



May 20, 2011

To keep you informed of legislative changes resulting from the 2011 Florida Regular Legislative Session, Carlton Fields' **Government Law and Consulting** practice group is pleased to provide you with our latest legislative summary providing a general overview of the Omnibus Property/Sinkhole Insurance Package Bill (House Strike-All to Senate Bill 408) passed by the 2011 Florida Legislature and approved by the Governor on May 17, 2011.¹

Due to the volume of issues addressed in this bill, this summary is not an exhaustive summary of the bill and we recommend that you refer to the actual bill passed by the Legislature and approved by the Governor available at <http://www.flsenate.gov/Session/Bill/2011/0408/BillText/er/HTML>

This bill makes numerous and significant changes to laws related to property insurance to address insurance cost-drivers, contribute to stabilizing Florida's property insurance market, and attract new capital investment to Florida. During the legislative process, the bill underwent significant debate and multiple amendments, with the final product resulting in a strike-all amendment by the House of Representatives to Senate Bill 408. The bill was presented to Governor Scott for his signature on May 11, 2011 and signed into law on May 17, 2011. However, it should be noted that the bill has received negative press as Senator Mike Fasano (Rep. – District 11) released a public statement prior to the bill signage asking Governor Scott to veto the legislation after its successful passage through the Florida Legislature. Once signed, Senator Fasano released another statement expressing disappointment in the Governor's decision.

House Strike-All to Senate Bill 408

Statute of Limitations

An action for breach of a property insurance contract must be brought within 5 years from date of loss.

Definition of "Losses" Under the Florida Hurricane Catastrophe Fund Reimbursement Contracts

For reimbursement contracts beginning June 2011, the definition of "losses" will include:

¹ This report was compiled in substantial part using public records data from the Florida Senate and the Florida House of Representatives.

- Amounts paid as fees on behalf of or inuring to the benefit of a policyholder;
- Losses under liability coverage;
- Property losses that are proximately caused by any peril other than a covered event, including but not limited to, fire, theft, flood or rising water, or
- Amounts paid as the result of a voluntary expansion of coverage by the insurer, including, but not limited to, a waiver of an applicable deductible;
- Amounts paid to reimburse a policyholder for condominium association or homeowners' association loss assessments or under similar coverages for contractual liabilities;
- Amounts paid as bad faith awards, punitive damage awards, or other court-imposed fines, sanctions, or penalties;
- Amounts in excess of the coverage limits under the covered policy; or,
- Allocated or unallocated loss adjustment expenses.

Capital Build-Up Incentive Program

Insurers participating in the Capital Build-Up Incentive Program ("Program") may renegotiate the surplus note obtained from the Program. If as part of the renegotiation, an insurer agrees to an acceleration of the surplus note, the insurer may be exempt from premium-to-surplus requirements required under the Program.

Insurer Capitalization – Minimum Capital and Surplus

Minimum capital and surplus requirements for certain new and existing insurers are increased. A domestic insurer applying for a new certificate of authority that transacts residential property insurance and is not a wholly owned subsidiary of an insurer domiciled in any other state must maintain have at least \$15 million in surplus. A new insurer may not be required to have surplus as to policyholders greater than \$100 million.

Regarding current insurers, residential property insurers not holding a certificate of authority before July 1, 2011 must have \$15 million in surplus as to policyholders. Residential property insurers holding a certificate of authority before July 1, 2011, and until June 30, 2016, must have surplus as to policyholders of \$5 million to be increased to \$10 million on or after July 1, 2016 until June 30, 2021, and further increased to \$15 million after July 1, 2021.

Public Adjusters – Reform

Effective June 1, 2011, amends section 626.854, Fla. Stat.:

- Caps public adjuster compensation for reopened or supplemental claims at 20% of the reopened or supplemental claim payment.

- Applies the provisions of subsections (5) – (13) of section 626.854 to condominium unit owners.

Effective January 1, 2012, amends section 626.854, Fla. Stat.:

- Makes certain statements in public adjuster advertising or solicitations deceptive or misleading.
- Defines a written advertisement to include only newspapers, magazines, flyers, and bulk mailers. Requires all public adjuster written advertisements to have a notice in bold print and capital letters advising that the written advertisement is a solicitation for business and that if the person has had a claim for an insured property loss or damage and are satisfied with the payment made by the insurance company, the solicitation may be disregarded.
- Requires an insurer or its representative (e.g, company employee adjuster, independent adjuster, attorney, and investigator) to provide 48 hours notice to the insured or claimant, public adjuster, or legal representative of the claimant before scheduling a meeting with the claimant or an on-site inspection of the insured property. If the required notice is not provided, the insured or claimant may deny access to the property. The insured or claimant may waive the 48 hour notice.
- Requires a public adjuster to ensure prompt notice of property loss claims submitted to an insurer. The public adjuster must also supply his or her contract, that the property is available for inspection of loss or damage by the insurer, and the insurer is given an opportunity to interview the insured directly about the loss and the claim. The insurer must be allowed to obtain necessary information to investigate and respond to the claim.
- Prohibits a licensed contractor or subcontractor from adjusting a claim on behalf of an insured unless licensed under and in compliance with laws regulating public adjusters. A contractor may discuss or explain a bid for construction or repair of covered property with a residential property owner who has suffered loss or damage covered by a property insurance policy, or the insurer of such property, if the contractor is doing so for the usual and customary fees applicable to the work to be performed as stated in the contract between the contractor and the insured.

Effective January 1, 2012, amends section 626.8796, Fla. Stat. to require:

- A public adjuster contract relating to a property and casualty claim must contain certain specific information concerning the insured, the adjuster and the claim.
- An unaltered copy of the executed contract must be remitted to the insurer within 30 days after execution.

Deadline to File Claims for Property Insurance

Effective June 1, 2011, creates section 626.70132, Fla. Stat., that bars a claim, supplemental claim, or reopened claim under an insurance policy providing property insurance for loss or damage caused by the peril of windstorm or hurricane unless notice of the claim, supplemental claim, or reopened claim is given to the insurer in accordance with the terms of the policy within 3 years after the hurricane first made landfall or the windstorm caused the covered damage.

- The term “supplemental claim” or “reopened claim” means any additional claim for recovery from the insurer for losses from the same hurricane or windstorm which the insurer has previously adjusted pursuant to the initial claim.
- This provision does not affect an applicable limitation on civil actions under section 95.11, Fla. Stat., for claims, supplemental claims, or reopened claims timely filed under section 626.70132, Fla. Stat.

Rates and Rate Filings

- Requires that the fee(s) to be charged for private section access and use of the public model must be the reasonable costs associated with the operation and maintenance of the model by the Florida Office of Insurance Regulation (FOIR).
- Prohibits the FOIR from impeding an insurer’s right to acquire policyholders, advertise, or appoint agents, including agent commissions.
- Deletes obsolete language relating to the presumed factor for medical malpractice insurance.
- Allows all reinsurance costs, the cost of financing products used to replace reinsurance, the financing costs incurred in the purchase of reinsurance, or the costs of the price increase Cat Fund coverage to be included in an expedited rate filing up to a maximum of 15 percent per policy.
- Extends prohibition on “use & file” filings to May 1, 2012.
- Allows an insurer to provide additional information in a rate filing without having to withdraw the filing and re-file; requires certification of the additional information.
- Allows an insurer to include in its rate filing the costs of replacing the Florida Hurricane Catastrophe Fund TICL coverage with reinsurance without removing expenses and profit load.
- No longer prohibits the following acts in order for an insurer to make a separate filing related to reinsurance or financing products that replace Florida Catastrophe Fund TICL coverage:

- Including expenses or profit for the insurer;
 - Including other changes in its rate in the filing;
 - Having implemented a rate increase in the past 6 months; or,
 - Filing for a rate increase within 6 months of approval.
- Repeals an obsolete requirement that the Office of Insurance Regulation develop a standard rating territory plan for residential property insurance by January 15, 2006.
 - Repeals a requirement that the Office of Insurance Regulation develop a method to directly correlate property insurance hurricane mitigation discounts and credits with the Uniform Home Grading Scale.

Citizens Property Insurance Corporation

- Prohibits a public adjuster from charging or accepting any compensation, payment, fee, or other thing of value greater than 10% of the additional amount actually paid over the amount that was originally offered by Citizens for any one claim.
- Replaces references to the "high risk" account to "coastal" account.
- Specifies that the Citizens policyholder surcharge is payable upon cancellation, termination, renewal, or issuance of a new policy within 12 months after imposition of the surcharge or the period of time necessary to collect the surcharge.
- Specifies that Citizen's rates for sinkhole coverage are not subject to Citizen's statutory 10% rate cap.
- Specifies that new or renewal policies issued by Citizens on or after January 1, 2012, which cover sinkhole loss does not cover any loss to appurtenant structures, driveways, sidewalks, decks, or patios that are directly or indirectly caused by sinkhole activity. Citizen must notify its policyholders of the exclusion of such coverage through a notice of coverage change, which may be included with the policy renewal.
- Specifies that Citizens must only provide the named insured written notice of nonrenewal at least 45 days before the effective date of nonrenewal when the policy nonrenewed by Citizens because it has been assumed by an authorized insurer offering replacement coverage to the policyholder.
- Specifies that effective January 1, 2012, agents must obtain from applicants for Citizens coverage acknowledged signed statements concerning the potential for surcharge and assessment liability as Citizens policyholders.

- Provides that members of the Citizens board with insurance experience are deemed to be within the exception in section 112.313(7)(b), Fla. Stat., that allows a public officer to practice a particular profession or occupation when required or permitted by law or ordinance. Also provides procedures for board members who have a conflict of interest regarding a particular matter.

Notices of Cancellation, Nonrenewal or Renewal Premium

The bill revises the notice of cancellation, nonrenewal or termination requirements for personal lines and commercial lines residential property insurance policies:

- At least 120 days notice must be given to a named insured whose residential structure has been insured by the insurer or its affiliate for at least 5-years. Under current law 180 days notice must be provided for the cancellation, nonrenewal, or termination of such policies.
- Allows an insurer to cancel or nonrenew a property insurance policy after at least 45 days notice if the FOIR finds that the early cancellation of some or all of the insurer's policies is necessary to protect the best interests of the public or policyholders and the FOIR approves the insurer's plan for early cancellation or nonrenewal of some or all of its policies. The FOIR may base such finds upon the financial condition of the insurer, lack of adequate reinsurance coverage for hurricane risk, or other relevant factors. The FOIR may condition its finding on the consent of the insurer to be placed in administrative supervision or the appointment of a receiver under the Florida Insurance Code.
- Specifies that a policy covering both a home and motor vehicle may nonrenewed for any reason applicable to either the property or motor vehicle insurance after providing 90 days notice.
- Allows insurers to issue a "Notice of Change in Policy Terms" with a renewal policy to make a change in policy terms without nonrenewing those policyholders that the insurer wishes to continue insuring. If an insurer fails to provide the "Notice of Change of Policy Terms", the original policy terms remain in effect until the next renewal and the proper service of the notice or until the effective date of replacement coverage obtained by the named insured, whichever comes first. Proof of mailing or registered mailing through the U.S. Postal Service of the "Notice of Change in Policy Terms" to the named insured at the address shown in the policy, although not required, is sufficient proof of notice.

Replacement Costs

The bill modifies how insurers must pay dwelling or personal property losses on a replacement cost basis:

- For a dwelling loss, the insurer must initially pay the actual cash value, minus the deductible. Subsequently the insurer must pay any amounts necessary to perform

repairs as work is performed. If a total loss of a dwelling occurs, the insurer must pay the entire replacement cost coverage without holdback of depreciation in value pursuant to the Valued Policy Law.

- For personal property losses insured on a replacement cost basis, the insurer must offer two claim payment options. The first option requires the insurer to pay the replacement cost without holdback of depreciation, regardless of whether the insured replaces the property. The second option allows the insurer to limit the initial payment to the actual cash value of the personal property to be replaced. To receive payment from the insurer for the full replacement value of the personal property, the insured must provide a receipt for the replaced property to the insurer. A policy authorizing the insurer to require replacement of personal property prior to paying the full replacement cost must provide the policyholder with a premium credit or discount and the insurer must provide clear notice of the payment process before the policy is bound.

Sinkholes

The bill enacts numerous revisions and clarifications to sections 627.706-627.7074, Fla. Stat., governing sinkhole and catastrophic ground cover collapse insurance. The clarifications and revisions to these provisions are intended to reduce the number and cost of sinkhole claims and disputes, increase reliance on scientific or technical determinations relating to sinkhole claims, and ensure that repairs are made in accordance with scientific and technical determinations and insurance claims payments:

- The bill authorizes insurers to restrict catastrophic ground cover collapse and sinkhole loss coverage to the principal building as defined in the insurance policy. The bill also allows an insurer to require a property inspection prior to issuing sinkhole loss coverage.
- The bill clarifies that additional living expense coverage is only available pursuant to a sinkhole loss if there is structural damage to the covered building.
- The bill changes the definition of "sinkhole loss," primarily by creating a statutory definition of "structural damage." A sinkhole loss is defined in statute as structural damage to the covered building, including the foundation, caused by sinkhole activity.
- The bill creates a detailed definition of "structural damage" for purposes of determining whether a sinkhole loss has occurred. The definition specifies five distinct types of damage that constitute structural damage. Each type of damage is tied to standards contained in the Florida Building Code or used in the construction industry. Accordingly, in order for the policyholder to obtain policy benefits for sinkhole loss, the insured structure must sustain structural damage as defined by the bill that is caused by sinkhole activity.

- The bill creates a substantially new process for an insurer's investigation of a sinkhole claim. The process requires the insurer to determine whether: (1) the building has incurred structural damage that (2) has been caused by sinkhole activity. Coverage for sinkhole loss is not available if structural damage is not present or sinkhole activity is not the cause of structural damage. The bill creates many new requirements pertaining to the payment of sinkhole claims and stabilization of sinkholes.
- The bill specifies that if a covered building suffers a sinkhole loss or catastrophic ground cover collapse, the insured must repair such damage in accordance with the insurer's professional engineer's recommended repairs. However, if repairs cannot be completed within policy limits, the insurer has the option to either pay to complete the recommended repairs or tender policy limits.
- The policyholder is prohibited from accepting a rebate from a person performing sinkhole repairs. If the policyholder does receive a rebate, coverage under the insurance policy is rendered void and the policyholder must refund the amount of the rebate to the insurer. A person who offers a rebate commits insurance fraud punishable as a third degree felony as provided in section 775.082, Fla. Stat. (up to 5 years imprisonment), section 775.083, Fla. Stat. (up to a \$5,000 fine), and section 775.084, Fla. Stat. (for a habitual felony offender up to 10 years imprisonment with no eligibility for release for 5 years).
- The circumstances that allow an insurer to nonrenew a policy on the basis of filing a sinkhole claim are modified. The policy may only be nonrenewed if the insurer makes payments for sinkhole loss that equal or exceed policy limits for damage to the covered building or the policyholder does not repair the structure in accordance with the engineering recommendations.
- A sinkhole testing report must verify whether the structural damage to the covered building has been identified within a reasonable professional probability.
- In addition to filing the sinkhole testing report with the Clerk of Court after paying a sinkhole loss claim, the bill requires the insurer to also file the neutral evaluator's report (if any), a copy of the certification indicating that stabilization has been completed (if applicable), and the amount of the claim payment. The policyholder must file a copy of any sinkhole report prepared on behalf of the policyholder as a precondition to accepting a sinkhole loss payment.
- Once building stabilization or foundation repairs of a sinkhole loss are completed, the professional engineer responsible for monitoring the repairs must issue a report to the property owner detailing the repairs performed and certifying that the repairs were performed properly. The professional engineer must file with the Clerk of Court a copy of the report and certification, the legal description of the real property, and the name of the county clerk of court.
- The bill also changes the neutral evaluation process.

Other Provisions

The bill also:

- Repeals the consumer advocate report card for property insurers.
- Clarifies that the requirement that an insurer must pay property insurance claim within 90 days of receiving notice of the claim applies to reopened and supplemental claims.
- Clarifies that inquiries about coverage on a property insurance contract are not claim activity unless a claim is filed by the policyholder which results in an insurer investigation of the claim.
- Repeals the electronic database of sinkhole activity.
- Specifies that the insurer may request at its own expense the verification a uniform hurricane mitigation verification provided to the insurer by the policyholder or policyholder's agent in addition to forms provided by an authorized mitigation inspector.
- Provides that all provisions of the act are severable from any provision that is held invalid.

For more information, please contact:



**Kelly Cruz-Brown,
Shareholder**

850.513.3610 direct

kacruz-brown@carltonfields.com

[View Bio](#)

[V-Card](#)



**Beth A. Vecchioli, Senior
Government Consultant**

850.513.3609 direct

bvecchioli@carltonfields.com

[View Bio](#)

[V-Card](#)

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