayton Beach News-Journal	\$790	\$40,000	51x
Santiago v. Florida Peninsula Insurance Co.	\$41,000	\$1,201,670	29x
Deshpande v. Universal P&C Insurance Co	\$25,000	\$206,090	8x
Pedrero v. Citizens Property Insurance Corp	\$35,000	\$702,927	20x
Martinez v. Citizens Property Insurance Corp	\$60,000	\$236,340	4x
Maso, LLC v. Citizens Property Insurance	\$2,754	\$42,971	16x
Bush v. Homeowners Choice P&C Corp	\$18,912	\$756,888	40x
Martinez v. Universal P&C Corporation	<\$6,000	\$116,000	19x
Cabrera v. Tower Hill Preferred Insurance Co	\$26,085	\$622,958	24x

Note: All figures are rounded to the nearest dollar.²⁸

As the table above shows, the amount paid to attorneys can easily dwarf the payout to assignees. The generous rewards from lawsuits encourage even more lawsuits, as contractors dispute exaggerated claims and attorneys inflate their legal costs. Because of this perverse incentive, over the last 10 years, insurers have paid out \$51 billion in connection with insurance litigation.²⁹ Of that amount, according to some reports, only 8% went to claimants, while 71% went to attorneys.³⁰ In other words, while attorneys may claim to sue in the name of “protecting consumers,” consumers get very little from this litigation, while attorneys generously enrich themselves in the process.

²⁸ Compiled from Frank Fernandez, “Small Claims, Big Impacts: Surge in Lawsuits Drives Up Costs for Volusia-Flagler Motorists,” *The Daytona Beach News-Journal*, September 23, 2018; Scott Johnson, “Litigation Reality Check,” December 11, 2020; and William Large, “Contingency Multipliers,” Florida Justice Reform Institute, forthcoming. Note that the Deshapande v. Universal P&C Insurance Co case originally awarded \$415,495 – legal fees amounting to nearly 17 times the amount awarded the insured – but this amount was lowered on appeal, as shown in the table above.

²⁹ Lyle Adriano, “Revealed – What’s Tearing Apart Florida’s Homeowners’ Insurance Market?” *Insurance Business American*, June 24, 2022, <https://www.insurancebusinessmag.com/us/news/breaking-news/revealed--whats-tearing-apart-floridas-homeowners-insurance-market-410816.aspx>.

³⁰ Ibid.

As the examples above illustrate, attorneys frequently receive significantly more than consumers. In another case, an insurance company sent a check that covered the full \$100,000 policy limit for an accident, but the court’s final judgement was for \$8.47 million.³¹ Consumers ultimately bear these costs.

Once deemed the number one “judicial hellhole” for litigation by the American Tort Reform Foundation, the state of Florida remains a legal nightmare for insurers, particularly in south Florida, which “has developed a well-deserved reputation for its aggressive personal injury bar and fraudulent and abusive litigation practices.”³² The table below shows the concentration of lawsuits by Florida county.³³

Five Florida Counties Account for 89% of All AOB Lawsuits (First 6-Months 2022)		
<u>County</u>	<u>Total Lawsuits</u>	<u>Percent of Lawsuits</u>
Miami-Dade	47,725	33.1%
Hillsborough	29,704	20.6%
Broward	20,766	14.4%
Orange	20,456	14.2%
Duval	9,094	6.3%
62 Others	16474	11.4%

Not only are lawsuits concentrated by county, but a handful of attorneys and assignees account for the vast majority of lawsuits. As the table below shows, 90% of AOB lawsuits are

³¹ Harvey v. Geico General Insurance Co., No. SC17-85 WL 4496566, September 20, 2018.

³² Judicial Hellholes, 2020-2021 edition, <https://www.judicialhellholes.org/reports/2020-2021-executive-summary/>.

³³ ACI compilation of data from the Department of Financial Services, first six months of 2022.

generated by 27% of assignees, often contractors. Similarly, 90% of AOB lawsuits are filed by less than 5% of attorneys that file these lawsuits. From the data collected during the first six months of 2022, it is easy to conclude that a small group of Florida attorneys – working with a handful of cooperative contractors – are responsible for the overwhelming majority of lawsuits filed against insurers for repair costs and other disputes.

**A Few Lawyers and Assignees
Account for Most AOB Lawsuits**

Percent of <u>Lawsuits</u>	Number of Lawyers <u>in Those lawsuits</u>	Percent of <u>Total lawyers</u>
50%	14	2.0%
60%	22	3.1%
70%	34	4.8%
80%	59	8.3%
90%	106	4.9%
100%	492	100.0%

Percent of <u>Lawsuits</u>	Number of Assignees <u>in Those Lawsuits</u>	Percent of <u>Assignees</u>
50%	221	2.7%
60%	387	4.6%
70%	666	8.0%
80%	1,177	14.1%
90%	2,242	26.9%
100%	8,333	100.0%

Department of Financial Services, first six months of 2022.

Did the Recent Reforms Stop the Fee-Shifting?

Recent steps have been taken to rein in the Sunshine State's high number of lawsuits, with legislative reforms passed in 2019 and 2021. These laws targeted AOB abuses and have attempted to chip away at frivolous lawsuits and contractor solicitation practices, among other things. Nonetheless, a high rate of litigation persists as some attorneys look for novel ways to obtain excessive legal fees from insurers.³⁴

In the latest round of reforms, during a special 2022 session for SB 2-D, laws were enacted that made attorney fees unrecoverable for anyone other than homeowners in AOB lawsuits, meaning that an AOB contractor's attorney would no longer be able to seek the recovery of attorney fees.³⁵ The 2022 law also eliminated attorney fee multipliers except in "rare and exceptional circumstance with evidence that competent counsel could not be retained in a reasonable manner." SB 2-D has been and could be further challenged in court by AOB contractors and their allies.³⁶ While recent reforms were important first steps, there is still much work to be done.

The Latest Evolution of Lawsuits

Despite new laws that have slowly chipped away at AOB lawsuits and roofing scams, attorneys are still finding new and creative ways to sue, thereby allowing them to recover excessive attorney fees. In short, while the volume of lawsuits may have slowed, the latest law does not end the overly generous incentives to sue insurers in Florida.

1. Bad Faith Lawsuits

SB 2-D addresses fees under Florida Statute 627.7152, which deals with the everyday breach of contract or declaratory action lawsuits dealing with AOBs. The law removes

³⁴ In 2019, House Bill 7065 was passed and became effective on July 1, 2019, impacting mostly vendor AOB lawsuits. In 2021, Senate Bill 76 was passed and became effective on July 1, 2021, impacting mostly first party lawsuits.

³⁵ Senate Bill 2D is available online at <https://www.flsenate.gov/Session/Bill/2022D/2D>.

³⁶ As an example, see Jim Saunders, "Florida Insurance Law Fight Goes to Appeals Court," *Daily Business Review*, September 09, 2022, <https://www.law.com/dailybusinessreview/2022/09/09/florida-insurance-law-fight-goes-to-appeals-court/>.

the ability of an AOB assignee to obtain attorney fees when they sue. However, if the AOB vendor is able to get the insurer to pay anything after the 60-day safe harbor period, whether it be due to a late appraisal, mistake, delay, settlement or litigation, the vendor/attorney can then sue the insurer for "bad faith." The Civil Remedy/Bad Faith Statute 624.155(4) allows for attorney fees and is completely separate from assignment agreements, as covered under Florida Statute 627.7152.

“Upon adverse adjudication at trial or upon appeal, the authorized insurer shall be liable for damages, together with court costs and reasonable attorney’s fees incurred by the plaintiff.”³⁷

In effect, attorneys are filing CRNs and asserting bad faith damages as a means to recover legal fees. This leaves insurance carriers with the choice of either settling now or paying an exorbitant legal fee later in bad faith cases. Most insurers have no desire to participate in a lengthy court battle and therefore are likely to agree to settle. Unfortunately, this sets the stage for future abuses.

As noted by the James Madison Institute in a recent policy brief, bad faith lawsuits can take any number of different forms ranging from – “intentionally making unreasonable or vague demands of insurance companies that are impossible to comply with, sending letters to an obscure company address (i.e., a different department or a satellite office in another state) in order to purposely create delays” – to requesting payment of full policy limits even “when the case does not justify it.”³⁸ The incentive for attorneys to invent new bad faith CRN claims remains unchecked.

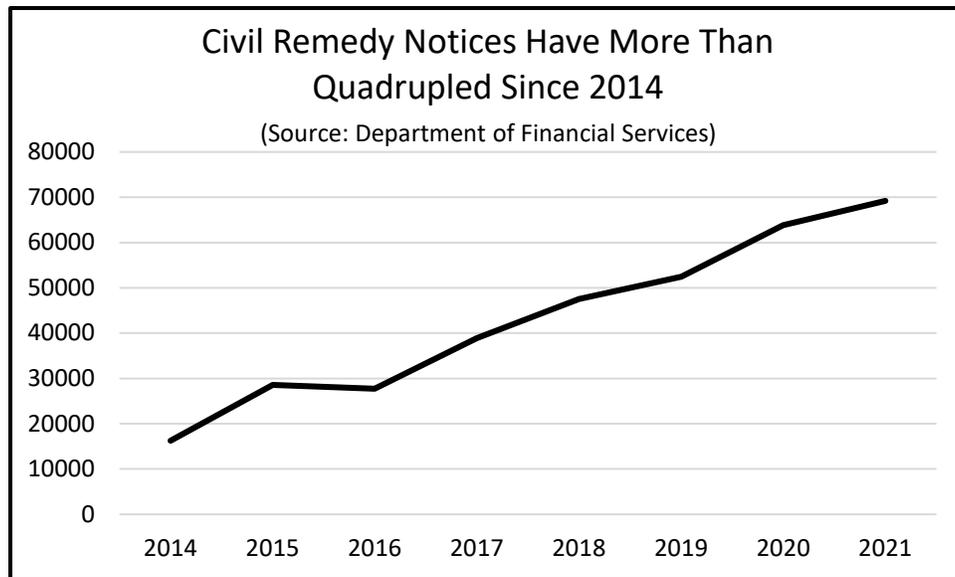
Unsurprisingly, in recent years, CRN filings have exploded in number. Between 2014 and 2021 alone, filings increased by a factor of 4.3, as shown in the chart below.³⁹ While 2022 filings are temporarily off by about 600 per month, average CRN filings are still running around 5,000

³⁷ Florida Statute, Insurance Code, Section 624.155(4).

³⁸ Christian Camara, “Battering Down: Policy Reforms to Avoid a Florida Insurance Meltdown,” The James Madison Institute, January 10, 2022, p.7, <https://www.jamesmadison.org/battering-down-policy-reforms-to-avoid-a-florida-insurance-meltdown/>.

³⁹ These data are from the Florida Department of Finance and is available for downloading and analysis at <https://apps.fldfs.com/CivilRemedy/SearchFiling.aspx>.

per month and seem likely to rise in the future. Suing insurers remains one of the easiest ways to garner legal fees and attorneys are not afraid to jump at the opportunity. In short, bad faith cases are likely to become the next big avenue for lawyers looking to recover one-way fees and contingency fee multipliers.



To summarize, while SB 2-D theoretically blunted the ability of contractors to act on behalf of consumers and ended fee multipliers for attorneys in AOB cases, it is clear that CRNs represent the future of abusive practices. In short, bad faith cases are becoming the new means to achieve the same result, which will continue to drive up insurance costs. While SB 2-D was well-intentioned, and a step in the right direction, one-way attorney fees and fee multipliers continue to provide an incentive to sue that needlessly increases insurance carrier costs and consumer premiums.

2. Another Legal Maneuver to Watch

Even though AOB cases do not allow the recovery of attorney fees in a breach of contract action, insurance companies are already seeing contractors take assignments. In some cases, AOB contractors are attempting to use “direction to pay” contracts as leverage against insurance carriers. We also see attorneys filing (on behalf of a contractor) notices of intent to

litigate using Florida Statute 627.70152 (a notice of intent to initiate litigation) to recover costs from an insurance carrier.⁴⁰ Even though this statute does not apply to contractors, it is being used in that manner.

Recommendations

Recent legislative measures may help reduce the number of AOB suits in the short term, because SB 2-D prevents AOB vendors from seeking attorney fees and limits the application of fee multipliers to rare and exceptional circumstances.

However, some Florida attorneys continue to adapt and find novel ways to sue Florida insurers for big financial gains. While SB 2-D may provide some temporary relief, what the new law does not do is remove the ability of a lawyer representing an AOB vendor to get attorney fees under Civil Remedy Statute 624.155(4). To be clear, if the attorney representing an AOB vendor files a CRN against an insurer, it can bypass SB 2-D's exclusion for attorney fees and may even require the insurer to pay contingency fee multipliers.

Based on our analysis, we recommend ending or restricting the one-way attorney fee statute and removing the ability of AOB vendors in first-party claim matters from being able to file CRNs against insurers, which will end another avenue for fee-shifting.

It is important to stress that these recommendations are entirely consistent with the original intent of lawmakers with respect to SB 2-D. While recent reforms will modestly help crack down on some AOB lawsuits, the problem will not go away, and bad faith claims will become the new avenue for litigious exploitation and overly generous fee-shifting. To be clear, lawmakers should expect the number of bad faith lawsuits to increase, as attorneys continue to look for new ways to bypass SB 2-D. Like a game of whack-a-mole, where one aspect of the AOB legal shenanigans gets addressed by legislation, the contract/attorney cabal will find new ways to bilk and profit from insurers at the detriment of consumers.

⁴⁰ Florida Statute, Insurance Rates and Contracts, Section 627.70152.

In summary, based on our analysis of prior legislative fixes and the subsequent legal maneuvers by attorneys and contractors, several problems need addressing to curb needless AOB litigation, including ending one-way attorney fees and stopping AOB vendors in first-party claim matters from being able to file a Civil Remedy Notice.

Until these incentives to litigate are eliminated, the high incidence of lawsuits in Florida will persist, thereby driving up insurance costs and putting upward pressure on homeowner insurance rates. The only way to finally fix these problems once and for all is to end the fee-shifting and take away what creates the pointless incentive to sue.