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March 17, 2023

Prof. Michael Green
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Re: Preliminary Liaison Comments for Council Draft No. 4; Sect. 20A. of ALI Rest. of the Law Third. Torts: Misc. Prov.

Dear Michael:

Thank you for the opportunity to provide input regarding Section 20A: Bad-Faith Performance of First Party Insurance Contract while the ALI's deliberations and drafting efforts are still in process. I am pleased to serve as the insurance industry liaison to the ALI Restatement of the Law Third, Torts: Miscellaneous Provisions project.

I am reviewing all of Section 20A in Council Draft No. 4 (December 2022) and anticipate having further comments. Meanwhile, I write to raise two major concerns and to urge that the upcoming May 2023 ALI Annual meeting agenda not include Section 20A for action by the ALI membership, to allow time for adjustments addressing these concerns:

1. the grave instability of the first-party property insurance market in places such as Florida, Louisiana and California, and the need for legal standards that will promote a viable property insurance marketplace, particularly in areas that have seen substantial insurance fraud and litigation abuse, along with catastrophic weather and climate-related losses; and

2. the need for Section 20A to address the broad range of commercial and specialized first-party coverages, and the variations in the law based on the nature of first-party cover, policyholder sophistication, and jurisdictional approaches.

As you know, the ALI's guidelines for Restatements contain several guiding principles, one of which is to address the impact of any proposed rule.[1] Thus, the crisis in the first-party insurance

[1] In discussing the four principal elements of a Restatement, the ALI identifies, as the fourth element, the need to "ascertain the relative desirability of competing rules. Here, social science evidence and empirical analysis can be helpful." *A Handbook for ALI Reporters and Those Who Review Their Work,* First Ed. 2005, Revised 2015 at 5.

marketplace is directly relevant as you, along with the Advisors, Members' Consultative Group, ALI Leadership and Council, continue to work on – and improve – Section 20A. Equally important is the provision of a complete view of first-party insurance products and agreements, case law relevant to first-party bad faith, and the competing interests at stake in the next version of Section 20A. These changes and additions are important to drafting a stronger Restatement, and to allowing informed consideration of Section 20A by the ALI members.

1. **Proposals for Section 20A Must Recognize Portions of the First-Party Property Market Are in Crisis.**

At the moment, Section 20A overlooks the crisis in availability and affordability in important sectors of the property insurance market. Section 20A recognizes that insurance contracts "play an important role in the American economy by transferring and distributing risk." What is missing, however, is a discussion of the legal system's role in maintaining a healthy insurance market. As state regulators, legislators, and many courts recognize, a legal climate hostile to insurers or that fails to rein in legal system abuses or account for other man-made elements (e.g., increased regulation that impacts rate freedom in a competitive market) that artificially inflate insurance costs will not foster stability or offer incentives for insurers to remain in the market, which may limit the availability and affordability of insurance for all policyholders.

While heated rhetoric is not helpful, there is no easy way to temper the grim reality that major first-party insurance markets are in crisis. This starkly reminds us of the need for balance in legal rules governing insurance relationships, particularly bad faith claims. The state of property coverage markets in Florida, Louisiana and California provide a cautionary tale.

Florida:

"The Florida home insurance market has spent most of 2022 tumbling toward collapse . . .." *Can lawmakers save the collapsing Florida home insurance market? The crisis in the Florida insurance market,* https://www.bankrate.com/insurance/homeowners-insurance/florida-homeowners-insurance-crisis/. "Florida accounts for only 9 percent of the country's home insurance claims but 79 percent of its home insurance lawsuits, many of them fraudulent." *Id.* Further, "because of the fraudulent lawsuits and the high overall claim risk in Florida, insurance companies have faced two consecutive years with net underwriting losses over $1 billion." *Id.* Now, the devastating damage from Hurricane Ian will likely put further strain on Florida insurers and could worsen the crisis. *Id.*

Louisiana:

Louisiana declared an emergency situation in its property insurance market, reflecting the important public interest in maintaining a business environment where insurers can reasonably operate. In February, the governor of Louisiana signed into law a bill that will inject $45 million into an incentive fund for property insurers as an emergency measure to stabilize the market. *Louisiana governor signs two insurance bills into law,* Insurance Business America *(Feb. 8, 2023)* https://www.insurancebusinessmag.com/us/news/breaking-news/louisiana-governor-signs-two-insurance-bills-into-law-435549.aspx. The bills, while insufficient to solve the overriding issues, are intended to help attract new insurance business to the state, encourage existing insurers to continue to write new property insurance policies, and stabilize insurance rates.[2]

California:

Many commenters believe the California property insurance market has headed into a crisis. There, the combination of "ballooning regulation with increasing wildfire risk" (and mudslide, wind damage and flooding risk) has meant that insurance companies' incentive to provide policies in California is waning dramatically. "The Golden State is facing 'an untenable situation, potentially affecting millions of California homeowners'" reports PropertyCasualty360. *Could California be the next state to face an insurance crisis?* PropertyCasualty360 Feb. 16, 2023 found at: https://www.propertycasualty360.com/2023/02/16/could-california-be-the-next-state-to-face-an-insurance-crisis/.[3]

As these illustrations show, the property insurance system depends on a delicate balance. That balance requires a commercially viable environment for insurers to keep insurance available and rates affordable for the public. Insurance fraud and excessive litigation are important factors making certain property insurance markets unwelcome and costly for insurers -- driving up premiums for policyholders and threatening the availability of insurance. These factors must be included if the ALI's work is to be responsive to the needs of property insurance policyholders and insurers alike.

The topics under consideration by the ALI in Section 20A are the subject of emergency legislative sessions and regulatory action in multiple states right now.

Insurance Fraud:

One key consideration is the need to promote legal rules and standards that protect the interests of insurers, policyholders and society in ensuring that only valid claims are paid. Commentators note that Florida's history of roofing scams and fraud, as well as a legal system that invites litigation (discussed below), has generated that state's current crisis. The roofing scam fraud in Florida is illustrative of how the cumulative effect of fraud can affect the insurance market. As one news article reported:

> An avalanche of lawsuits fueled by roofing scams has plunged Florida into a property insurance crisis that has forced dozens of companies to shut their doors, drop customers, raise rates or flee the state. It's a slow-motion collapse that lawmakers have known about for years but have failed to fix.

[2] *See also* https://insurancenewsnet.com/oarticle/la-passes-tourniquet-to-stop-bleeding-in-insurance-crisis; https://apnews.com/article/louisiana-climate-and-environment-business-473290f67742917fa41340de4307aef7.
[3] *See also The California Insurance Crisis,* California Lawyers Association, found at: https://calawyers.org/real-property-law/the-california-insurance-crisis/.

> The mess has made it harder for people to protect their homes in a state that is frequently battered by high winds, hard rains and hail and is increasingly vulnerable to climate change.

Florida lawmakers scramble to fix a property insurance crisis before hurricane season – Fl Consumer Watch NBC News (May 21, 2022) (Roofing scams targeting insurance companies are leading to higher bills and fewer options for homeowners, officials say.).[4]

Despite the well-documented insurance fraud contributing to market problems in Florida, Section 20A does not mention the problem, what insurance companies must do to ensure they are paying only valid claims, and the adverse consequences to policyholders in the higher cost of insurance and unavailability of coverage that results from the payment of inflated or invalid claims.

Detecting insurance fraud is a significant aspect of insurance operations. Standards for claim-handling – particularly for bad faith claims based on allegations of improper claim handling or unjustified delay in payment -- must take account of the time and the effort required for an insurer to detect and weed out fraudulent claims. These factors need to be incorporated into Section 20A.

Indeed, in response to the current crisis, Florida has passed insurance law and legal system abuse reform that addresses the adverse consequences to insurance consumers of "social inflation" and *reverses* the very rules being proposed in Section 20A -- provisions that contributed to the state's insurance crisis in the homeowners and property insurance markets.[5] Among other measures, new Florida law requires a court finding of breach of contract before a policyholder can sue a property insurance company for bad faith based on how the insurance company resolved a homeowners or commercial property claim.

Legal System Abuse:

A related factor driving the property insurance crisis in key states is that the incidence of legal system abuse is on the rise. For instance, a Houston-based law firm recently was found to have filed dozens of baseless lawsuits against insurers falsely alleging hurricane-related losses.

[4] A Florida official explained: "Scam roofing schemes are driving up insurance rates for every Florida family and plaguing our state." *Florida DFS Arrests Two Roofing Contractors in Insurance Fraud Scheme,* Roofing Contractor (March 18, 2022) https://www.roofingcontractor.com/articles/96801-florida-dfs-arrests-two-roofing-contractors-in-insurance-fraud-scheme (reporting, inter alia, that roofing contractors had been "instructing their sales employees to solicit insured homeowners with a promise they can get them a new roof without paying the required homeowner's deductible").

[5] The new Florida legislation can be found here: https://flsenate.gov/Session/Bill/2022A/2A/BillText/Filed/PDF. Additionally, the legislature created a backstop reinsurance fund, the "Florida Optional Reinsurance Assistance Program ("FORA"), to help stabilize the property insurance market by permitting eligible insurers to purchase reinsurance coverage from the State at a cap of $1 billion. https://www.jdsupra.com/legalnews/florida-insurance-reform-special-6272057/ ; *see also* https://floir.com/newsroom/archives/item-details/2022/07/27/florida-establishes-temporary-reinsurance-arrangement-for-insurers-facing-potential-financial-stability-rating-downgrades. The legislature also passed a bill regulating contractor activities that fed insurance fraud. See https://www.flsenate.gov/Session/Bill/2021/76/BillText/er/PDF.

https://www.claimsjournal.com/news/southcentral/2023/01/23/314890.htm (reporting that 1,642 hurricane lawsuits were filed over four days, which included duplicate filings and claims for property damage not in the path of the hurricane).

Actions taken in an attempt to coerce insurers into paying invalid or inflated claims come at the expense of all policyholders, and to the market overall. The interests of the public are not advanced by increasing pressure on and leverage over insurers seeking to investigate and evaluate the legitimacy of first-party property claims. States grappling with the property insurance crisis have recognized how the litigation climate contributes to the property insurance challenges, and that legal reform may help alleviate some well-entrenched problems. For instance, a Triple-I analysis of Florida Office of Insurance Regulation and National Association of Insurance Commissioners data noted that litigation in the state is fueled by "one of the most generous attorney-fee mechanisms in the country, sometimes resulting in insurers paying policyholders' attorney fees far greater than the award paid to policyholders." See https://www.iii.org/press-release/triple-i-extreme-fraud-and-litigation-causing-floridas-homeowners-insurance-markets-demise-062322 In response, Florida has now passed insurance law reform that repeals the one-way attorney fee provisions related to property insurance claims (so each party is responsible for payment of their own attorney fees in a property insurance claims lawsuit),[6] and is considering new legislation that would repeal the one-way attorney fee provisions across all lines.

2. <u>The Section 20A Black-Letter Rules, Comments and Reporters' Notes Need Greater Balance and Transparency.</u>

These market realities underscore why it is important not to swing the pendulum too far in one direction in proposing and, in some instances, creating new legal standards for first-party bad faith tort claims and remedies.

Courts and commentators recognize there are undesirable consequences to lowering the threshold for bad faith exposure and stiffening the penalties for violations. A proposal that creates immediate, easy liability in the event of an insurer not paying claims, or for not paying claims quickly, could lead to pressure to simply pay questionable claims rather than to utilize investigative tools to determine if there are valid grounds for payment, effectively building the opportunity for fraudulent claims to go undetected and unchallenged. Insurers need time to investigate claims, and doing so benefits insureds and insurers. A legal rule that protects insurers' ability to investigate suspect claims and deny fraudulent claims keeps down the cost of insurance for consumers because it improves the prospects that only valid claims are paid.

The goals of the ALI Restatement process, and the state of the property insurance market today, require a balanced approach to first-party bad faith issues that incorporates the need to combat fraud and litigation abuse. To provide transparency and balance, Section 20A should recognize and articulate the benefits to consumers and the insurance system of providing insurers the time

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[6] *See* https://www.jdsupra.com/legalnews/florida-s-property-insurance-reform-the-1269772/.

and ability to weed out suspect claims, and to require documentation of loss before paying a covered claim. Section 20A should be amended to address these considerations.

In addition to the black-letter rule, the Comments and Reporters' Notes deserve further review. One illustration of the need for improvement is in the factors laid out in Comment *c* referring to the "special nature of insurance" and citing only factors said to support a bad-faith tort. Comment *c* implies that insurers are intent on wrongfully denying claims and that all claims are valid, without acknowledging the mutual obligations of the contracting parties to act fairly and in good faith. If that balance is absent, the insurer will "face[] a 'Hobson's choice' of either paying [the unsubstantiated] claim, or exposing itself to bad faith liability." *United States Fire Ins. Co. v. Icicle Seafoods, Inc.*, 2022 WL 17424295 (9th Cir. Dec. 6, 2022). The serious problems of fraud and litigation abuse – issues contributing substantially to the current property insurance crisis – are overlooked in Comment *c*.

3. **Section 20A Also Lacks Necessary Consideration of Commercial and Specialized First-Party Insurance**

A second topic I recommend Section 20A address is commercial property insurance and specialized first-party insurance. "First-party insurance" encompasses a much wider array of insurance products than Section 20A identifies. For example, Comment *a* describes "first-party" insurance as insurance a person purchases to protect themselves "or their family" from loss.[7] It cites as examples "health insurance, life insurance, and disability insurance."

These examples are all personal-lines insurance products, typically purchased by individuals. Comment *a* next explains that some insurance policies are hybrids, encompassing both first-party and third-party losses. In doing so, however, Comment *a* again points only to personal lines coverages, citing the examples of "standard-form" automobile and homeowners' policies.

Personal lines products purchased by individual customers are one type of first-party insurance coverage. A significant part of the first-party marketplace, however, is for commercial insureds, including not only commercial property insurance covering the physical plant of major manufacturers, pharmaceutical companies, energy companies, health care corporations, agricultural industries and more, but also an array of other more specialized coverages such as inland marine insurance, crime insurance, builder's risk insurance, aviation hull insurance, cyber insurance, and commercial trucking coverage. Businesses purchase commercial first-party protection in hybrid policies, such as cyber insurance coverage, and in first-party monoline coverage such as cargo or ocean marine shipping coverage.

By limiting the discussion solely to coverage purchased by individual consumers, Section 20A inadvertently fails to explain that first-party insurance takes myriad forms and is purchased by multi-national companies, often facilitated by large insurance brokerage firms. Accordingly, Section 20A needs to consider and convey the breadth and complexity of first-party insurance,

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[7] Comment *a* to Section 20A, titled "History, terminology, scope, and cross-reference," introduces the concept of bad-faith performance of a first-party insurance contract.

especially as it evaluates a tort of bad faith that might apply to *all* first-party property insurance products, industry-specific products, and the broad range of policyholders purchasing those coverages, including large global business entities with significant negotiating power. There also should be more discussion of how, unlike third-party insureds, first-party policyholders do not face the prospect of unfunded costs of defense or adverse rulings finding liability to others.

A balanced presentation of the issues should include an even-handed discussion of the competing considerations at stake. Comment *c*, titled "The special nature of insurance contracts," sets forth what are described as "exceptional aspects" of any insurance agreement that allegedly justify differential treatment of an insurance policy from other contracts with respect to permitting bad faith claims. Characterizing these issues as "realities," Comment *c* and the corresponding Reporters' Note assume that all policyholders are at a bargaining disadvantage — and thus in need of a tort claim and the potential for further recovery outside the insurance contract to achieve a better outcome in insurance disputes. Those assumptions then form the basis for the conclusion that a tort of first-party bad faith is justified because of: (1) vast disparity of bargaining power; contracts of adhesion; (2) public nature of insurance; (3) risk transfer and distribution; (4) reliance and reasonable expectations of the insured; (5) economic fragility of insureds; and (6) lack of adequate incentives, absent tort liability. These considerations are presented as though they applied to all first-party insurance relationships, overlooking (i) the reality that the vast majority of first-party claims are paid without litigation or dispute; and (ii) for the commercial and specialized first-party insurance market, very different "realities" are in play.

To advance the ALI's goal of transparency, Comment *c* and the corresponding Reporters' Note should include a discussion of the considerations that led 13 states to *reject* a first-party bad faith tort. Comment *c*, as with Section 20A as a whole, suggests that first-party insurance policies generally are standard-form contracts of adhesion, and emphasizes that "some insureds are economically fragile and vulnerable." By focusing solely on the personal-lines consumer, Comment *c* omits much of the first-party insurance market, which does not align with the description of the first-party consumer in Comment *c*.[8]

Many first-party insurance purchasers are not economically fragile or vulnerable, do not lack bargaining power, and do not enter contracts of adhesion. They may be powerful, sophisticated policyholders who employ in-house risk management professionals to oversee and negotiate insurance solutions. The Risk and Insurance Management Society (RIMS) is a professional association of over 10,000 risk management professionals who manage risk for their organizations through various mechanisms, including securing insurance.[9] These professionals often operate in specialized industries (such as biotechnology, ocean marine, pharmaceuticals, robotics, aerospace or a host of others) where they are highly knowledgeable about their own organization's risk. Besides in-house resources, many policyholders also engage leading

[8] Also, insurers are subject to a variety of state-specific regulatory requirements including reporting requirements, data calls, and market conduct exams designed to protect consumer interests. In addition, many state insurance departments have created consumer complaint processes whereby a policyholder can file a complaint with the department, which can then investigate an insurer's conduct.

[9] *See* RIMS, https://www.rims.org (last visited March 17, 2023).

brokerage houses to negotiate their policies and customize coverage options.[10] The 100 largest U.S. insurance brokerage firms have revenues that range from tens of millions of dollars to over $6 billion annually.[11] Leading brokers “exemplify creative risk solutions, exceptional customer service and a profound knowledge of the industry.”[12] Global broking powerhouses such as Marsh, Aon and Willis Towers Watson develop their own hybrid and monoline property insurance coverage forms and offer their clients bespoke coverage solutions designed to address the particular risks of importance to their corporate policyholders.[13] This information about the sophistication and power of first-party insurance purchasers in the commercial and specialized markets,[14] and how first-party insurance can be a business tool crafted to finance corporate risks particular to industry sectors, is missing from Section 20A.

* * * *

Thank you in advance for considering these comments about the property insurance crisis in important markets, the impact of litigation-related costs on those markets, and the breadth and complexity of what may be encompassed within “first-party insurance” products. These concerns

[10] E.g., Autumn Heisler, Gallagher Power Broker John Chino Builds Programs Based in Trust and Knowledge, Risk & Ins. (June 19, 2020), https://riskandinsurance.com/gallaghers-john-chino-builds-programs-based-on-trust-and-knowledge/
(recognizing that brokers “work tirelessly in assisting in creating strategies alongside their clients, using technical skills, actuarial and statistical data, a deep understanding of the market and communication”).

[11] BI Top 100, Bus. Ins. (Jan. 1, 2020), https://www.businessinsurance.com/article/20190103/NEWS06/912325911/Business-Insurance[1]2018-Data-Rankings-BI-Top-100-brokers-US-business.

[12] Autumn Heisler, 84 Insurance Brokers You Haven’t Heard the Last Of, Risk & Ins. (May 15, 2020), 84 Insurance Brokers You Haven't Heard the Last Of : Risk & Insurance (riskandinsurance.com) (Risk & Insurance magazine recently named 190 brokers as 2020 Power Broker winners and finalists, 84 of whom were under the age of 40, making them Risk & Insurance Rising Stars.)

[13] E.g., Aon, Insurance for M&A: A Coming of Age and an Exciting Future Ahead 3 (2019), https://www.aon.com/inpoint/library/white-papers/insuranceforma.jsp (“Aon has led the way in developing bespoke insurance solutions to meet the M&A industry’s needs for the past 20 years.”); Construction, Marsh, https://www.marsh.com/uk/industries/construction-insurance.html (last visited Jan. 31, 2023) (offering to design programs that align to strategic objectives, optimize capital, and protect business now and into the future).

[14] The Comments and Reporters’ Notes in Section 20A should also acknowledge that concerns about differential bargaining power may not apply if a policy is procured by a corporate policyholder that is a sophisticated commercial entity. *E.g., Six Flags Inc. v. Westchester Surplus Lines Ins. Co*., 565 F.3d 948 (5th Cir. 2009) (where insured’s brokers drafted the policy language, no presumption applied against insurer); *Eagle Leasing Corp. v. Hartford Fire Ins. Co*., 540 F.2d 1257, 1261 (5th Cir. 1976) (finding significant that the policyholder was “a corporation of immense size, carrying insurance with annual premiums in six figures, managed by sophisticated business men, and represented by counsel on the same professional level as the counsel for insurers").

are fundamental to ensuring Section 20A reflects the realities of the marketplace, provides balanced rules, and includes a fuller explanation of how states address first-party bad faith.

I look forward to our continued work toward these goals.

Very truly yours,

Laura A. Foggan

cc: Eleanor Barrett, ALI Deputy Director
The Hon. Diane P. Wood, ALI Director Designate
Professor David F. Levi, ALI President
ALI Council Members

The Newspaper for the Future of Miami

Fixing Florida property insurance mess a slow process

Written by Monica Correa on January 18, 2023

After the two bills aimed at fixing the property insurance crisis in Florida, experts are hopeful the new measures are a step in the right direction, but the effects will still take time.

Florida Governor Ron DeSantis signed senate bill 4-A and senate bill 2-A on the special session last December. The first bill provides $750 million for disaster relief to Floridians affected by Hurricane Ian and Hurricane Nicole in the form of tax reliefs. The second bill is a property insurance reform that is aimed at stabilizing the market by increasing competition and strengthening consumer protections.

SB 2-A eliminates one-way attorney fees for property insurance claims, in efforts to disincentivize lawsuits and reduce excessive litigation, which is meant to reduce premiums for homeowners. The bill would also enhance the Office of Insurance Regulation's ability to conduct market examinations of property insurers to prevent abuse of the appraisal process. It would reduce timeless for insurers to get payments to policyholders.

The main issue responsible for the Florida insurance industry long being in a parlous state is excessive litigation, said Jerry Theodorou, director of Finance, Insurance and Trade Policy for the R Street Institute. “They are good measures,” he said of the bills, “mainly because they came at the abuses of the legal system, which has been responsible for the artificial inflation of claims, which has led to the increases in premium.”

Unfortunately, these measures will take time to go through the system, he added, “and there is opposition from some of the law firms and the contractors that have benefited from taking advantage of those things, but in the long run, that’s what needed to be done.”

The Florida home insurance market had a difficult 2022, said Jennifer Gimbel, home insurance expert at Policygenius. Florida filed more than 535,000 claims since Hurricane Ian, totaling an estimated $5.9 billion in insured losses, as of last October. The average cost of property insurance rose 39% higher than the national average, said a Policygenius analysis, which predicted the market to continue to rise.

“Expensive natural disasters, fraudulent roof damage lawsuits, and company bankruptcies have led the market to the brink of collapse,” said Ms. Gimbel. “Homeowners are dealing with record-high insurance rates and limited insurance options outside of Citizens Property Insurance.”

Less choice for Florida homeowners will push them to seek coverage from Citizens Property Insurance Corporation, the state-ran insurance company, Florida’s source of last-resort insurance. “So, the market is going to be under pressure,” said Mr. Theodorou.

Another factor contributing to the pressure is reinsurance, he said. Reinsurance is the insurance that insurance companies buy “to protect their balance sheets.

And it has gotten a lot more expensive, so those costs are going to be passed down to the policyholder, and some of the smaller insurance companies may not be able to afford to buy adequate insurance, setting some of them to go out of business. So, it's a shrinking market."

Since 2020, 15 insurance companies declared insolvency in Florida, including FedNat Insurance, Southern Fidelity, Lighthouse, Avatar Property and Casuality, St. Johns and Weston Property and Casuality. Florida filed 75% of all the property claims lawsuits of the country in the last two years, according to the Insurance Information Institute.

Fortunately, continued Mr. Theodorou, Citizens Insurance is in good shape, with their expense ratio — the total expenses of a company divided by the premiums — at about 14% or 15%, compared to other insurance companies, whose expense ratio is at an average of 30%.

"Because insurance companies [need to] protect their balance sheet, they limit the amount of what they can lose in one event," he said. "If another Hurricane Ian hits, it will mean that more of those small companies will fail."

In an analysis of Florida-only companies, Mr. Theodorou did, they retain only about 35% of the coverage risk and 65% is given to reinsurance companies. "So, if the price of reinsurance go up 25% or 35%, it makes it very expensive for them and it strains their financials. If they're hit by another massive hurricane, it could mean an existential threat of going out of business."

Nonetheless, Florida homeowners are not likely to see a decrease in home insurance rates yet this year, said Ms. Gimbel, but due to the new laws put in effect late last year, "we could start seeing more insurance companies entering the market."

Another draw for insurance companies to return to Florida is the newly created Florida Optional Reinsurance Assistance Program — she added — which established a

$1 billion fund to bail out insurers after a major hurricane or natural disaster.

“The more home insurance companies willing to write policies in the state, the more likely homeowners will be able to find a policy with competitive rates and coverages and stop having to rely on Citizens,” she said.

Previously, the Florida legislation passed SB 2-D in May, with $2 billion in reinsurance relief, which required insurance companies to file a supplemental rate filing once enrolled in the program to provide relief to policyholders. It prohibited insurance companies from denying coverage based on the age of a roof if the roof is less than 15 years old or if the roof is determined to have at least five years of useful life remaining, according to Florida legislation. It also required companies to provide reasonable explanation if they were to deny a claim, created a new standard for application of attorney fee multipliers, and limited the assignment of attorney’s fees in cases.

Another bill passed in May was HB 7065, aimed at the insurance assignment agreements, setting “requirements for the execution, validity and effect of such agreements, and creating a formula that will determine which party, if any, receives an award of attorney fees should litigation related to an assignment agreement result in a judgment,” according to a press release by the state.

The new series of laws also require Citizens policyholders who qualify for a private policy to drop the Citizens policy and go with a private insurer. “So, in essence,” said Ms. Gimbel, “homeowners could be forced to purchase a more expensive private policy this year, and for homeowners who stay with Citizens, they will be required to purchase flood insurance, in addition to their home insurance policy, regardless of their home’s flood risk. This requirement will be phased in over the next four years, starting April.”

2/10/23 Tampa Bay Bus. J. (Fla.) (Pg. Unavail. Online)
2023 WLNR 5162711

Tampa Bay Business Journal

February 10, 2023

Florida property insurance market braces for another tough year

Christina Georgacopoulos

Last year was a turning point for the Florida insurance market.

Property insurance companies based in the Sunshine State accounted for five of eight U.S. insurers that were liquidated last year, according to an S&P Global Market Intelligence report.

The liquidated companies include Tampa-based Avatar Property & Casualty Insurance Co., Tallahassee-based Southern Fidelity Insurance Co., Orlando-based St. Johns Insurance Co., and two South-Florida based companies, Weston Property & Casualty Insurance and FetNat Insurance.

Southern Fidelity had the most assets among the liquidated companies when it was appointed to receivership in June, and around 78,000 policies in Florida, according to the report.

The Florida Office of Insurance Regulation reiterated how the crisis of excessive litigation is largely to blame for the state's insurance market in its latest annual property insurance stability report published in January.

In 2021, Florida insurers paid roughly $3 billion in litigation costs, according to FLOIR. The number of notices of intent to initiate litigation peaked at around 5,400 in September last year versus 2,700 notices in 2021.

Florida lawmakers passed legislation to curb excessive litigation for property insurers during a special session late last year, but those reforms will fail to provide immediate relief to the market, according to Mark Friedlander, a director at the Insurance Information Institute. Those legislative changes won't apply to existing policies, including for homeowners who were battered by Hurricane Ian last fall, he said.

"Insurers aren't expecting for the spigot to turn off all of the sudden ... the market doesn't expect to see much positive movement at all this year," Friedlander said.

Between July and December last year, 24 insurers were referred to the FLOIR stability unit for enhancing monitoring due to a variety of reasons, including requesting a rate increase greater than 15% or to nonrenew more than 10,000 policies, and for filing financial reports that demonstrated unsound condition.

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---- Index References ----

Company: ST. JOHNS INSURANCE COMPANY, INC.; Avatar Property & Casualty Insurance Co; INSURANCE INFORMATION INSTITUTE INC.; Florida Office of Insurance Regulation

Industry: (Financial Services (1FI37); Household Insurance (1HO71); Insurance (1IN97); Insurance Brokerage (1IN33); Insurance Industry Highlights (1IS93); Personal Property & Casualty Insurance (1PE46); Property & Casualty Insurance (1PR21))

Region: (Americas (1AM92); Florida (1FL79); North America (1NO39); U.S. Southeast Region (1SO88); USA (1US73))

Language: EN

Other Indexing: (Southern Fidelity Insurance Co.; Weston Property & Casualty Insurance; FetNat Insurance; FLOIR; St. Johns Insurance Co.; Avatar Property & Casualty Insurance Co.; Insurance Information Institute; Florida Office of Insurance Regulation)

Word Count: 323

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2/21/23 Terms + Conditions (Blog) (Pg. Unavail. Online)
2023 WLNR 6542184

Terms + Conditions (Blog)

February 21, 2023

Louisiana Insurance Regulator IssuesCease & Desist Orderto Texas Law Firm

Jeff Dunsavage

Feb 21, 2023

Louisiana Insurance Commissioner Jim Donelon last week issued a cease-and-desist order against a Houston-based law firm, accusing it of fraud involving potentially hundreds of hurricane-related claims in his state.

"The size and scope of McClenny, Moseley & Associates' illegal insurance scheme is like nothing I've seen before," Donelon said in a press release . "It's rare for the department to issue regulatory actions against entities we don't regulate, but in this case, the order is necessary to protect policyholders from the firm's fraudulent insurance activity."

According to Donelon, the law firm filed more than 1,500 hurricane claim lawsuits in Louisiana over the span of three months last year.

Sean Kevelighan Discusses Legal System Abuse

The Louisiana property insurance market has been deteriorating since the state was hit by record hurricane activity in 2020 and 2021, to the extent that 11 insurers that write homeowners coverage in Louisiana were declared insolvent between July 2021 and September 2022. Insurers have paid out more than $23 billion in insured losses from over 800,000 claims filed from the two years of heavy hurricane activity. The largest property-loss events were Hurricane Laura (2020) and Hurricane Ida (2021).

In addition to driving insurer insolvencies, the growing losses have caused a dozen insurers to withdraw from the market and more than 50 to stop writing new business in hurricane-prone parishes.

Louisiana's troubles parallel those of another coastal state, Florida, but there are significant differences. Florida's problems are largely rooted in decades of legal system abuse and fraud , whereas Louisiana's have had more to do with insurers being undercapitalized and not having enough reinsurance coverage to withstand the claims incurred during the record-setting hurricane seasons of 2020 and 2021. In general, Louisiana insurers have not experienced the level of excessive litigation that Florida insurers have faced.

"It now appears some trial attorneys are trying to take a page out of the Florida playbook by engaging in litigation abuse against Louisiana property insurers," said Triple-I Director of Corporate Communications Mark Friedlander. "We commend Commissioner Donelon for quickly addressing these fraudulent practices."

According to reporting by the Times Picayune/New Orleans Advocate , an investigation by the Louisiana Department of Insurance found the Houston-based firm engaged in insurance fraud and unfair trade practices through Alabama-based Apex Roofing and Restoration and has faced accusations of potentially criminal behavior in courts across the state. In one such case, the paper reported , a woman testified that she had never intended to retain the law firm when she hired the roofing company to fix her hurricane-damaged roof.

"The firm told her insurance company that it represented her and even filed a lawsuit on her behalf, though she said she was unaware of it," the paper said.

Legal system abuse is a pervasive problem that contributes to higher costs for insurers and policyholders nationwide, as well as to rising costs generally, given the importance of insurance in development and commerce. Triple-I is committed to informing the discussion around this critical issue.

Learn More:

Hurricanes Drive Louisiana Insured Losses, Insurer Insolvencies

Florida Insurance Crisis Reforms Gain Momentum With Latest Proposal

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Company: NEWSTEX, LLC; Louisiana Department of Insurance

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Language: EN

Other Indexing: (Texas Law Firm; McClenny, Moseley & Associates'; Apex Roofing and Restoration; Newstex; Louisiana Department of Insurance)

Keywords: (Insurance Fraud); (Insurers and the Economy); (Legal Environment); (Regulation)

Word Count: 747

End of Document

Louisiana OKs $45 million to lure insurance companies. Will your premiums go down?

Lawmakers say more work lies ahead in regular session; Donelon says he'll push for money to fortify homes

BY: **GREG LAROSE** - FEBRUARY 3, 2023 5:28 PM

A damaged home is seen after Hurricane Laura passed through the area on Aug. 27, 2020 in Lake Charles. The hurricane hit with powerful winds causing extensive damage to the city. (Photo by Joe Raedle/Getty Images)

The Louisiana Legislature gave final approval Friday to a $45 million deposit from the state's general fund into an incentive fund meant to lure property insurers to the market. The vote brought to an end a five-day special session to address the state's insurance crisis, which has forced 120,000 households to obtain coverage from the state's property insurer of last resort.

Hurricane Ida in 2021 capped a two-year pummeling of the Louisiana coast following three major storms the year before. After Hurricane Ian shook the already-precarious Florida insurance market last year, the ripple effects have led policy writers with Gulf Coast exposure to leave the market or fold entirely.

The situation has forced tens of thousands of policyholders to buy last-resort coverage from the Louisiana Citizens Property Insurance Corp. Insurance Commissioner Jim Donelon has said the $45 million was needed to attract companies that can absorb policies from Citizens, whose customers are already seeing a 63% increase in premiums.

Donelon said Friday he believes there are between 75,000 to 80,000 "attractive" Citizens policies that incentivized insurance companies could take off its books. He expects 40,000 or so to come off within the next 12 months, similar to the rate after Hurricane Katrina in 2005 when the first iteration of the incentive program was created.

The commissioner said the entry of new insurers into Louisiana will benefit not just Citizens customers, who by law must pay premiums 10% higher than the market average, but also homeowners throughout the state.

"I think as companies write policies out of Citizens, they're going to want to write an equal number of policies to counterbalance that coastal exposure in central and north Louisiana," Donelon said, explaining the added competition would likely result in lower premiums.

Ahead of the 2020 hurricane season, which saw major storms Laura, Zeta and Delta strike Louisiana, the policy count for Citizens was down to about 35,000. Donelon's projections for the current incentive program would pare the Citizens load back down to that level, which an insurance department official said Friday is the threshold amount to keep the insurer of last resort solvent.

So what does the $45 million infusion mean for homeowners who have seen soaring premiums since the catastrophic hurricane seasons of 2020 and 2021? Is rate relief happening anytime soon?

Donelon acknowledged what lawmakers have said before and during the special session: the $45 million in grants is only the first step toward potentially bringing down homeowners' insurance rates.

What happened Friday

The lone area of dispute among lawmakers heading into the weekend was whether the conditions some wanted placed on companies with access to the $45 million could legally be added to the bill. The Senate Finance Committee removed three amendments Thursday that the House had added earlier in the week, but the full Senate restored two of them Friday.

One added back was a provision from Rep. Polly Thomas, R-Metairie, to place insurers that offer hail and wind coverage at the front of the line for the incentive cash. The other restored amendment, from Rep. Beau Beaullieu, R-New Iberia, creates reporting requirements for the state insurance department with details on the companies that are awarded incentive grants.

The only amendment not put back on the bill would have required 25% of the net premiums from new policies an insurer that accepts incentives writes come from the Citizens customer pool.

Lawmakers had questioned whether such requirements would be legal because they attach conditions to an appropriations bill. In Louisiana, any such provisions must be handled through separate legislation.

Donelon said he expects new insurers to exceed the 25% mark once they have access to the incentives. Companies can receive from $2 million to $10 million from the state program, and they must write double the amount given in new premiums.

The Senate gave unanimous approval to a bill from Rep. John Stefanski, R-Crowley, that prohibits executives and major shareholders of failed insurance companies from taking part in the incentive program through a new business.

Late concerns

Heading into Friday, there were some qualms among legislators regarding the insurance's department's rules for the incentive fund. Another concern was an adjustment made in the act that revived the incentive fund. Sen. Kirk Talbot, R-River Ridge, authored the bill, which updated the measure that created a similar fund after hurricanes Katrina and Rita in 2005.

One major difference between the current and earlier versions is that insurers who want to take part in the incentive program now must have a minimum capital requirement of $10 million. That's down from the $25 million basement established after the 2005 storms.

The minimum capital amount represents the assets an insurance company has on hand that could easily be converted to cash in order to satisfy claims.

Talbot, who chairs the Senate Insurance Committee, convened an informational hearing Friday where this matter and others were addressed. Officials with the Louisiana Department on Insurance were on hand to answer questions relative to the incentive program's rules

Referencing data from the insurance department, Talbot said a $25 million minimum capital requirement would be too prohibitive for insurers to consider doing business in Louisiana.

“Not realistic in today’s insurance market,” Talbot said.

Florida’s baseline is $15 million, he added, and $10 million would be more than adequate for Louisiana. Susan Gardner, Donelon’s chief of staff, confirmed that figure.

The wreckage of a car teeters on a buckled roadway in the wake of Hurricane Ian on Sept. 30, 2022 in Matlacha, Florida. (Photo by Win McNamee/Getty Images)

What’s next

With the governor’s signature, Donelon will issue a request for proposals from companies that want to take part in the incentive program by the end of the month. Ten have already expressed an interest, the insurance commissioner said, and five or six are already doing business in the state. That would mean they could start absorbing Citizens policies by the end of March, he said.

Another two or three companies not licensed in Louisiana that have asked about the incentive can now seek the reinsurance coverage needed to write policies here, according to Donelon.

Once insurers are vetted, the Joint Legislative Committee on the Budget will have the final say on whether they receive incentive grants.

For the regular session, Donelon said the Department of Insurance will get behind an effort to provide grants to homeowners in order for them to fortify their houses, ultimately lowering the risk to insurance and bringing down premium rates. Alabama launched a Fortified Home program in 2022 that offers grants of up to $10,000 to make roof improvements as well as window and door upgrades. Louisiana set up the framework for its own version last year.

Donelon did not provide a dollar amount when asked how much he thought a fortifying program would need, but said he would be willing to accept as much as lawmakers approved.

Another area Donelon said lawmakers would be asked to address is insurance reform. He mentioned that interests from the insurance, real estate and banking sectors are likely to recommend a package of proposals taken from ones the Florida Legislature adopted in a December special session.

Republican lawmakers in Florida added another $1 billion to their insurance incentive fund and included a provision that makes it harder for policyholders to retain attorneys when insurance companies don't satisfactorily pay their claims. Democrats called the measure a "bailout" for the insurance industry that did nothing to lower customer premiums.

Housing advocates in Louisiana have also been critical of the $45 million incentive allotment because it doesn't provide direct support to homeowners.

Louisiana Sen. Sharon Hewitt, R-Slidell, who's announced she will run for governor, also mentioned the need for insurance reforms on the Senate floor. She specifically noted the state's legal climate.

"I do believe it is going to help some families with more affordable insurance," Hewitt said in regards to the $45 million, "but our work is definitely not done.

GREG LAROSE

Greg LaRose has covered news for more than 30 years in Louisiana. Before coming to the Louisiana

Greg LaRose has covered news for more than 30 years in Louisiana. Before coming to the Louisiana Illuminator, he was the chief investigative reporter for WDSU-TV in New Orleans. He previously led the government and politics team for The Times-Picayune | NOLA.com, and was editor in chief at New Orleans CityBusiness. Greg's other career stops include Tiger Rag, South Baton Rouge Journal, the Covington News Banner, Louisiana Radio Network and multiple radio stations.

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California homeowners could continue losing insurance as wildfire threat looms

Insurers argue the state should update rate regulations to account for more frequent catastrophic fires

FELTON, CALIFORNIA – August 24: Homeowner Judy Osborn stands in the backyard for a portrait on Aug. 24, 2022, in Felton, Calif. (Dai Sugano/Bay Area News Group)

By **ETHAN VARIAN** | evarian@bayareanewsgroup.com | Bay Area News Group

PUBLISHED: August 29, 2022 at 6:00 a.m. | UPDATED: August 30, 2022 at 9:08 a.m.

Almost a year to the day after evacuating during the devastating CZU Lightning Complex fires in August 2020, Judy Osborn learned she'd been dropped by her home insurance company.

Her two-bedroom house in the Santa Cruz Mountains had become too risky to cover, her provider explained, and Osborn was left to seek out a new policy in the middle of fire season.

"It was just like adding insult to injury," Osborn said. "It triggered a whole lot of memories and fear."

Following a string of destructive and deadly fires in 2017 and 2018, insurance companies have ended coverage for tens of thousands of California homeowners as providers have pulled out of high fire-risk areas – forcing many homeowners to buy policies through the expensive California FAIR Plan, the state's insurer of last resort.

Now, heading into what could be the worst of this year's fire season, many more homeowners may soon be in jeopardy of losing their policies.

"It's that time of year, and here we go again," said Osborn, who eventually found new private coverage for the home she's owned since 1985.

FELTON, CALIFORNIA – August 24: Judy Osborn's house is seen through trees and bushes on Aug. 24, 2022, in Felton, Calif. (Dai Sugano/Bay Area News Group)

In response to growing uncertainty in the insurance market, the state has imposed new wildfire regulations in recent years aimed at bringing down costs and protecting homeowners. But the insurance industry has pushed back hard against the reforms, arguing the state should instead overhaul how it regulates policy rates to account for more frequent catastrophic fires.

"Risks are getting worse, and rates are going to have to go up to ensure insurers are solvent and operational in California," said Seren Taylor, senior legislative advocate with the Personal Insurance Federation of California, an industry trade group.

In 2018, former Gov. Jerry Brown signed a law prohibiting insurance companies from canceling or refusing to renew homeowners' policies in areas impacted by a wildfire until twelve months after the blaze. In 2019, California Insurance Commissioner Ricardo Lara ordered the FAIR Plan to expand its coverage beyond fire to include liability, theft and other parts of a traditional homeowner's policy. Insurance companies, which manage and fund the state-created FAIR Plan, have challenged the regulation in court.

And later this year, the state insurance department is expected to begin requiring that providers offer lower rates to homeowners who fireproof their homes.

“If (Commissioner Lara) reaches too far, and he already has several times, insurance companies will just say, ‘We’re leaving California – we’re not going to write that product anymore,’” said Edan Cassidy, a broker with Cassidy Insurance Agency in Scotts Valley near Santa Cruz.

Early this year, high-end home insurers American International Group Inc. and Chubb Ltd. drastically reduced coverage in California in the wake of recent fire seasons. And this summer, Geico closed all of its brick-and mortar sales offices in the state, though company officials said it will continue offering policies online.

Department of Insurance spokesperson Michael Soller said the agency is working with the industry to understand their concerns and refuted the notion the new rules could push many insurers out of the state.

“We have a strong insurance market statewide, even with massive wildfires we’ve seen over the past few years,” Soller said.

In 2020, insurers ended coverage for over 212,000 properties in California, according to the most recent state data. More than 77,000 homeowners couldn’t find private insurance that year and signed up for the FAIR Plan. That was a slight increase from 2019, but more than triple the number of new FAIR Plan policies in 2018.

To reverse that trend, insurance companies argue they must be allowed to set rates based on the wildfire risk caused by the climate crisis. The industry wants to use computer models to predict future fire danger and guide the approach to policies. That would increase premiums, but it would also enable insurers to write policies for more high-risk areas and drop fewer homeowners, insurance companies say.

“We’re dealing with regulations that say we can only look backward and we can’t look forward,” said Taylor, with the Personal Insurance Federation. “That’s what’s missing from the conversations to increase availability.”

The state insurance department – which under a voter-approved 1988 law called Prop. 103 must sign off on changes to insurance companies’ policies – currently requires insurers to determine rates based on historical damages. Providers have been able to raise rates in recent years, but they contend it’s not enough to shield their risk.

“The insurance companies have been claiming ‘we need to use algorithms to set insurance rates,’” said Harvey Rosenfield, founder of Consumer Watchdog. “But under Prop. 103, they’re required to use historic data, which is empirical.”

With seemingly no resolution on the horizon, that could mean more lost policies and rising premiums in the years ahead.

Sean Murawsky had to buy a FAIR Plan policy after his insurer stopped covering his home in Boulder Creek following the CZU fires. His annual premium is now around $3,000, roughly three times what he was paying before.

Despite the increased cost and growing wildfire threat, he has no plans of moving his family from the area.

“I’m not scared off,” he said. “I know there’s high risk, but there’s high risk in many areas of California.”

Tags: **Affordable Housing**, **California Fires**, **Climate Change**, **Editors' Picks**, **Housing Crisis**, **Insurance**, **PM Report**, **Regional**, **Wildfire**

Ethan Varian | Housing Reporter

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OPINION • Opinion

Could California be headed for a homeowners insurance catastrophe?

(iStockphoto)

By CAROLINE MELEAR |
PUBLISHED: June 22, 2022 at 2:00 p.m. | UPDATED: June 22, 2022 at 2:00 p.m.

Californians are in the midst of an environmental crisis as the frequency and intensity of wildfires worsen. This year alone has produced an unseasonable January wildfire in Big Sur and a geographically uncommon fire in Laguna Niguel. Though these are outlier incidents, they are increasingly commonplace, leaving many residents of the Golden State scrambling to find homeowners insurance.

A recent report predicts that wildfire risk in California will continue to grow over the next 30 years from a deadly combination of higher temperatures and lower-than-normal rainfall. This leaves homeowners in moderate-to-low-risk communities concerned with protecting life and property for an issue they likely assumed would never affect them. Couple this with a struggling insurance market, and a crisis may be on the horizon.

Officials in California have enacted numerous laws and regulations to provide coverage options for riskier properties and maintain relative affordability, including the implementation of Proposition 103 in 1988 and the creation of the FAIR Plan in 1968. Proposition 103 requires insurers to seek "prior approval" for rate changes from California's Department of Insurance (DOI). The FAIR Plan offers residents a temporary, last resort for insurance, often at higher prices and with less robust coverage.

If California would like to see a better-functioning insurance market, it should be careful when implementing additional regulations, which have led to insurers fleeing the state. This year alone has seen the departure of American Insurance Group from California and a significant reduction in insurance offerings from Chubb. These are two of the largest insurers in the nation and both cited burdensome regulation in their decisions.

Compounding the problem, California DOI Commissioner Ricardo Lara proposed additional regulations on insurance companies in February, forcing them to make wildfire risk assessment models and tools public—an intellectual property issue. Specifically, the proposed regulation states that risk modeling will be made public regardless of whether the information and methods are "confidential, proprietary, or trade secret." This requirement would disincentivize insurers from using their most effective tools, leading to market stagnation and reductions in innovation—a net harm to homeowners.

Lara's proposal also lists many "mandatory factors" insurance companies must consider when assessing a property's wildfire risk, including the property being part of a "Fire Risk Reduction Community." Insurers have taken issue with this, noting that the designation is new and should not be a required factor for risk assessment when its track record is unproven.

Some lawmakers are attempting to strangle the already struggling market even further. Assembly Bill 1755 mandates that insurance companies provide policies to all homeowners whose properties undergo certain mitigation efforts regardless of any other factors. It was introduced by Assemblyman Marc Levine, D-Marin County, in February and was re-referred to Commissioner Lara in March.

Couple ballooning regulation with increasing wildfire risk, and insurance companies' incentive to provide policies in California is waning dramatically. Wildfire losses cost providers up to $13 billion in 2020 alone—a number that is likely to grow. If insurance companies feel the regulatory squeeze growing tighter, more may decide to depart the state.

To ensure insurance access for its residents, California should primarily focus on wildfire mitigation, and concentrating on prescribed burns is a good starting point. Commissioner Lara sent notice to insurance companies in April suggesting they increase coverage for prescribed burns, which reduce the likelihood and severity of wildfires by methodically burning dried leaves and brush. Data shows these burns are effective at combating wildfire risk, and the method has been used for centuries.

Educating homeowners on their wildfire vulnerability and methods to promote resiliency is also vital. A number of steps—many of which are taken into account when insurers issue policies—reduce the risk of wildfire damage, such as clearing vegetation and trimming trees. Data from The Center for Insurance Policy Research (CIPR) shows these strategies to be highly effective, reducing wildfire risk by up to 78 percent when coupled with structural modifications to the home such as fire-rated roofs, vent screens and other improvements. This is an area where public-private partnership can thrive, with the state and insurance companies working together to educate and promote resiliency efforts.

Insurance provides homeowners with financial security, and it is their first line of defense when tragedy strikes. The California DOI must focus on increasing insurers' appetite to operate in the state. This will increase competition and broaden the risk pool, giving consumers more options at a lower cost.

Effective wildfire mitigation is the most attractive solution for both insurers and consumers. But the beneficial effects of this approach will be negated if a continuous stream of new regulation makes business unviable. Regulation often has unintended consequences, and when it becomes so burdensome that insurers cannot support communities, everyone loses.

Caroline Melear is a fellow in finance, insurance and trade at the R Street Institute, a public policy research organization committed to promoting free markets and limited, effective government.

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