INSURANCE LITIGATION™ Reporter

Volume 45 • Number 3 • March 3, 2023

CONTENTS

Consumers Had No Voice: Changes to Property Insurers' Laws in Florida

by Dennis J. Wall, Esquire

(Continued on Inside Page)

WEST®

Insurance Litigation Reporter (USPS # 747–370) (ISSN 0744-1045) is published semi-monthly (twice a month) (except January 1 and July 15) by Thomson Reuters , 610 Opperman Drive, Eagan, MN 55123.
Periodicals Postage paid at St. Paul, MN

Periodicals Postage paid at St. Paul, MN 55164.
Postmaster: Send address changes to INSURANCE LITIGATION REPORTER, 610 Opperman Drive, Eagan, MN 55123
For subscription information call: (800) 221-9428
Editor-in-Chief: John K. DiMugno, Esq.
Editorial Board Director and Senior Contributing Editor: William T. Barker
Senior Contributing Editor: Stephen S. Ashley, Steven Plitt
Contributing Editors: Robert D. Phillips Jr., Michael Sean Quinn, John Torigian

Editorial Offices: Litigation Research Group, 3450 Palmer Dr., Cameron Park, CA 95682
Telephone: (530) 344-0239 Facsimile: (530) 344-0189 E-Mail dimugno@pacbell.net

Editorial Board

Peter J. Laufenberg
Wendel Rosen Black & Dean, L.L.P.
1111 Broadway, 24th Floor
Oakland, CA
(P) 510-834-6600
(F) 510-588-4974

Linda Oliver
Wilson Elser Moskowitz Edelman
& Dicker LLP
655 Montgomery St., Ste. 900
San Francisco, CA 94111
415.625.9307 (Direct)
415.433.0990 (Main)
linda.oliver@wilsonelser.com

Jonathan MacBride
Zelle LLP
1635, Suite 1600
Philadelphia, PA 194103
(P) (484) 532-5341
jmacbride@zelle.com

Vincent E. Morgan
Pillsbury Winthrop LLP
909 Fannin, Suite 2200
Houston, Tx 77010
(P) 713-425-7325
vmorgan@pillsburywinthrop.com

Steven Plitt
The Cavanagh Law Firm
1850 North Central Avenue, Suite 2400
Phoenix, AR 85004
(P) 602-322-4078
splitt@cavanaghlaw.com

Jordan Plitt
The Cavanagh Law Firm
1850 North Central Avenue, Suite 2400
Phoenix, AR 85004
(P) 602-322-4000
jplitt@cavanaghlaw.com

Robert D. Phillips Jr.
Reed Smith LLP
101 Second St., Suite 1800
San Francisco, CA 94105-3659
(P) 415-659-5965
rphillips@reedsmith.com

Charles Platto
Law Offices of Charles Platto
1020 Park Ave., Suite 6B
New York, New York 10028
212-423-0579
cplatto@plattolaw.com

Michael Sean Quinn, Phd, JD, CPCU
Law Office Michael Sean Quinn
2630 Exposition Blvd. #115
Austin, Texas 78730
(o) 512-296-2594
(c) 512-656-0503
mquinn@@msqlaw.com

Douglas R. Richmond
Aon Risk Services
200 East Randolph, 12th Floor
Chicago, IL 60601
(P) 312-381-4000

Matthew J. Sekits
Bullivant Houser Bailey PC
925 Fourth Ave., Suite 3800
Seattle, WA 98104
206-521-6452
matthew.sekits@bullivant.com

Dan Syhre
Betts, Patterson & Mines, P.S.
1 Convention Place, Suite 1400
701 Pike Street
Seattle, WA 98101
(P) 206–292–9988

John S. Torigian
Krell & Torigian
1600 Smith Street
Suite 3885
Houston, TX 77002
(P) 713–951–7603
jtorigian@msn.com

Jason Vacha
Reed McClure, Attorneys at Law
1215 Fourth Avenue
Suite 1700
Seattle, WA 98161
(206) 292-4900 main office line
(206) 386-7017 direct dial
jvacha@rmlaw.com

Consumers Had No Voice: Changes to Property Insurers' Laws in Florida

by Dennis J. Wall, Esquire

Dennis Wall is an experienced litigator, mediator, and expert witness in Florida and federal trial and appellate courts. He is an "a, v" rated attorney, and an elected member of the American Law Institute. He has personally litigated issues in trial courts and in appellate courts similar to the newly arising issues addressed in this article, and he has also testified as an expert about such issues. He is the author of four books.

INTRODUCTION AND ABSTRACT

The property insurers' agenda became Florida law in 2022. Many consumer protections and consumer rights were stripped away, terminated, or greatly reduced in what may be a prelude to enacting the agendas of other first-party insurance carriers and of liability insurers. It is too early to know with certainty, of course, but the actions of the Florida Legislature in 2022 including in the December Special Session may be the origin of at least two lines of furious litigation.

One contentious line of future litigation is predicted to involve the question of the 2022 laws abrogating the current legal framework for reining in socially undesirable behavior including bad faith conduct throughout the entire insurance industry. The other involves various questions of constitutionality of many of these 2022 laws. All of these potential consequences are addressed in this article.

I wrote this article from the perspective of a lawyer trying to understand complex behavioral issues by thinking like the other side in a case. In this case, that meant beginning to understand how property insurers and their counsel think about property insurance laws. I needed to approach property insurance laws from their way of looking at property insurance laws before I could hope to explain what property insurance companies and the corporate lawyers-lobbyists who presented their agenda to the Florida legislators had in mind as respects property insurance law changes in 2022. This article will explore that perspective throughout a thorough analysis of the many changes made to Florida property insurance law by the Florida Legislature in 2022, changes which, in the long run, will not necessarily be limited to property insurance laws or to Florida.

I. THE MOST SIGNIFICANT CHANGE IN 2022: PROTECTING PROPERTY INSURERS FROM BAD FAITH CLAIMS

A. SECTION 624.1551 AND THE CHANGES IT MADE TO FLORIDA'S BAD FAITH LAW IN 2022

Florida Statute Section 624.155 is known throughout the nation as "Florida's Bad Faith Statute." Its title is *Civil remedy. B*efore 2022, it applied to all or most insurers doing business in the State of Florida.[1]

No changes were made to Section 624.155 in 2022. Instead, a new statute was enacted for property insurers, Section 624.1551. Its title is *Civil remedy actions against property insurers*.[2] After the 2022 Florida Legislature enacted it during their regular session,[3] they replaced Section 624.1551 with a nearly complete substitute in their December, 2022 Special Session.[4]

When it was first enacted, effective May 26, 2022,

1. Fla. Stat. § 624.155 (West, Westlaw current with laws and joint resolutions in effect from the 2022 second reg. sess. and spec. A, C and D sess's of the Twenty-Seventh Legis.).

2. Fla. Stat. § 624.1551 (West, Westlaw current with laws and joint resolutions in effect from the 2022 second reg. sess. and spec. A, C and D sess's of the Twenty-Seventh Legis.).

3. 2022 Fla. Sess. Law Serv. Ch. 2022-268 (S.B. 2) (West).

4. 2022 Fla. Sess. Law Serv. Ch. 2022-271 (S.B. 2-A) (West).

Section 624.1551 made new law for property insurance companies. The new law restricted the "civil remedy action" or bad faith statute with respect to property insurers in the following language:

> Notwithstanding any provision of s. 624.155, a claimant must establish that the property insurer breached the insurance contract to prevail in a claim for extracontractual damages under s. 624.155(1)(b).[5]

In this newly enacted statute in May, property insurers received two unique protections from bad faith claims: a claimant with such a claim had to prove (1) "that the property insurer breached the insurance contract," and (2) that this proof was necessary "to prevail in a claim for extracontractual damages under s. 624.155(1)(b)." There had never been a requirement in Florida law that any insurer could not be liable for bad faith conduct unless its conduct breached the policy at issue. This requirement was imposed only with respect to "a claim for extracontractual damages under s. 624.155(1)(b)" and so was not made applicable to a claim for breach of the insurance contract but only to an "extracontractual damages" claim, and only then when the claim was made under Fla. Stat. § 624.155(1)(b).

As will be discussed below, the issues of proving a breach of contract in order to prevail in a statutory action for bad faith or "extracontractual" damages under only one subsection of the Florida Bad Faith Statute were brought forward in a bill in December, 2022 that went well beyond these changes and instead revamped the law of bad faith as respects insurance companies. An understanding of the statute as it was enacted in May is perhaps best achieved when Section 624.1551 is contrasted and compared with the changes made to it a short time later, in December of the same year.

The December substitute for Section 624.1551 made it clear from the outset that this was an attempt to address "any claim for extracontractual damages under s. 624.155(1)(b)." The two new opening sentences of the statute read in full as follows:

> Notwithstanding any provision of s. 624.155 to the contrary, in **any claim for extracontractual damages under s. 624.155(1)(b)**, no action shall lie until a named or omnibus insured or a named beneficiary has established through an **adverse adjudication by a court of law that the property insurer breached the insurance contract and a final judgment or decree has been rendered against the insurer**. A**cceptance 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**.[6] (Emphasis supplied.)

Viewing each of these highlighted changes separately brings into focus the larger agenda behind them.

1." [A]ny claim for extracontractual damages"

After the enactment of Section 624.1551 and subsequent amendments to it, clearly the new statutory provisions do not address just any claim. They are intended to address a claim for "extracontractual damages." This term is not defined in the statute.

Surprisingly, the term "extracontractual damages" is not well-defined in Florida case law, either. It is fair to say that the courts of Florida would treat "extracontractual" payments as payments beyond those required by a contract. Extracontractual damages are not "benefits" subject to setoff because they are considered punitive. "[B]ad faith claims punish the insurer's failure to fulfill its obligations to the insured."[7]

It is highly likely that this is what the people who wrote Section 624.1551 and its amendments in 2022

5. Fla. Stat. § 624.1551, as amended by 2022 Fla. Sess. Law Serv. Ch. 2022-268, § 6 (S.B. 2) (West).

6. Fla. Stat. § 624.1551, as amended by 2022 Fla. Sess. Law Serv. Ch. 2022-271, § 2 (S.B. 2-A) (West), effective December 16, 2022.

had in mind when they wrote of claims for "extracontractual" damages, i.e., damages beyond the benefits afforded by the terms of the insurance contract.

2." [U]nder s. 624.155(1)(b)"

Section 624.155(1)(b) is clearly the target of Section 624.1551 and its amendments in 2022. Property insurers were clearly concerned about the risk of exposure to bad faith damages beyond and maybe even above their policy limits.

As a result, property insurers had every reason to make it especially hard to sue under Section 624.155(1)(b) for extracontractual damages. Section 624.155 itself was untouched by the Florida Legislature in 2022. That includes Subsection (1)(b), which was chosen for limitation to property insurers through the enactment of new and amended Section 624.1551.

Section 624.155(1)(b) provides that any person may bring a civil action against an insurance carrier when that person is damaged by the insurer's commission of any of the following acts:

> 1. Not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured and with due regard for her or his interests;
>
> 2. Making claims payments to insureds or beneficiaries not accompanied by a statement setting forth the coverage under which payments are being made; or
>
> 3. Except as to liability coverages, failing to promptly settle claims, when the obligation to settle a claim has become reasonably clear, under one portion of the insurance policy coverage in order to influence settlements under other portions of the insurance policy coverage.
>
> Notwithstanding the provisions of the above to the contrary, a person pursuing a remedy under this section need not prove that such act was committed or performed with such frequency as to indicate a general business practice.[8]

It is not hard to identify the provision of Subsection 624.155(1)(b) that was the greatest concern to property insurers. It is the same provision that has always been the greatest concern to insurance companies since Subsection 624.155(1)(b) was first enacted: The greatest concern to any insurer is Subparagraph 1.

Subparagraph 1 of subsection (1)(b) and a provision of subsection (1)(a) of the Bad Faith Statute together provide the closest thing in the Florida Statutes to adopting and providing a right of action in Florida based on the National Association of Insurance Commissioners' Act Relating to Unfair Methods of Competition and Unfair and Deceptive Practices in the Business of Insurance, which to date has been adopted in 49 States in whole or in part.[9]

As the Florida Supreme Court noted in 1995, Subparagraph 1 of Subsection 624.155(1)(b) "provides remedies for *both* first- and third-party causes of actions."[10] Subparagraph 1 also reiterates, in nearly

7. Ellison v. Willoughby, 326 So. 3d 214, 222 (Fla. 2d DCA 2021) ("An extracontractual payment on a bad faith claim does not appear to meet this definition [of "collateral sources" which are subject to setoff in settlements for uninsured motorist or UM benefits]] because it is not a payment of 'benefits.'"), review granted, No. SC21-1580, 2022 WL 211113 (Fla. Jan. 25, 2022). *See* Randolph v. Mitchell, 677 So. 2d 976, 978 (Fla. 5th DCA 1996) (viewing duties of an insurance agent as fiduciary in nature and so "extracontractual" or beyond the contract between the agent and an applicant for insurance).

8. Fla. Stat. § 624.155(1)(b).

9. For the relevant text of the NAIC Model Act and discussions of its application to various insurers, see 1 DENNIS J. WALL, LITIGATION AND PREVENTION OF INSURER BAD FAITH (2011 Third Edition with 2022 Supplements), § 3:28, *Legal Bases of Liability in Settlement—Statutory*, regarding liability insurers, and in 2 *id.* § 9:14, *Express Statutory Causes of Action, r*egarding first-party carriers including property insurers.

identical language, Florida's Standard Jury Instruction for an *Insurer's Bad Faith (Failure to Settle)*.[11]

The remaining Subparagraphs of Subsection 624.155(1)(b), Subparagraphs 2 and 3 quoted above, are unlikely to be of much concern to property insurance carriers. The last remaining reference in an unnumbered final paragraph in Section 624.155 is to a "general business practice" or GBP. This unnumbered paragraph does not actually appear to belong in Subsection 624.155(1)(b) and it does not refer to it, although the last unnumbered paragraph in question is located immediately following Subsection (1)(b) in the Florida Statutes. It may have been intended to address Subsection (1)(a) instead, but its awkward placement in Section 624.155 is confusing.[12] The Florida Legislature has not changed Subsection 624.155(1)(a) in twenty years, nor was any part of Subsection 624.155(1)(a) altered in any way in 2022.[13]

The clear target of property insurers in Florida in 2022 was the standard for measuring any insurer's liability under Subparagraph 1 of Subsection 624.155(1)(b) for its alleged bad faith failure to settle.

3." [A]dverse adjudication by a court of law"

The effects of requiring an adverse adjudication by a court of law are two-fold. The first effect is to make the conclusion of any alternative forum that a property insurer breached its insurance contract, irrelevant to the viability of an action for bad faith against that property insurer. The second effect is clearly an attempt to make it impossible to sustain a bad faith statutory action against a property carrier in any conceivable situation in which there is no adjudication by a court of law that the offending property carrier breached its insurance policy.

An example of the first effect would presumably include a determination in an arbitration proceeding that the property carrier breached its insurance policy, for example. Given the customarily confidential nature of arbitrations, this may not be a great concern.

Consider next the effect of requiring an "adverse adjudication by a court of law" on a property carrier's admission by agreement with its policyholder that the carrier breached the property insurance policy—unaccompanied by an adverse adjudication by a court of law despite the property carrier's admission of its breach.

Consider also the effect of a settlement without an adjudication in an action for Declaratory Judgment[14] that the property insurance carrier breached its policy, and the policyholder reserves its rights under Subsection 624.155(1)(b).

Other situations can likely be posited, in which the same question arises in all of them, which is whether an action under Subsection 624.155(1)(b)1, i.e., an

10. State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 62 (Fla. 1995).

11. Florida Standard Jury Instruction 404.4, *Insurer's Bad Faith (Failure to Settle)*, https://www.floridabar.org/rules/florida-standard-jury-instructions/civil-jury-instructions/civil-instructions/#404, last accessed on Monday, February 20, 2023. This Standard Jury Instruction provides in full:

> Bad faith on the part of an insurance company is failing to settle a claim when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward [its policyholder] [its insured] [an excess carrier] and with due regard for [his] [her] [its] [their] interests.

The first note on use for this standard instruction recites that "Instruction 404.4 does not distinguish statutory claims from common law claims or first party claims from third party claims," citing the *Laforet* decision of the Florida Supreme Court in 1995 which is cited in the immediately preceding footnote.

12. Only one reference has been found to a general business practice in the context of bad faith actions in Florida, and that reference is in Fla. Stat. § 626.9541(1)(i)3, part of Florida's Unfair Claims Settlement Practices Act which is made actionable by Fla. Stat. § 624.155(1)(a)1.

13. For many years, it has been the office of subsection 624.155(1)(a) to make provisions in six other Florida statutes actionable, beginning with a long litany of proscribed behaviors listed in the Florida Unfair Claims Settlement Practices Act, Fla. Stat. § 626.9541(1)(i), and including thereafter a list of statutory claims for the denial of insurance using prohibited reasons such as race discrimination; agents; life, health, and disability insurance; and cancellation and return of premiums on motor vehicle insurance policies, among other things.

action for statutory bad faith, is valid any longer against property insurers in any of these situations following the 2022 amendments to Section 624.1551.

4."[T]hat the property insurer breached the insurance contract"

A new statutory mandate took effect in Florida on December 16, 2022. That is the effective date, of course, of the Florida Legislature's 2022 Special Session's amendments to Section 624.1551. Among these amendments is a new requirement that a bad faith claim against a property insurer under Subsection 624.155(1)(b) is not viable until there is an adverse adjudication of the property insurer's breach of its insurance policy.

The requirement is clear but the motivation for it may not be so clear. With this amendment property insurers are tying bad faith actions to their property insurance policies, as a necessary preliminary step before questions can be addressed concerning whether the property insurers' conduct satisfies standards of good faith and fair dealing.

To be sure, there is dicta in the Florida case law that Florida "case law does not require a breach of contract as a prerequisite to a bad faith claim,"[15] yet courts facing actions for bad faith in Florida, as elsewhere throughout the United States, have generally required proof that the claim was covered by the policy at issue regardless of whether the claim is a third-party claim or a first-party claim.[16]

Moreover, a question arises from this unique new requirement as to what sort of breach of the property insurance contract would suffice here. To put it another way, what particular "breach of the insurance contract" did the persons who wrote this provision have in mind? They did not say. Presumably, they meant to include bad faith actions for breach of settlement duties. The authors of this amendment did not tie a subsequent bad faith action to any particular part of the property policy, but if they meant to include bad faith actions for breach of settlement duties, they may have wanted to emphasize the policy's payment obligations.

However, this is speculation without guidance from the language of the amended statute. The fact is that no breach of contract can accomplish a breach of settlement duties, not even a breach of contract involving payment of policy benefits. Breach of settlement duties is actionable only if and where remedies for insurer bad faith conduct are recognized.[17]

The nature of a bad faith action in Florida which calls an insurance carrier's settlement conduct into question, was different, historically, in third-party actions than in first-party claims. The difference is significant. Third-party bad faith in settlement was traditionally viewed as a breach of fiduciary duty.[18] There was no such thing as first-party bad faith in Florida until Section 624.155 was enacted.[19] After Section 624.155 became law, however, first-party bad faith actions became available in Florida. Thereafter, both third-party and first-party bad faith actions would be governed by the same standard of extracontractual liability, the standard set forth in

14. The Florida Statutes provide for Declaratory Judgment Actions in Chapter 86. Fla. Stat. §§ 86.011 (West, Westlaw current with laws and joint resolutions in effect from the 2022 second reg. sess. and spec. A, C and D sess's of the Twenty-Seventh Legis.), *et seq.* The Federal Statutes provide for Declaratory Judgments in 28 U.S.C.A. §§ 2201 – 2202 (West, Westlaw current through P.L. 117-262).

15. Bryant v. GeoVera Spec. Ins. Co., 271 So. 3d 1013, 1022 (Fla. 4th DCA 2019).

16. Cases from across the nation including Florida are collected in, *e.g.*, 1 DENNIS J. WALL, LITIGATION AND PREVENTION OF INSURER BAD FAITH § 3:95 *Burdens of Proof [in Third-Party Bad Faith Cases]—Who Has The Burdens* (3d ed. with 2022 Supps, 2023 Supps. in process); 2 *id.* § 9:18 *Burdens of Proof [in First-Party Bad Faith Cases]—Who Has The Burden.*

17. Moreover, this concentration on settlement conduct may be correct in diagnosing an ailment that property insurers wanted to cure, but there still remains the question of what if any *other* breaches of the insurance contract beyond payment may satisfy the new prerequisite to an action for extractontractual damages against a property insurer.

18. E.g., Berges v. Infinity Ins. Co., 896 So. 2d 665, 668, 669 (Fla. 2004); Doe ex rel. Doe v. Allstate Ins. Co., 653 So. 2d 371, 374 (Fla. 1995); Fla. Farm Bureau Mut. Ins. Co. v. Rice, 393 So. 2d 552, 555 (Fla. 1st DCA 1980), review denied, 399 So. 2d 1142 (Fla. 1981).

Subsection 624.155(1)(b)1.[20]

First-party bad faith actions under Florida law never depended on proof that the insurer breached the insurance contract until the December 2022 amendments to Section 624.1551 were enacted. Subsection 624.155(1)(b)1 in particular set the standard of exposure to bad faith liability for all insurers in Florida. That changed for property insurers in Florida effective December 16, 2022. Since then, the law has changed to block a claimant for extracontractual or bad faith damages under Subsection 624.155(1)(b) until the claimant has obtained an adjudication by a court of law that the property insurer in question breached the property insurance policy involved.

5. "[A]nd a final judgment or decree has been rendered against the insurer"

Language similar to the phrase, "a final judgment or decree has been rendered against the insurer," has not by itself prevented Florida courts from equating an insurer's payment to a confession of judgment, whereby the insurer's payment is legally treated by the courts as a substitute for an adverse judgment.[21]

In *Allstate Fire & Casualty Insurance Co. v. Castro*.[22] a Florida intermediate appellate court thoroughly reviewed the confession of judgment doctrine. The *Castro* case involved an uninsured motorist claim for the UM policy limits, a policyholder who served a Civil Remedy Notice (a required condition precedent to a statutory bad faith claim), and a lawsuit filed by the insured for the policy limits of the carrier's UM policy.

The UM carrier settled and paid the policy limit before judgment was entered for the insured.

That left only the issue of its insured's right to recover her attorney's fees under Fla. Stat. § 627.428. That statute provides that the attorney's fees of a prevailing party-insured shall be included "[u]pon the rendition of a judgment or decree by any of the courts of this state[.]"[23]

The *Castro* court did not make new law in applying the confession of judgment doctrine in this case. To the contrary, the *Castro* court followed already settled Florida law after the court reviewed many of the more significant cases in which Florida courts had previously applied the confession of judgment doctrine. In brief, as the *Castro* court explained, Florida courts have applied the confession of judgment doctrine when insurers have denied their insureds benefits to which the insureds were entitled under their policies and, further, when in addition the carrier's refusal to pay the benefits has forced the insured to file suit, at which juncture the insurer changes its mind and pays the claim before a judgment has been rendered in favor of the prevailing insured.[24] At that point, of course, the insured has already incurred attorney's fees in successfully prosecuting or defending litigation caused by the insurer. In such a case, as in *Castro* itself, an insurer will not be allowed to evade liability for the insured's attorney's fees by

19. *E.g.*, State Farm Mut. Auto. Ins. Co. v. Laforet, 658 So. 2d 55, 62 (Fla. 1995) ("Florida differs, however, from most jurisdictions given that first-party bad faith actions are actionable only under section 624.155 and not the common law."); Utd. Prop.& Cas. Ins. Co. v. Chernick, 94 So. 3d 646, 647 (Fla. 4th DCA 2012); Gen. Star Indem. Co. v. Atl. Hospitality of Fla., LLC, 93 So. 3d 501, 503 (Fla. 3d DCA 2012).

20. *Laforet*, 658 So. 2d at 63 ("For consistency, however, we find that the standard set forth in this opinion should apply equally to third-party actions brought at common law."). The "standard set forth in this opinion" was the standard set forth in Subparagraph 624.155(1)(b)1. I*d.* at 62.

21. As one example of the confession of judgment doctrine applied by Florida's Courts, Florida Statute Section 626.9373 requires attorney's fees to be included in any award against a surplus lines insurer, "[u]pon rendition of a judgment or decree by any court of this state …." This language did not prevent a Florida court from applying the legal fiction of a confession of judgment to a surplus lines insurer which paid an appraisal award before judgment was entered for its insured. Bryant v. GeoVera Spec. Ins. Co., 271 So. 3d 1013, 1019 & n.1, 1020 (Fla. 4th DCA 2019).

22. Allstate Fire & Cas. Ins. Co. v. Castro, 351 So. 3d 127 (Fla. 1st DCA 2022).

23. Fla. Stat. § 627.428 (West, Westlaw current with laws and joint resolutions in effect from the 2022 second reg. sess. and spec. A, C and D sess's of the Twenty-Seventh Legis.).

24. *Allstate Fire & Casualty v. Castro,* 351 So. 3d at 132.

paying the claim before judgment can be rendered in favor of the prevailing insured.

The court in *Allstate Fire & Casualty v. Castro* noted in the course of applying the confession of judgment doctrine, that "[n]othing in section 627.428(1) or anywhere in the insurance code prevents the entry of a confessed judgment."[25]

The *Castro* court's decision was published on November 9, 2022. The Florida Legislature amended the newly enacted Section 624.1551 effective December 16, 2022. By the time the Florida Legislature was finished in December, 2022, things had been added to the insurance code which are clearly intended to prevent the entry of a confessed judgment with respect to property insurers. These things are addressed in the next section of this article.

6. Neither accepting an offer of judgment nor paying an appraisal award constitutes "an adverse adjudication under this section."

Eliminating the confession of judgment doctrine with respect to property insurers was clearly on the agenda in the Florida Legislature's December 2022 Special Session. The authors of the amendments to Section 624.1551 directed their attention with precision to the results in specific cases.

An offer of judgment was involved in the *Castro* case which has already been discussed at some length in the immediately preceding section. The *Castro* court treated the requirement of a judgment or decree rendered in favor of a party offering judgment under the Offer of Judgment Statute[26] as an alternative basis for its decision. The court held that the confession of judgment doctrine would apply here too.[27]

In another case that has been discussed above, *Bryant v. GeoVera Specialty Insurance Co.*'[28] a different appellate court held that a homeowner's insurer's payment of an appraisal award was the legal equivalent of a confession of judgment and so its insureds were entitled to attorney's fees under Section 627.428 since they prevailed in an action against their insurance carrier, despite the fact that the carrier paid the award before judgment could be entered in favor of the insured.[29]

In a single sentence, the December 2022 amendments to Section 624.1551 legislatively overruled in particular the holdings in C*astro* that a prevailing party which offered judgment, and in *GeoVera* that a prevailing party which received the insurer's payment of an appraisal award, were entitled to attorney's fees because in both cases the insurer's payment legally constituted a sufficient substitute for judgment in favor of the insured. Since December 16, 2022, "[a]cceptance 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."[30]

---

25. *Allstate Fire & Casualty v. Castro,* 351 So. 3d at 133.

26. Fla. Stat. § 768.79 (West, Westlaw current with laws and joint resolutions in effect from the 2022 second reg. sess. and spec. A, C and D sess's of the Twenty-Seventh Legis.).

27. Allstate Fire & Casualty v. Castro, 351 So. 3d at 154:

> But Castro has a separate statutory basis for fees under section 768.79. A confessed judgment from an insurer or other debtor by abandoning its defenses and paying the policy limits can be a "judgment obtained" under section 768.79, allowing for the award of fees if the other requirements of that statute are met, just as it is a "judgment" under section 627.428.

28. Bryant v. GeoVera Spec. Ins. Co., 271 So. 3d 1013 (Fla. 4th DCA 2019).

29. *GeoVera*, 271 So. 3d at 1018-20. The *GeoVera* decision included recognition of a partial payment as the equivalent of a full payment by the insurer, so that the confession of judgment doctrine should be applied in that case. *GeoVera*, 271 So. 3d at 1019-20. On the basis of this aspect of the decision, the *GeoVera* case has been "limited to its facts" by the same Fourth District Court of Appeal which decided that case, in People's Trust v. Farinato, 315 So. 3d 724, 728 (Fla. 4th DCA 2021). There was, however, no dispute between the panels in either case, *GeoVera* or *People's Trust*, that regardless of whether payment is full or partial, the fact of payment by an insurer can constitute a confession of judgment despite statutory language which on its face seems to require the entry of a judgment or decree.

30. Fla. Stat. § 624.1551, as amended by 2022 Fla. Sess. Law Serv. Ch. 2022-271, § 2 (S.B. 2-A) (WEST), effective December 16, 2022.

Although the December amendments represented the best efforts of their authors to bar application of the confession of judgment doctrine to property insurers, the amendments did provide that if there is a disparity between the "insurer's appraiser's final estimate and the appraisal award," the disparity may be admitted in evidence in a bad faith action under Subsection 624.155(1)(b). Even then, however, the authors of the amendment hastened to write, once again, that this would not be "deemed an adverse adjudication under this section," and for good measure they added that this would not "on its own, give rise to a cause of action."[31]

B. QUESTIONS OF CONSTITUTIONALITY

For people dealing with these new statutory provisions, the Constitutional issue that looms largest is the question of Equal Protection. These statutory provisions are designed to protect one class of insurer, and one class only, namely, property insurers. All other kinds of insurance companies doing business in Florida are left alone by these laws, although it is foreseeable that future legislative sessions will see the agendas of other insurers. For now, the statutory provisions enacted in Florida in 2022 and addressed throughout this article focus on property insurers and property insurers alone.

The starting point for any Equal Protection analysis is the Fourteenth Amendment to the United States Constitution.[32] People who consider Equal Protection and other Constitutional issues are wise to consult Constitutional scholars, including for arguments pros and con concerning the provisions discussed in this article.

Here, the most that the author will do is suggest some issues to consider. There will be no debate here about whether to apply a rational basis test or. a strict scrutiny test. The discussion of Equal Protection issues will be based on the assumption that the lower level of scrutiny, rational basis, will apply.

The rational basis test was concisely stated in 1981 by the United States Supreme Court in a case involving an insurance company:

> In determining whether a challenged classification is rationally related to achievement of a legitimate state purpose, we must answer two questions: (1) Does the challenged legislation have a legitimate purpose? and (2) Was it reasonable for the lawmakers to believe that use of the challenged classification would promote that purpose?[33]

These questions should be asked regarding each of the new 2022 property insurance provisions that are challenged on Equal Protection grounds.

The first question to ask, according to the U.S. Supreme Court, concerns the existence of a "legitimate state purpose." It is important to identify what purpose is served. If the purpose of the various changes to Florida's Bad Faith laws, for example, is to keep property insurers in the State, that cannot be a "legitimate state purpose" unless the property insurers collecting premiums and otherwise doing business in Florida provide insurance coverage. The legitimate state purpose has to be, then, to keep property insurers in Florida which provide insurance coverage to policyholders with property in Florida.

That brings up the second question to be addressed. Continuing with our example of the 2022 changes to Florida's Bad Faith laws, was it reasonable for the lawmakers to believe that singling out property insurers for protection from "extractontractual damages" would promote the purpose of keeping property insurers in Florida which provide insurance coverage?

Or that adding other provisions to Florida's legal framework of Bad Faith Law, such as requiring an

31. *Id.*

32. U.S. CONST. amend. XIV, § 1.

33. W. & So. Life Ins. Co. v. State Bd. of Equalization of Cal., 451 U.S. 648, 668, 101 S. Ct. 2070, 2083 (1981).

adverse adjudication by a court of law, or that such an adjudication be of an unspecified breach of a property insurance policy (but not of any other kind of insurance policy by any other kind of insurer), or that property insurers alone should be set free of Florida's confessed judgment doctrine? Answering the second question in favor of upholding the 2022 statutory changes will require Florida judges to rule that these changes, or any of them, were the product of a reasonable belief by the lawmakers that use of the challenged classifications would promote the purpose of attracting property insurers to Florida which provide insurance coverage to policyholders with property in Florida.

It appears to be unlikely that Florida judges will declare that it was reasonable for the lawmakers to believe that enacting these changes in 2022 would promote the legitimate state purpose of keeping property insurers in Florida that provide coverage to policyholders with property in Florida.

II. ATTORNEY'S FEES

The risk of paying a policyholder's attorney's fees in the event the policyholder prevails in litigation with an insurer is one of the factors that insurers must take into account. This is something that comes to an insurer's attention first at the stage when the carrier decides whether it will deny coverage. At that stage, the calculus includes the insurer's best guess whether the fact, timing, or context of denying an insured's claim is likely to lead to litigation.

Once in litigation, most if not all insurers will continue the calculus by estimating the likelihood that the policyholder may prevail. The threat of paying its insured's attorney's fees is a continuing factor in the insurer's decisional process of whether to affirm or deny coverage, whether that decision is made before or after litigation with the policyholder has begun. The threat of paying an insured's attorney's fees cannot be underestimated unless the insurance company involved is an outlier for which money is no concern.

We have already touched upon three statutes, decisions under each of which have previously led to an insurer's payment of its prevailing insured's attorney's fees despite the absence of a judgment rendered or entered in favor of the insured.

A. THE OFFER OF JUDGMENT STATUTE, SECTION 768.79.

As respects Florida's Offer of Judgment statute, Section 768.79,[34] the December amendments targeted only the confession of judgment doctrine which the Florida courts have applied to it. An insurer's "[a]cceptance of an offer of judgment under s. 768.79" does not constitute the newly required "adverse adjudication" by a court of law that the property insurer breached the policy, a required step for the policyholder to maintain a bad faith action against the property insurer under Subsection 624.155(1)(b).[35]

The 2022 Florida laws left intact the possibility of an offeree recovering its attorneys fees under Section 768.79, unlike the Florida Legislature's actions regarding other statutes shifting an insured's attorney's fees to the insurer, discussed below.

The Florida Legislature did explicitly make one change to the text of Section 768.79 in 2022, but it does not strictly relate to an insured's recovery of attorney's fees. "For a breach of contract action," presumably as distinguished from an action for extracontractual damages, property insurers have been enabled to "make a joint offer of judgment or settlement that is conditioned on the mutual acceptance of all the joint offerees."[36]

Apparently, it was a problem, not widely known and unique to property insurers, that previous to this amendment they found it difficult to condition a joint offer of judgment or settlement on acceptance by

34. Fla. Stat. § 768.79

35. Fla. Stat. § 624.1551, as amended by 2022 Fla. Sess. Law Serv. Ch. 2022-271, § 2 (S.B. 2-A) (WEST), effective December 16, 2022.

36. Fla. Stat. § 768.79(6), newly added by 2022 Fla. Sess. Law Serv. Ch. 2022-271, § 24 (S.B. 2-A) (WEST), effective December 16, 2022.

every one of the parties to which the property insurer made the joint offer. Since December 16, 2022 this impediment to a joint offer of judgment or settlement no longer exists for property insurers in Florida.

B. PREVAILING INSUREDS' ATTORNEY'S FEES AWARDS AGAINST INSURERS GENERALLY: FLA. STAT. § 627.428

An insured prevailing in litigation with an insurance company in Florida, except for suits over life insurance and annuity contracts, is entitled to her, his, or its attorney's fees under Florida Statute Section 627.428.

For some six months, Section 627.428 provided that the right to attorney's fees under this section could not be "transferred to, assigned to, or acquired in any other manner by anyone other than a named insured or omnibus insured or a named beneficiary."[37] Presumably, this meant that no insured could assign its right to attorney's fees under Section 627.428 to anyone else, at least not to anyone else other than a fellow named insured, omnibus insured, or named beneficiary.

A different statute was also amended effective May 26, 2022 which affected the availability of fees under Section 627.428. The calculation of an attorney's fees award under Section 627.428 in a suit involving a property insurer, was changed with respect to dismissal of the insured's suit in which case the insurer could be awarded its "reasonable attorney fees and costs associated with securing the dismissal," and with respect to lodestar fees being made subject to a new statutory "presumption" that "a lodestar fee is sufficient and reasonable."[38]

This was the law in Florida from May 26 until December 16, 2022. Then a different statutory provision took effect which eliminated, but only with respect to property insurers, a*nyone's* right to recover attorney's fees under Section 627.428. Subsection (4) was added to Section 627.428, as follows:

> In a suit arising under a residential or commercial property insurance policy, there is no right to attorney fees under this section.[39]

C. PREVAILING INSUREDS' ATTORNEY'S FEES AWARDS AGAINST SURPLUS LINES INSURERS: FLA. STAT. § 626.9373

Section 626.9373 is another attorney's fee-shifting statute. It shifts the attorney's fees incurred by a prevailing insured in a suit with its surplus line insurer, from the insured to the insurer. It shares the same history of the amendments made in 2022 to Section 627.428, the attorney's-fee-shifting statute as respects litigation with insurers generally.

In language identical to Subsection 627.428(4) quoted above, effective on May 26, 2022, the reach of Section 626.9373 was changed. For nearly seven months thereafter, Subsection 626.9373(3) provided that the right to attorney's fees under this section could not be "transferred to, assigned to, or acquired in any other manner by anyone other than a named insured or omnibus insured or a named beneficiary."[40] During the same period, there would be no recoverable attorney's fees by anyone at all in suits against property insurers with the same two exceptions as enacted under the amended Section 627.428 regarding insurers generally:[41] in frivolous lawsuits,[42] and by a new method to calculate "the

37. Fla. Stat. § 627.428, as amended by 2022 Fla. Sess. Law Serv. Ch. 2022-268, § 12 (C.S.S.B. 2-D) (WEST).

38. Fla. Stat. § 627.70152(8)(b) & (c), amended by 2022 Fla. Sess. Law Serv. Ch. 2022-268, § 16 (C.S.S.B. 2-D) (WEST).

39. Fla. Stat. § 627.428(4), newly added by 2022 Fla. Sess. Law Serv. Ch. 2022-271, § 13 (S.B. 2-A) (WEST), effective December 16, 2022. Subsection 627.70152(8), which had addressed calculations for the amount of attorney's fees awards in suits against property insurers, was eliminated by § 17, *id.*, also effective December 16, 2022.

40. Fla. Stat. § 626.9373(3), newly added by 2022 Fla. Sess. Law Serv. Ch. 2022-268, § 12 (C.S.S.B. 2-D) (WEST). It is perhaps of more than passing interest that the limitation on attorney's fees against surplus lines insurers was added by Section 11, and that the limitation on attorney's fees against insurers generally was added by Section 12 of the same Session Law.

amount of reasonable attorney fees and costs" in suits "arising under a residential or commercial property insurance policy" including under Subsection 626.9373(1).[43]

However, since the December amendments, none of this is true any longer with respect to property insurers. Under the December amendments, no-one can recover their attorney's fees under Section 626.9373 against a property insurer. In language that is identical to the language of new Section 627.428(4), quoted above, Section 626.9373 has provided since December 16, 2022 that "[i]n a suit arising under a residential or commercial property insurance policy, there is no right to recover attorney's fees under this section."[44]

D. QUESTIONS OF CONSTITUTIONALITY, ONCE MORE

Within the limits previously set for this article, the most likely challenge to the provisions discussed in this Section is Equal Protection of the laws. As previously mentioned, the appropriate test in an Equal Protection analysis here, seems to be whether it was reasonable for the lawmakers to believe that singling out property insurers for special treatment would promote the legitimate state purpose of attracting property insurers to Florida that provide insurance coverage to policyholders with property located in Florida.[45]

In order to answer that question affirmatively, Florida judges will have to answer Equal Protection challenges to the changes made in 2022 to Sections 627.428 and 626.9373 that refusing to allow the recovery of attorney's fees against property insurers would promote the purpose of keeping property insurers in Florida which provide insurance coverage to policyholders with property located in Florida.

Once again, it must be said that that seems unlikely.

III. POST-LOSS ASSIGNMENTS

A. A DEFINITION OF POST-LOSS ASSIGNMENTS

Post-loss assignments are really workarounds. For example, they enable homeowners who have suffered damage to their home in a storm but cannot afford the cost of repairs, to contract to get the necessary repair work done. The workaround is to contract with a construction repair company, for example, to do the work and in exchange the homeowners assign their right to the homeowner's policy proceeds to the repair company.[46]

B. THE 2022 LAWS REGARDING POST-LOSS ASSIGNMENTS

In 2022, the Florida Legislature amended existing

41. *Id.*

42. Fla. Stat. § 57.105, (West, Westlaw current with laws and joint resolutions in effect from the 2022 second reg. sess. and spec. A, C and D sess's of the Twenty-Seventh Legis.).

43. Fla. Stat. § 627.70152(8), amended by 2022 Fla. Sess. Law Serv. Ch. 2022-268, § 16 (C.S.S.B. 2-D) (WEST).

44. Fla. Stat. § 626.9373(3), newly added by 2022 Fla. Sess. Law Serv. Ch. 2022-271, § 6 (S.B. 2-A) (WEST).

45. *See* discussion *supra* Section I.B.

46. Post-loss assignments and case law from across the United States concerning them, are addressed in Dennis J. Wall, § 7:19, *Post-Loss Assignment*, in 1 JOHN K. DIMUGNO, STEVEN PLITT, AND DENNIS J. WALL, CATASTROPHE CLAIMS: INSURANCE COVERAGE FOR NATURAL AND MAN-MADE DISASTERS (Dec. 2022 ed.). The Florida Statutes offer this definition of post-loss assignments under property insurance policies:

> (b) "Assignment agreement" means any instrument by which post-loss benefits under a residential property insurance policy or commercial property insurance policy, as that term is defined in s. 627.0625(1), are assigned or transferred, or acquired in any manner, in whole or in part, to or from a person providing services, including, but not limited to, inspecting, protecting, repairing, restoring, or replacing the property or mitigating against further damage to the property. The term does not include fees collected by a public adjuster as defined in s. 626.854(1).

Fla. Stat. § 627.7152(b) (West, Westlaw current with laws and joint resolutions in effect from the 2022 second reg. sess. and spec. A, C and D sess's of the Twenty-Seventh Legis.).

statutes that restrict post-loss assignments under property insurance policies. These changes are in addition to what might be called "the attorney's fee two-step" previously discussed.[47] In this legislative choreography the recovery of attorney's fees was limited in the first step and then eliminated in the second step some six months later.

In addition, the Florida Legislature amended Florida Statute § 627.7152, titled "Assignment Agreements," to limit the availability of post-loss assignment agreements under residential property insurance policies and most commercial property insurance policies, to those property insurance policies which were "issued on or after July 1, 2019 and before January 1, 2023."[48] This change was instituted as of December 16, 2022.

The second significant change that the Florida Legislature made to Section 627.7152 in 2022 was to add a new subsection (13) to forbid a policyholder to "assign, in whole or in part, any post-loss insurance benefit under any" such residential or commercial property insurance policy that was "issued on or after January 1, 2023."[49]

Third and finally, in December 2022 the Florida Legislature enacted a complete prohibition on post-loss assignments under property insurance policies issued on or after January 1, 2023. The amendment which called for this prohibition was made effective December 16, 2022: "An attempt to assign post-loss insurance benefits under such a policy is void, invalid and unenforceable."[50]

C. ANOTHER QUESTION OF CONSTITUTIONALITY: IMPAIRMENT OF CONTRACTS

The 2022 changes to Section 627.7152 and to the availability of post-loss assignments of benefits under property insurance policies face passing muster under two Constitutional provisions. One is Federal,[51] and one is State,[52] both of which prohibit the State from passing any law which impairs the obligation of contracts.

The standard for measuring Constitutionally prohibited impairment of contracts under the United States Constitution has been set out by the U.S. Supreme Court as follows:

> If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation, [citation omitted], such as the remedying of a broad and general social or economic problem…. The requirement of a legitimate public purpose guarantees that the State is exercising its police power, rather than providing a benefit to special interests.[53]

It has been observed that Florida courts say that they will tolerate lesser impairments under the Florida Constitution than the federal courts will tolerate under the U.S. Constitution.[54]

For present purposes, it is unnecessary to wade into an examination of results in decided cases as to whether Florida courts enforce the Florida Constitution's prohibition on impairment of contracts more

47. *See* discussion *supra* Section II B & C.

48. Fla. Stat. § 627.7152(2)(a)1, amended by adding new paragraph 1 in 2022 Fla. Sess. Law Serv. Ch. 2022-271, § 21 (S.B. 2-A) (WEST), effective December 16, 2022.

49. Fla. Stat. § 627.7152(13), added by 2022 Fla. Sess. Law Serv. Ch. 2022-271, § 21 (S.B. 2-A), effective December 16, 2022.

50. *Id.*

51. U.S. CONST. Art. I, § 10, cl. 1.

52. FLA. CONST. Art. I, § 10.

53. Energy Reserves Grp., Inc. v. Kansas Power & Light Co., 459 U.S. 400, 411-12, 103 S. Ct. 697, 704-05 (1983).

54. Jonathan Brennan Butler, Comment, *Insurers Under Fire: Assessing the Constitutionality of Florida's Residential Property Insurance Moratorium After Hurricane Andrew,* 22 Fla. St. U. L. Rev. 731, 754, 763 (1995).

strictly than federal courts enforce the nearly identical prohibition in the U.S. Constitution. It is clear that judges in either the federal or the Florida system of courts would inquire in any contract impairment inquiry whether Section 627.7152 serves "a significant and legitimate public purpose." Alternatively, courts in either system will almost certainly ask whether in this particular instance "the State is exercising its police power, rather than providing a benefit to special interests," to apply the words of the U.S. Supreme Court[55].

The benefit to special interests from Section 627.7152 is clear: Post-assignment agreements are prohibited as to property insurance policies issued on or after January 1, 2023.[56] The benefit to public interests is less clear. Perhaps the issue of the benefit to public interests from such a prohibition will be addressed in an appropriate forum in the future, whether in the Florida Legislature or in a Florida court.

For policies "issued on or after July 1, 2019 and before January 1, 2023," an assignment agreement "must" be executed.[57] Apparently, the 2022 Legislature intended to limit post-loss assignment agreements to property insurance policies "issued on or after July 1, 2019, and before January 1, 2023," but that is not what the statute says. The new amendment, quoted below in boldface, was engrafted onto the existing Section 627.7152, which is reproduced below in regular (non-boldfaced) typeface:

> (2)(a) An assignment agreement must:
>
> 1. **Be executed under a residential property insurance policy or under a commercial property insurance policy, as that term is defined in s. 627.0625(1), issued on or after July 1, 2019, and before January 1, 2023.**[58]

Taking the legislative intent rather than the language actually used by this amendment's authors, there is a question as to the restriction to policies issued before July 1, 2019. This is possibly a reference to the Florida statute of limitations for '[a]n action founded on a statutory liability,"[59] namely, Fla. Stat. § 624.155, the thinking being, perhaps, that no action could be brought in court in 2023 over a policy issued before July 1, 2019. This is speculation, of course. More than that, it is incomplete speculation. Actions for violations of Florida's Bad Faith Statute even when the alleged violation occurred on **June 30**, 2019—to pick a date—could still be filed by June 30, 2023, which is four years later.

Whatever the motivation, the 2022 amendment to Fla. Stat. § 627.7152(2)(a)1 purports to limit post-loss assignment agreements to policies "issued on or after July 1, 2019 and before January 1, 2023." Repair contracts with post-loss assignment of policy benefits may have been in existence before July 1, 2019 and still be at issue or perhaps involved in litigation pending even now.

Purportedly refusing to recognize the validity of such post-loss assignment agreements is almost certain to run afoul of the Constitutional prohibitions on impairment of contract. At the very least, any such statutory provision will have to be interpreted in the light of the Constitutional prohibitions or they will almost certainly be struck down as unconstitutional.

Removing this limitation to contracts issued on or after July 1, 2019 (or any other such date) would be consistent, as well, with the amendment to Fla. Stat.

---

55. *Energy Reserves Group*, 459 U.S. at 411-12, 103 S. Ct. at 704-05.

56. Fla. Stat. § 627.7152(13), added by 2022 Fla. Sess. Law Serv. Ch. 2022-271, § 21 (S.B. 2-A), effective December 16, 2022.

57. Fla. Stat. § 627.7152(2)(a)1, amended by adding new paragraph 1 in 2022 Fla. Sess. Law Serv. Ch. 2022-271, § 21 (S.B. 2-A) (WEST), effective December 16, 2022.

58. *Id.* (boldface added to statute; boldface in original session law).

59. Fla. Stat. § 95.11(3)(f) (West, Westlaw current with laws and joint resolutions in effect from the 2022 second reg. sess. and spec. A, C and D sess's of the Twenty-Seventh Legis.). "A Fl. Stat. § 624.155 bad faith claim is '[a]n action founded on a statutory liability' and is therefore governed by the four year statute of limitations." Lopez v. Geico Cas. Co., 968 F. Supp. 2d 1202, 1206 (S.D. Fla. 2013).

§ 627.7152(13) made in the same Session Law that amended Fla. Stat. § 627.7152(2)(a)1. The amendment to Subsection (13) makes any attempt to assign post-loss insurance benefits under a policy issued on or after January 1, 2023 "void, invalid and unenforceable."[60]

In the final analysis, there is no need to mention any specific date at all, whether it be July 1, 2019 or any other. It is difficult, at best, to say that mentioning it serves "a significant and legitimate public purpose."

IV. MANDATORY ARBITRATION PROVISIONS, IF CERTAIN BOXES ARE CHECKED

Section 627.70154, titled *Mandatory binding arbitration*, was newly enacted in December, 2022. It became effective December 16, 2022. Section 627.70154 is addressed only to property insurance policies, and it provides in full as follows:

> A property insurance policy issued in this state may not require that a policyholder participate in mandatory binding arbitration unless all of the following apply:
>
> (1) The mandatory binding arbitration requirements are contained **in a separate endorsement** attached to the property insurance policy.
>
> (2) The premium that a policyholder is charged for the policy includes an **actuarially sound credit or premium discount for the mandatory binding arbitration endorsement**.
>
> (3) The policyholder signs a **form** electing to accept mandatory binding arbitration. The form must notify the policyholder of the rights given up in exchange for the credit or premium discount, including, but not limited to, the right to a trial by jury.
>
> (4) The endorsement establishes that an insurer will comply with **the mediation provisions set forth in s. 627.7015** before the initiation of arbitration.
>
> (5) The insurer **also offers the policyholder a policy that does not require that the policyholder participate in mandatory binding arbitration**.[61]

The boldfaced terms in the above-quoted Section 627.70154 will be addressed below.

(1). The mandatory binding arbitration provisions must be written "in a separate endorsement."

This provision presents a puzzle: Why is mandatory arbitration required to be offered in an endorsement, why not in the policy itself?

The answer is perhaps because the mandatory arbitration provisions are not limited to newly issued policies and their Insuring Agreements, which are the basic insurance coverage provisions of any property insurance policy.

The new statute is written to apply, then, to existing policies simply by issuing endorsements to existing or newly issued property insurance policies alike, at any time from and after December 16, 2022.

(2) "[A]ctuarially sound"

An initial observation comes from the text of the statute itself. The authors of Subsection 627.70154(2) specifically referenced a "credit" and a "discount." Those terms imply a credit or discount as a result of the mandatory arbitration endorsement being in the property insurance policy in the first place.

Upon reflection, a further observation comes from the *absence* of language in the statute itself. There

60. Fla. Stat. § 627.7152(13), added by 2022 Fla. Sess. Law Serv. Ch. 2022-271, § 21 (S.B. 2-A), effective December 16, 2022.

61. Fla. Stat. § 627.70154 (emphasis supplied), added by 2022 Fla. Sess. Law Serv. Ch. 2022-271, §18 (S.B. 2-A) (WEST), effective December 16, 2022.

is no corresponding requirement regarding non-mandatory arbitration policies. Property insurance policies without a mandatory arbitration endorsement face no requirement under this statute that their premiums, or any part of their premiums, be "actuarially sound."[62]

(3) A new **"form"**

This seems to be self-explanatory: The insured must elect mandatory binding arbitration by signing a form. The provisions of the form, some of them, are set forth in Subsection 627.70154(3).

This seems analogous to the statutory requirements for Uninsured/Underinsured Motorist Coverage when the insured selects lower policy limits for that coverage than the limits mandated by statute.[63] For those who are not experienced insurance coverage practitioners, Florida has developed a large body of case law surrounding the question of whether the UM applicant's selection of lower UM limits is voluntary and knowing.[64] The results in the decided cases are not always as straight-forward as a statute may seem to suggest. Rather, the case results often depend largely on a judge's or a jury's resolution of disputed issues of fact.

(4) Mediation compliance

Subsection 627.70154(4) refers to the mandatory arbitration endorsement and not to any conduct on the part of the property insurer in question. So long as "[t]he endorsement establishes that an insurer will comply" with the statutory mediation provisions of Section 627.7015 before initiating arbitration, Subsection (4) of Section 627.70154 is seemingly satisfied.

Briefly summarized, the statutory mediation provisions of Section 627.7015 set forth a "property insurance mediation program" administered by the Florida Department of Financial Services. The Department's mediation program for property insurance is a creature of statute and administrative rule. It is based on the mediation procedures followed in mediations ordered by Florida courts, but it is not a part of those judicially administered procedures.[65]

(5) Offering an alternative policy:

The insurer also offers the policyholder a policy that does not require that the policyholder participate in mandatory binding arbitration.

Subsection 627.70154(5) introduces the requirement of an alternative policy. Nothing is said about premiums for the alternative property policy in the new statute, nor is anything said about alternative property premiums anywhere else in the Insurance Code so far as is known, or for that matter, anywhere else in the Florida Statutes.

The factors that are properly taken into account in charging insurance premiums generally, are subject to review by the Florida Office of Insurance Regulation (O.I.R.).[66] Anyone who has worked in Tallahassee, as the author has, knows that regulation of the basics of charging money for insurance is often subject to the identity of the Florida Insurance Commissioner, who is in charge of the O.I.R. At any

62. There are other statutes which regulate the amount of premiums charged to policyholders by insurance companies, of course. These are discussed broadly *infra* Section IV.E.

63. Fla. Stat. § 627.727(1) (West, Westlaw current with laws and joint resolutions in effect from the 2022 second reg. sess. and spec. A, C and D sess's of the Twenty-Seventh Legis.).

64. This is true nationally, not just in Florida. S*ee generally* Steven Plitt and Paige Pataky, *Providing Notification to Insureds of the Opportunity to Purchase UM/UIM Insurance: Is "English Only" Enough?,* 35 Ins. Litig. Rptr. 197 (May 1, 2013).

65. *See* Fla. Stat. § 627.7015(4) (West, Westlaw current with laws and joint resolutions in effect from the 2022 second reg. sess. and spec. A, C and D sess's of the Twenty-Seventh Legis.).

66. *See* Fla. Stat. §§ 627.062, *Rate Standards* (West, Westlaw current with laws and joint resolutions in effect from the 2022 second reg. sess. and spec. A, C and D sess's of the Twenty-Seventh Legis.) & 627.0645, *Annual Filings* (West, Westlaw current with laws and joint resolutions in effect from the 2022 second reg. sess. and spec. A, C and D sess's of the Twenty-Seventh Legis.).

given time, moreover, modern-day insurance premiums tend to be set in accordance with the directions taken by legislative or gubernatorial policies.

There are many questions, then, about the alternative policies that do not require mandatory binding arbitration policies that property insurers must offer. One question of perhaps greatest concern to policyholders and competing insurance companies is the obvious one: What will the leading property insurance companies issuing policies in Florida charge for policies ***without*** mandatory arbitration provisions?

Another question concerns whether the insurance coverage provided by these alternative property insurance policies will be as good as the coverage provided by the mandatory-binding-arbitration policies.

Other questions will undoubtedly arise. The point is that the authors of the new law did not write that either the *same* Insuring Agreement or the *same* insurance coverage had to be offered in the alternative policies; the authors only wrote that something called a policy has to be offered ***without*** mandatory arbitration provisions.

V. POLICYHOLDERS PROVIDING NOTICE AND REPORTING THEIR CLAIMS IN HALF THE TIME

Florida Statute Section 627.70132 pre-existed the 2022 Florida Legislature. If anything, Section 627.70132, titled *Notice of property insurance claim*, is a product of the property insurers' pre-2022 agenda. The "notice" to which the title of this statute refers may be confusing at first reading. The reference is to notice or reporting of a property insurance claim that is provided to the property insurer by the insured or someone acting for an insured.

Section 627.70132 continues to operate with respect to claims, "reopened claims" or previously closed claims that have been reopened at an insured's request for additional costs for previously reported losses,[67] and "supplemental claims" or claims for additional costs from the same peril that caused the previously reported loss or from repairs or replacement of the loss.[68]

Section 627.70132 previously established reporting periods for claims, reopened claims, and supplemental claims. The statute established the applicable reporting periods by specific reference to "the terms of the policy[.]"[69] If a claim was not reported within the period established by the statute, that claim would be barred.[70]

The reporting periods for all claims were cut in half, effective December 16, 2022. By the terms of the amended Section 627.70132 claims and reopened claims would be barred "unless notice was given to the insurer in accordance with the terms of the policy within 1 year after the date of loss."[71] The previous period within which to report such claims was 2 years.

Similarly, a supplemental claim is barred by the newly amended statute "unless notice of the supplemental claim was given to the insurer in accordance with the terms of the policy within 18 months after the date of loss." [72] The previous reporting period for supplemental claims had been 3 years.

Section 627.70132 is really a statute of limitations except that claims are barred when they are not reported to the property insurance carrier within the statutorily prescribed period regardless of whether the claims are filed in court, or not. The question becomes

67. Fla. Stat. § 627.70132(1)(a) (West, Westlaw current with laws and joint resolutions in effect from the 2022 second reg. sess. and spec. A, C and D sess's of the Twenty-Seventh Legis.).

68. Fla. Stat. § 627.70132(1)(b) (West, Westlaw current with laws and joint resolutions in effect from the 2022 second reg. sess. and spec. A, C and D sess's of the Twenty-Seventh Legis.).

69. Fla. Stat. § 627.70132(2) (West, Westlaw current with laws and joint resolutions in effect from the 2022 second reg. sess. and spec. A, C and D sess's of the Twenty-Seventh Legis.).

70. *Id.*

71. *Id.*, as amended by 2022 Fla. Sess. Law Serv. Ch. 2022-271, § 16 (S.B. 2-A) (WEST), effective December 16, 2022.

72. *Id.*

two-fold, whether and why the property insurance company needs such statutory consideration when the property insurer's own policy almost certainly addresses the time required for notice of a claim under that policy. The answers are unclear, at best, from a legal point of view.

VI. A FEW POLICYHOLDER PERKS AND PROTECTIONS

Over all, the 2022 Florida Property Insurance laws included a few protections for policyholders. In general terms, these changes are to time periods and triggers for property insurance companies to investigate and pay claims. These few changes are reflected in what the statutes call a Homeowner Claims Bill of Rights.[73]

Specifically, from January 1, 2023 until March 1, 2023, Subsection 627.70131(3)(d) provided that the property insurer had to notify its policyholder that she or he could request a copy "of any detailed estimate of the amount of the loss generated by an adjuster's insurer."[74] After March 1, 2023, the same statute provides that within 7 days after a "detailed estimate of the amount of the loss" is "generated by an insurer's adjuster," the property insurer must send a copy of the estimate to its policyholder.[75] A request from the insured is no longer required to trigger the insurer's action.

By amending one statute titled *Insurer's duty to acknowledge communications regarding claims; investigation*,[76] and another statute which is included in the Florida Unfair Claim Settlement Practices Act[77] which, it will be recalled, is so far still made actionable by Florida's Bad Faith Statute even against property insurers,[78] Florida property insurance laws were changed slightly in favor of policyholders with respect to paid, unpaid, and denied claims.

Since the December 2022 amendment to the first statute, a property insurer must pay all or some of a claim, or deny the claim, within 60 days after it receives notice of the claim unless the nonpayment is for reasons beyond the control of the insurer.[79] Payments made after the 60 days, or after a period extended by order of the Office of Insurance Regulation, shall bear interest.[80]

Since the December 2022 amendment to the second statute, property insurers must pay *undisputed* full or partial benefits within 60 days "after an insurer receives notice of a ***residential*** property insurance claim, determines the amounts of partial or full benefits, and agrees to coverage, unless payment of the undisputed benefits is prevented by factors beyond the control of the insurer[.]"[81] To be clear, the language of the Unfair Claim Settlement Practices Act was untouched in 2022, except for changing the time to 60 days from the previous 90 day timeframe within which "to pay ***undisputed*** amounts of partial or full benefits owed under first-party property insurance policies[.]"[82]

VII. CONCLUSION

Florida laws were enacted and amended in 2022 that changed the framework of insurance law, and in particular insurance bad faith law, in ways that benefit

73. Fla. Stat. § 627.7142, *Homeowner Claims Bill of Rights*, as amended by Fla. Sess. Law Serv. Ch. 2022-271, § 20 (S.B. 2-A) (WEST), effective March 1, 2023.

74. Fla. Stat. § 627.70131(3)d), amended by 2022 Fla. Sess. Laws Serv. Ch. 2022-268, § 15 (C.S.S.B. 2-D) (WEST), effective January 1, 2023.

75. Fla. Stat. § 627.70131(3)(e), renumbered and amended by Fla. Sess. Law Serv. Ch. 2022-271, § 15 (S.B. 2-A) (WEST), effective March 1, 2023.

76. Fla. Stat. § 627.7031(7)(a), amended by Fla. Sess. Law Serv. Ch. 2022-271, § 15 (S.B. 2-A) (WEST), effective March 1, 2023.

77. Fla. Stat. § 626.9541(1)(i)4, amended by 2022 Fla. Sess. Law Serv. Ch. 2022-271, § 7 (S.B. 2-A) (WEST).

78. Fla. Stat. § 624.155(1)(a).

79. Fla. Stat. § 627.7031(7)(a), amended by Fla. Sess. Law Serv. Ch. 2022-271, § 15 (S.B. 2-A) (WEST), effective March 1, 2023.

80. *Id.*

81. Fla. Stat. § 626.9541(1)(i)4 (emphasis supplied), as amended by 2022 Fla. Sess. Law Serv. Ch. 2022-271, § 7 (S.B. 2-A) (WEST).

82. Fla. Stat. § 626.9541(1)(i)4 (emphasis supplied).

only property insurers. Whether these changes will last in Florida depends in large measure on whether courts will hold them to be constitutional.

Beyond the borders of Florida, the appeal of these sorts of statutory changes may be irresistible to property insurers in other jurisdictions. Beyond geography, the appeal of changes like those made for property insurers by the 2022 Florida Legislature may be irresistible to many other insurers which issue other lines of insurance.

The resulting situations are foreseeable, perhaps, but they have not yet taken place. If and when they do, this article will serve as advance notice, and as a warning.

Insurance Litigation Reporter **Periodical**

West
ISSN 0744-1045
620 Opperman Drive
Eagan, MN 55123