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Florida's Market-Based Property Reforms and Revocation of One-Way Attorney Fees: Implications for Florida Policyholders

JAE LYNN HUCKABA*

The recent turmoil in the Florida property insurance market has pushed the Florida legislature to take affirmative action to restabilize the market. But as Florida continues to enact market-based insurance reforms, residents are left to suffer the consequences, especially where the reforms incentivize insurers to unreasonably deny coverage and leave residential policyholders without recourse. The purpose of this Article is to highlight those consequences, including the difficulty of litigating residential property coverage claims under Florida law.

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Introduction

Property owners in Florida endure one of the hardest insurance markets in the country.[1] In recent years, a number of Florida property insurers have liquidated[2] or voluntarily left the state,[3] forcing homeowners to either pay increased premiums or purchase coverage from Florida's state-backed property insurer, Citizens Property Insurance Corporation ("Citizens").[4] For many residential homeowners, paying increasingly high rates[5] and premiums is not an option.[6] This reality is exemplified through the growing number of policies issued by Citizens. From 2018 to 2022, Citizens' number of active policies increased from 414,000 to over 1,000,000.[7] With so many homeowners insured by one insurer, just one more major storm could devastate both Citizens and the property insurance industry as a whole.

The struggling market is due, at least in part, to recent hurricanes impacting the state and causing significant damage.[8] Unfortunately, however, no one can change the weather and faulting hurricanes does not provide any relief to Florida residents. So, instead, lawmakers have blamed purportedly frivolous litigation and abuse of

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[1] Elizabeth Rivelli, *The Worst States for Homeowners Insurance: Our 2022 Analysis*, BANKRATE (May 27, 2022), https://www.bankrate.com/insurance/homeowners-insurance/worst-states-for-home-insurance/.

[2] *Sixth Florida Property Insurer Declared Insolvent*, CBS NEWS (Sept. 26, 2022), https://www.cbsnews.com/miami/news/sixth-florida-property-insurer-declared-insolvent/; Cate Deventer, *Can Lawmakers Save the Collapsing Florida Home Insurance Market?*, BANKRATE (Dec. 19, 2022), https://www.bankrate.com/insurance/homeowners-insurance/florida-homeowners-insurance-crisis/.

[3] *See* Deventer, *supra* note 2.

[4] *Id.* (explaining that Citizens Property Insurance Corporation "has experienced rapid growth due to other carriers leaving the market").

[5] Harry Tucker, et al., *Florida Again Acts to Stabilize Property Insurance Market*, AMWINS (Dec. 20, 2022), https://www.amwins.com/resources-insights/article/florida-again-acts-to-stabilize-property-insurance-market.

[6] *Id.* (emphasizing that insurance rates for homeowners in Florida are nearly three times the national average).

[7] *See* Deventer, *supra* note 2.

[8] Joe McLean, *New Property Insurance Legislation to Take Effect Jan. 1 in Florida*, NEWS4JAX (Dec. 26, 2022, 6:18 PM), https://www.news4jax.com/news/florida/2022/12/26/new-property-insurance-legislation-to-take-effect-jan-1-in-florida/.

the courts for the unstable market.[9] Specifically, in recent years, Florida Governor Ron DeSantis and the Florida Legislature have enacted and signed into law a series of reform bills designed to curtail frivolous litigation and restabilize the property insurance market. The reforms impose barriers to bringing a coverage action against an insurer, including pre-suit notice requirements[10] and pre-requisites to filing a bad faith claim.[11]

On December 16, 2022, one of Florida's more recent insurance reform bills, Senate Bill 2-A ("S.B.-2A") went into effect, making litigating claims against property insurers even more difficult for policyholders.[12] Relevant here, S.B.-2A revoked the previous one-way fee-shifting statute. The fee-shifting statute allowed policyholders to recover their attorneys' fees from the insurer when the policyholder prevailed in the coverage action.[13] The statute protected policyholders from incurring high litigation costs where an insurer unreasonably denied coverage.[14] To some, however, the statute was another incentive for policyholders to bring frivolous lawsuits against their insurer in hopes of securing either a settlement or judgment, even when a claim should not have been covered.[15]

Excessive litigation undoubtedly drives up market rates.[16] And, to be fair, 76% of the nation's homeowners' insurance lawsuits are brought in Florida courts.[17] Even so, litigation is not the problem.

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[9] *See, e.g.*, Jackie Callaway, *Back-to-back Hurricanes Will Lead to Higher Property Insurance Premiums for Floridians: Storms Are One of the Multiple Factors in Increasing Insurance Bills*, ABC ACTION NEWS (Nov. 11, 2022, 2:18 PM), https://www.abcactionnews.com/money/consumer/taking-action-for-you/back-to-back-hurricanes-will-lead-to-higher-property-insurance-premiums-for-floridians.

[10] *See infra* notes 43–46.

[11] *See infra* notes 48–51.

[12] *See infra* Part II.

[13] FLA. STAT. § 627.428 (2015).

[14] *See id.*

[15] *See* Lyle Adriano, *DeSantis Signs Two Bills to Address State's Insurance Issues*, INS. BUS. AM. (Dec. 19, 2022), https://www.insurancebusinessmag.com/us/news/breaking-news/desantis-signs-two-bills-to-address-states-insurance-issues-431010.aspx.

[16] Matthew Lerner, *Fla. Senate Passes Property Insurance Bill*, BUS. INS. (Dec. 14, 2022), https://www.businessinsurance.com/article/20221214/NEWS06/912354347/Florida-Senate-passes-property-insurance-bill-.

[17] *See* Tucker et al., *supra* note 5.

Litigation is the "'scapegoat,'" and faulting excessive litigation for Florida's tumultuous insurance market ignores the fact that many homeowners believe that "'[b]ehind every lawsuit is a homeowner or business owner who has been underpaid or wrongfully denied coverage.'"[18] This Article addresses the Florida Legislature's insurer-friendly, market-based approach to stabilizing the property insurance market. This Article will focus primarily on the one-way fee shifting statute, but it will also briefly address the other changes designed to reduce litigation. First, this Article will discuss the traditional "American Rule" for fees and Florida's enactment of the fee-shifting statute. Next, it will discuss the December 2022 Special Session and S.B.-2A, which revoked the fee-shifting statute for actions on commercial and residential property insurance policies. Finally, this Article will identify the implications for Florida courts and the potential consequences policyholders will face as a result of the revocation.

I. THE "AMERICAN RULE" AND FEE-SHIFTING STATUTES

Many states, including those in the Eleventh Circuit, follow the traditional "American Rule," meaning each party is responsible for its own litigation costs.[19] Under the "American Rule," a court may award attorneys' fees only where the award is authorized by statute or an agreement between the parties.[20] The rationale for the rule is that a plaintiff should not avoid bringing a dispute to court out of

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[18] *Florida House Approves Historic Insurance Reforms, Sending Bill to Governor*, INS. J. (Dec. 15, 2022), https://www.insurancejournal.com/news/southeast/2022/12/15/699536.htm.

[19] *See, e.g.*, Leonard v. Enter. Rent A Car, 279 F.3d 967, 973 (11th Cir. 2002) ("Alabama generally applies the American rule, that each party bear its own costs of litigation."); Levesque v. Gov't Emps. Ins. Co., No. 21-12257, 2022 WL 1423477, at *5 (11th Cir. 2022) (stating that Florida follows the American Rule).

[20] Int'l Fidelity Ins. Co. v. Americaribe-Moriarty JV, 906 F.3d 1329, 1335 (11th Cir. 2018) ("Under Florida law, absent a specific statutory or contractual provision, a prevailing litigant has no general entitlement to attorney's fees."); U.S. f/u/b/o Krupp Steel Prods., Inc. v. Aetna Ins. Co., 831 F.2d 978, 983 (11th Cir. 1987) ("[I]n the absence of statutory or contractual guidance, the commercial aspect of Miller Act cases should not allow an exception to the American Rule: Parties must pay their own ways as far as legal costs.").

fear of having to pay legal fees for both sides. The Florida Legislature, however, recognized the need to deviate from the "American Rule" in first-party insurance disputes when it enacted Section 627.428 of the Florida Statutes in 2015.[21]

Pursuant to Section 627.428, "any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer" was entitled to an award of attorneys' fees if the insured prevails in a dispute with its insurer.[22] This statute, known as the one-way fee shifting statute, enabled policyholders to file their coverage disputes with the court and recover reasonable attorneys' fees and costs where the insurer unreasonably denied coverage.[23] The purpose of the statute was to level the playing field for policyholders and deter insurance companies from denying coverage for valid claims.[24] The statute provided "one-way" fee shifting because it only applied where the policyholder prevailed.[25]

But even with the statute, a prevailing policyholder's right to attorneys' fees was not absolute. The statute allowed the policyholder to recover only *reasonable* fees or compensation for an attorney's services.[26] In *Houston Specialty Insurance Company v. Vaughn*, the Middle District of Florida described the three-step process for determining the reasonable amount of court-awarded attorneys' fees.[27] First, the court calculates the reasonable hourly rate for the attorneys

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[21] FLA. STAT. § 627.428 (2015).

[22] *Id.*

[23] *See id.*

[24] W&J Grp. Enters., Inc. v. Hous. Specialty Ins. Co., 684 Fed. App'x 867, 869 (11th Cir. 2017); Johnson v. Omega Ins. Co., 200 So. 3d 1207, 1209 (Fla. 2016) ("We have consistently explained that the purpose of this statute is to provide an adequate means to afford a level process and make an already financially burdened insured whole again, and to also discourage insurance companies from withholding benefits on valid claims.").

[25] *See* Prime Ins. Syndicate, Inc. v. Soil Tech Distribs., Inc., 270 Fed. App'x 962, 963 (11th Cir. 2008) (explaining that § 627.428 applies when an insurer brings the suit and when the policyholder brings the suit, so long as the policyholder prevails).

[26] U.S. v. Pepper's Steel & Alloys, Inc., 289 F.3d 741, 743 (11th Cir. 2002).

[27] No. 8:14-cv-1187-T-17JSS, 2017 WL 6759709, at *1 (M.D. Fla. Dec. 29, 2017) (citing Norman v. Hous. Auth. of City of Montgomery, 836 F.2d 1292, 1298–03 (11th Cir. 1988)).

and other professionals involved in the case.[28] Second, the court determines the number of hours "reasonably expended" on the case.[29] Lastly, the court calculates the lodestar—the number of hours reasonably expended multiplied by the reasonable hourly rate—and then makes any necessary adjustments to the lodestar.[30]

The court scrutinizes the fees when determining the reasonable hourly rate and hours reasonably expended. The reasonable hourly rate "is the prevailing market rate in the relevant legal community for similar services by lawyers of reasonably comparable skills, experience, and reputation."[31] Trial courts in Florida must consider eight factors when calculating the reasonable hourly rate: (i) the time and labor required, the novelty and difficulty of the question involved, and the skill required to perform the legal services; (ii) the likelihood that accepting the particular employment will preclude other employment by the lawyer, if made apparent to the client; (iii) the fee customarily charged in the locality for similar legal services; (iv) the amount involved and results obtained; (v) the time limitations imposed, whether by the client or by the circumstances; (vi) the nature and length of the professional relationship with the client; (vii) the experience, reputation, and ability of the lawyer; and (viii) whether the fee is fixed or contingent.[32] These eight factors are known as the *Rowe* factors.[33]

A trial court determines the hours "reasonably expended" by eliminating hours that are "excessive, redundant or otherwise unnecessary."[34] The court can reduce the number of hours actually billed on a matter where common sense so requires.[35] For example, courts have found hours spent on a matter redundant where attorneys unreasonably engage in duplicative or repetitive work.[36] Some matters,

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[28] Houston Specialty Ins. Co. v. Vaughn, 2017 WL 6759709, at *1.

[29] *Id.*

[30] *Id.*

[31] Blum v. Stenson, 465 U.S. 886, 895 (1984).

[32] *Vaughn*, 2017 WL 6759709, at *2.

[33] *Id.*

[34] Norman v. Hous. Auth. of City of Montgomery, 836 F.2d 1292, 1301 (11th Cir. 1988).

[35] *See, e.g.*, Bioresource Tech., Inc. v. High, No. 21-CV-60854, 2022 WL 4287599, at *3–4 (S.D. Fla. Aug. 8, 2022).

[36] *See, e.g.*, Procaps S.A. v. Patheon, No. 12-24356-CIV, 2013 WL 6238647, at *16 (S.D. Fla. Dec. 3, 2013).

involving complex coverage issues, may require multiple attorneys, but overall, attorneys should avoid overlap between time spent on the same task.[37] Florida district courts are careful to filter duplicative hours out of the lodestar calculation.[38] The court's strict scrutiny of attorneys' fees, combined with the requirement that a policyholder prevail, protects insurers from both the risk of incurring substantial costs and the risk of frivolous litigation. Nevertheless, in December of 2022, lawmakers thought it necessary to protect property insurers even more.[39]

II. THE DECEMBER 2022 SPECIAL SESSION

Starting on December 12, 2022, the Florida Legislature convened for a Special Session to address the property insurance claim process, reinsurance, and regulation of insurance companies.[40] The Legislature set out the proposed changes in S.B.-2A.[41] The bill, guised as an effort to protect homeowners, takes a market-based approach to property insurance reforms.[42] Several of the key provisions may significantly reduce litigation of first party property insurance claims in Florida.

One key provision shortens the amount of time a policyholder has to file a property insurance claim with its carrier. Previously, Subsection (2) of Section 637.70132 of the Florida Statutes allowed policyholders two years after the date of loss to supply a carrier with

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[37] *See id.*

[38] *See id.*

[39] *See infra* Part II.

[40] *It's On: Florida Special Session on Insurance Slated for Dec. 12-16*, INS. J. (Nov. 29, 2022), https://www.insurancejournal.com/news/southeast/2022 /11/29/696725.htm; *Florida Insurance Proposals Could Bring Big Changes*, CBS MIA. (Dec. 9, 2022, 6:00 PM), https://www.cbsnews.com/miami/news/florida-insurance-proposals-could-bring-big-changes/ [hereinafter *Florida Insurance Proposals*].

[41] *Florida Insurance Proposals*, *supra* note 40.

[42] *Governor Ron DeSantis Signs Two Bills to Support Disaster Relief and Help Stabilize Florida's Property Insurance Market*, FLA GOVERNOR RON DESANTIS. (Dec. 16, 2022), https://www.flgov.com/2022/12/16/governor-ron-desantis-signs-two-bills-to-support-disaster-relief-and-help-stabilize-floridas-property-insurance-market/ [hereinafter *Governor Signs Two Bills*]. Governor Ron DeSantis describes SB-2A as "'an all hands on deck approach to cut through bureaucracy to help [Florida] communities.'" *Id.*

notice of a property insurance claim.[43] S.B.-2A revises the timeframe to give notice, providing that a policyholder's property claims are barred "unless notice of the claim was given to the insurer in accordance with the terms of the policy within 1 year after the date of loss."[44] The timeframe for filing a supplemental claim was reduced even further, changing from three years to only eighteen months after the date of loss.[45] The shorter periods decrease the amount of time a homeowner has to navigate a policy's conditions for coverage, including a policy's respective notice requirements. Notably, insurance contracts are often drafted with convoluted language that can be difficult to interpret, and the Eleventh Circuit has long recognized the advantage insurers have as drafters of the policy.[46] For this reason, homeowners may need to retain experienced coverage counsel when filing a claim to ensure compliance with all conditions precedent and notice requirements under a policy. S.B.-2A's revisions to Section 637.70132 give policyholders less time to retain coverage counsel, and moreover, limit the amount of time coverage counsel has to analyze a policy, evaluate a claim, and draft sufficient notice. While a year may seem to be sufficient time to file a notice of claim, the time can quickly run out, especially where property damage does not manifest until well after the date of loss.

S.B.-2A also includes changes to Florida's Bad Faith statute, Section 624.155.[47] A bad faith claim in Florida has three prerequisites: (1) a determination of the insurer's liability for coverage; (2)

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[43] Property Insurance Act of 2022, S.B. 2-A, 2022 Leg. Spec. Sess., (Fla. 2022).

[44] *Id.*

[45] *Id.*

[46] *See, e.g.*, Altman Contractors, Inc. v. Crum & Forester Specialty Ins. Co., 832 F.3d 1318, 1322 (11th Cir. 2016) (explaining that where an insurance policy language is ambiguous, the language should be interpreted "strictly against the drafter of the policy"); Nat'l Union Fire Ins. Co. of Pa. v. Carib Aviation, Inc., 759 F.2d 873, 875 (11th Cir. 1985) (placing the burden on the insurer, as the drafter of the policy, to prove an exclusionary provision applies).

[47] The more recent changes to Florida's bad faith statutory and common law bad faith actions under House Bill 837 are beyond the scope of this Article. *See* Walter J. Andrews, et al., *Florida Enacts Sweeping Tort Reform Legislation, Aimed at Reducing Tort Claims Against Businesses and Raising Barriers to Insurance Coverage Claims*, HUNTONAK INSIGHTS (Mar. 30, 2023),

a determination of the extent of the insured's damages; and (3) the filing of a Civil Remedy Noticed pursuant to Section 624.155(3)(a).[48] Courts have held that a variety of different means of determining liability suffice to establish the first-prong of the rule.[49] S.B.-2A, however, revises the Bad Faith statute to eliminate the acceptance of an offer of judgment or the payment of an appraisal award as a basis to file a bad faith action.[50] The revision requires policyholders to sue an insurer for breach of contract, receive a final judgment in the policyholder's favor, and then file another lawsuit for the bad faith claim.[51] Due to the high costs of litigation, this barrier will likely apply unequally to residential insureds, instead of commercial insureds, who may have the funds to endure prolonged litigation.

The final, and arguably most substantial, attempt to reduce litigation is S.B.-2A's revisions to the one-way fee shifting statute,

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https://www.huntonak.com/en/insights/fla-enacts-sweeping-tort-reform-legislation-aimed-at-reducing-tort-claims-against-businesses-and-raising-barriers-to-ins-coverage-claims.html?_hsmi=252487562&_hsenc=p2ANqtz--VlGR9HTukbgDq224kbL-w2sof0tj-en2EVmbqXUfGTcAjyMiBio217Py6PxDwMiNjQv5TYOMg0YCPk7ljE1e3jmDfNA.; H.B. 837 2023 Leg. Sess. (Fla. 2023).

[48] FLA. STAT. § 624.155(1)(b) (2023).

[49] *See, e.g.*, Sammy Sterling Holdings, LLC v. U.S. Aircraft Ins. Grp., No. 16-CIV-21230, 2016 WL 8679130, at *3 (S.D. Fla. Jun. 23, 2016) (refusing to dismiss bad faith count as premature because partial payments under policy were sufficient to establish liability and damages); Dadeland Depot, Inc. v. St. Paul Fire & Marine Ins. Co., 945 So. 2d 1216, 1234 (Fla. 2006) (recognizing that an arbitration award suffices as a determination of an insurer's liability); Hamilton v. Allstate Indem. Co., No. 805-CV-992-T17MAP, 2005 WL 2465021, at *3 (M.D. Fla. Oct. 6, 2005) (holding that insurer's payment of a substantial portion of the claim served as the "functional equivalent" of a determination of the insured's damages); Sabatula v. State Farm Mut. Auto. Ins. Co., No. 5:11-cv-368-OC-37TBS, 2011 WL 4345302, at *5 (M.D. Fla. Sept. 16, 2011) (holding that by paying the full policy amount, insurer conceded that insured plaintiff had a valid claim on first-party insurance contract and that insured's damages had a minimum value set at amount of policy limits); Barton v. Capitol Preferred Ins. Co., 208 So. 3d 239, 243–44 (Fla. Dist. Ct. App. 2016) (holding that insurer's partial payment under the policy after the Civil Remedy Notice expired constituted a sufficient determination of liability and damages).

[50] Property Insurance Act of 2022, S.B. 2-A, 2022 Leg. Spec. Sess., (Fla. 2022) ("Acceptance of an offer of judgment under s. 768.79 or the payment of an appraisal award does not constitute an adverse adjudication under this section.").

[51] *See* Property Insurance Act of 2022, S.B. 2-A, 2022 Leg. Spec. Sess., (Fla. 2022).

Section 627.428. The bill carves out an exception to the statute, revoking the right to attorneys' fees in suits arising under residential or commercial property insurance policies.[52] In its effort to deter litigation, the Legislature seems to have forgotten the reason it enacted the statute in the first place.[53] The one-way fee shifting statute mitigated the disparities between carriers and policyholders, especially residential insureds, and gave policyholders the necessary leverage to fairly litigate disputes against their insurers.[54] Now, insurers can deny coverage and force policyholders to litigate at their own expense even if they demonstrate that the insurer acted improperly. In other words, even if a court awards a policyholder the insurance policy proceeds to which it was entitled, the policyholder will not get all its money because it needed to pay for the litigation.[55] The change provides yet another barrier to relief for policyholders seeking coverage for property damage and loss, which recent trends have shown will become increasingly more common and severe as future storms impact Florida. Unsurprisingly, the insurance industry celebrates the revocation.[56]

III. IMPLICATIONS FOR POLICYHOLDERS

Within just two days, the Florida Senate and Florida House passed S.B.-2A without amendment and presented the bill to Governor DeSantis for signing.[57] DeSantis signed the bill into law on December 16, 2022.[58] Lawmakers argue the bill "is the most significant property insurance reform bill in recent history" and will "[strengthen] Florida's property insurance market."[59] But Florida

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[52] *See id.* ("In a suit arising under a residential or commercial property insurance policy, there is no right to attorney fees under this section.").

[53] *See supra* note 24 and accompanying text.

[54] *See supra* note 24 and accompanying text.

[55] *See supra* note 20 and accompanying text (explaining that in the absence of a statute or contractual agreement, the American Rule applies, and each party will be responsible for their own fees incurred in litigation).

[56] *See* Adriano, *supra* note 15.

[57] *See Governor Signs Two Bills*, *supra* note 42.

[58] *Id.*

[59] *Id.*

residents and policyholder advocates are rightfully skeptical of whether S.B.-2A will actually provide any relief to homeowners.[60]

It is too early to determine exactly how S.B.-2A will affect policyholders and insurance coverage litigation. One issue that will likely arise in the courts is whether S.B.-2A is intended to apply retroactively to bar awards of attorney fees in coverage disputes involving claims filed under policies issued before S.B.-2A took effect.[61] Policyholders and carriers have litigated the issue of retroactivity for other reforms enacted in recent years. In 2021, Governor DeSantis signed S.B. 76, a bill requiring pre-suit notice before filing suit against a carrier, into law.[62] The statute provided that "[a]s a condition precedent to filing suit under a property insurance policy, a claimant must provide the department with written notice of intent to initiate litigation . . . at least 10 business days before filing."[63] The bill did not include a provision on retroactivity, or otherwise express the Florida Legislature's intention for retroactive application.[64] As a result, parties took the issue to the Florida courts.

In *Williams v. Foremost Property & Casualty Insurance Company*, the Middle District of Florida held that the pre-notice statute could not be applied retroactively.[65] The court explained that Florida law recognizes a presumption against retroactive application of statutes that affect substantive rights.[66] The presumption is rebuttable only where (1) the legislation expresses a clear intent that it apply

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[60] *See* Anita Byer, *Florida Passes Sweeping Reforms to Fix Crumbling Property Insurance Market*, SETNOR BYER INS. & RISK (Dec. 20, 2022), https://setnorbyer.com/florida-passes-sweeping-reforms-to-fix-crumbling-property-insurance-market/ (describing the legislative reforms as "sweeping," "bold," and "consequential"). Florida homeowners will note that this is the third time Florida lawmakers have passed reforms to stabilize the market. *See* Child Welfare Bill of 2022, H.B. 7065 (Fla. 2022); Property Insurance Bill of 2022, CS/SB 2-D (Fla. 2022).

[61] Property Insurance Act of 2022, S.B. 2-A, 2022 Leg. Spec. Sess., (Fla. 2022) (providing no clarification of whether the Florida Legislature intended for the Act to apply retroactively).

[62] FLA. STAT. § 627.70152 (2022).

[63] *Id.*

[64] *See id.*

[65] No. 3:21-cv-926-MMH-JBT, 2022 WL 3139374, at *2 (M.D. Fla. Aug. 5, 2022).

[66] *Id.* at *3 (citing Arrow Air, Inc. v. Walsh, 645 So. 2d 422, 424 (Fla. 1994)).

retroactively and (2) the constitution permits retroactive application.[67] As to the second prong, retroactive application is impermissible where "'vested rights are adversely affected or destroyed or when a new obligation or duty is created or imposed.'"[68] The pre-suit notice statute imposes a penalty on policyholders because if the policyholder does not file a pre-suit notice, their case is dismissed.[69] Moreover, the statute grants insurers additional time to accept coverage, as well as imposes the additional obligation that insurers provide pre-suit notice.[70] Accordingly, the Middle District concluded the statute affects substantive rights, and thus, retroactive application is constitutionally impermissible.[71]

If brought to the courts, the retroactive application analysis would likely be the same for the S.B.-2A reforms, especially as applied to the carveout eliminating awards of attorney fees in property insurance cases. The carveout "affects" and "destroys" policyholders' vested rights to attorneys' fees under Section 627.428. Plus, the Florida Supreme Court has already rejected an attempt to retroactively apply a statute that restricted the availability of attorneys' fees to policies issued before the statute's enactment.[72]

Another likely consequence is exactly what Florida lawmakers intended: reduced coverage litigation.[73] The elimination of one-way attorneys' fees is intended to disincentivize frivolous lawsuits, and eventually, drive down home insurance costs.[74] While, at least in theory, less litigation could lead to lower premiums, there is no way to tell whether the decreased litigation will actually persuade carriers to lower their rates. Some lawmakers, including Florida House Democratic Leader Fentrice Driskell, worry that the plan will not operate quickly enough, if at all, to help Floridians with fixed incomes.[75] As tropical storms become more frequent and severe, homeowners have less and less time to wait for the "trickle down"

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67 Williams v. Foremost Prop. & Casualty Ins. Co., 2022 WL 3139374, at *3.

68 *Id.* (citing McCord v. Smith, 43 So. 2d 704, 708–09 (Fla. 1949)).

69 *Williams*, 2022 WL 3139374, at *4.

70 *Id.*

71 *Id.*

72 *See* Mendez v. Progressive Express Ins. Co., Inc., 35 So. 3d 873, 880 (Fla. 2010).

73 *See supra* Part II.

74 Adriano, *supra* note 15.

75 *Id.*

plan to provide relief.[76] Moreover, even if market rates stabilize and insurers return to Florida, homeowners still may not be protected from property loss or damage because the new barriers to bringing a coverage action limit policyholders' recourse where an insurer denies a property damage claim.[77]

CONCLUSION

The only certainty in the Florida property insurance market is that it will become increasingly more difficult for policyholders to negotiate and settle property damage claims on their own. In the last three years, major property insurance reforms, including the recent enactment of S.B.-2A, have followed a market-based approach focused on keeping insurers in the state. Lawmakers have painted the reforms as relief bills, intended to stabilize the hard market, protect homeowners from the high premiums, and react to widespread property damages throughout the state. The market-based approach, however, merely increases economic opportunity for insurers and incentivizes carriers to deny coverage, forcing policyholders to jump through procedural hoops and litigate claims at their own expense.

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[76] *See id.*

[77] *See supra* Part II.