

# PROPERTY INSURANCE IN FLORIDA: THE 1997 LEGISLATIVE REFORM PACKAGE

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## I. INTRODUCTION

During the 1997 legislative session, the Florida Legislature amended significant aspects of Florida's law regulating property insurance.<sup>1</sup> This Article focuses on the latest modifications designed to make property insurance available through commercial and quasi-governmental mechanisms. It examines the policy rationale for modifying the existing laws, and the practical effect the changes will have on the insurance market.

Parts II and III of this Article provide a general, schematic, and historical discussion of the quasi-governmental property insurance mechanisms available in Florida. Part IV details the 1997 legislative modifications to these mechanisms, while Part V provides recommendations to the 1998 Legislature. Part VI concludes that although the 1997 changes expand access to property insurance coverage in Florida, the price of this access is ultimately borne by all policyholders through increased rates.

## II. BACKGROUND ON PROPERTY INSURANCE IN FLORIDA

Property insurers in Florida are still recovering from the effects of Hurricane Andrew, which struck in August 1992.<sup>2</sup> The \$16 billion in

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1. See Act effective May 9, 1997, ch. 97-55, 1997 Fla. Laws 322 (amending FLA. STAT. § 627.351 (Supp. 1996)).

2. See FLORIDA LEGIS. WORKING GROUP ON RESIDUAL PROP. INS. MARKETS, FINAL REPORT 1 (1996) [hereinafter FINAL REPORT].

property losses sustained in South Florida far exceeded insurance companies' expectations, particularly because only \$1.5 billion was collected in annual premiums.<sup>3</sup> Because of the extraordinary losses, several insurance companies became insolvent and most others believed they were overexposed in Florida.<sup>4</sup> A property insurance availability crisis arose as insurers recognized that their premium rates were inadequate when compared to the potential losses and extraordinary exposure in Florida.<sup>5</sup>

In order to combat an exodus of insurance companies from the state and to stabilize the insurance market,<sup>6</sup> the Florida Legislature convened three separate special sessions during 1992 and 1993. The Florida Department of Insurance and the Legislature subsequently imposed four successive moratoriums on property insurers, requiring them to continue existing coverage for property located in Florida's high risk areas.<sup>7</sup>

#### A. The Residential Joint Underwriting Association

During the December 1992 special legislative session, the Legislature created the Florida Residential Property and Casualty Joint Underwriting Association (Residential JUA).<sup>8</sup> Persons denied property and casualty insurance coverage through private insurers can seek to purchase property coverage through the Residential JUA.<sup>9</sup> All property insurers in the state are required to participate in the program through regular and emergency assessments.<sup>10</sup> The Residential JUA Board, which is appointed by the Insurance Commissioner and comprised of representatives from the insurance industry, consumer advocates, and Department of Insurance employees, is authorized to write policies, collect premiums and assessments, and pay claims to those insured under the program.<sup>11</sup> By statute, the rates charged by the Residential JUA may not be lower than the average rates of the highest commercial carrier among the twenty carriers with the highest volume.<sup>12</sup>

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3. See FLORIDA H.R. COMM. ON INS., FLORIDA'S PROPERTY INSURANCE CRISIS 1 (1994) (on file with comm.) [hereinafter INSURANCE CRISIS]. The \$16 billion in insured damages makes Hurricane Andrew the costliest natural disaster in world history. See *id.*

4. See *id.* at 6-7.

5. See *id.* at 1-2.

6. See *id.* at 14.

7. See *id.* at 3.

8. See Act effective Apr. 10, 1993, ch. 92-345, § 3, 1993 Fla. Laws 1, 7 (codified at FLA. STAT. § 627.351(6) (1993)).

9. See FLA. STAT. § 627.351(6) (1997).

10. See *id.* § 627.351(6)(b)(3).

11. See *id.* § 627.351(6)(b).

12. See *id.* § 627.351(6)(d)(2). The time limit for this policy has been extended. Additionally, for mobile home policies, the rate must match the top five rather than the top eight insurers as was provided in past years. See *id.*

The Residential JUA was only intended to be a short term, safety net mechanism to provide insurance opportunities.<sup>13</sup> As originally envisioned, the Residential JUA was seen as an insurer of last resort, to provide residential insurance for applicants who were unable to gain insurance through the voluntary cooperative market.<sup>14</sup> Thus, the Residential JUA should have only been necessary for a limited period of time while the private market rebounded from the events of Hurricane Andrew. However, the Residential JUA has exceeded all expectations and “has become, by virtue of its size, a significant impediment to the restoration of a stable and competitive residential property insurance market in [Florida].”<sup>15</sup> Based on the number of policies and the value of property insured, the Residential JUA has become the second largest property insurance carrier in the state.<sup>16</sup> In response, measures have been undertaken to accelerate the transfer of policies from the Residential JUA to the private market.<sup>17</sup>

#### B. The Florida Windstorm Underwriting Association

The Residential JUA was modeled after other “insurance risk apportionment plans,”<sup>18</sup> principally the Florida Windstorm Underwriting Association (FWUA). The FWUA was established in 1970 to provide windstorm coverage<sup>19</sup> for persons unable to purchase coverage through the private market.<sup>20</sup> As originally designed, the FWUA allowed property owners who were in good faith entitled to windstorm insurance to contract for the equitable apportionment of insurance if unable to procure it through ordinary methods.<sup>21</sup> Thus, property owners denied access to windstorm coverage through the

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13. See *id.* § 627.3511(1) (stating that the Residential JUA has far exceeded initial expectations).

14. See *INSURANCE CRISIS*, *supra* note 3, at 2.

15. *FLA. STAT.* § 627.3511(1) (1997). As of November 1996, the Residential JUA provided coverage for approximately 930,000 policy holders. Interview with Wesley Williams, Marketing and Research Analyst, Florida Residential Property and Casualty Joint Underwriting Association, in Tallahassee, Fla. (Sept. 3, 1997) [hereinafter *Williams Interview*].

16. See *Williams Interview*, *supra* note 15. As of July 1997, the Residential JUA had 151,356 policies in force in Dade County, 104,061 policies in Broward County, and 71,699 policies in Palm Beach County. See *id.*

17. See *e.g.*, *FLA. STAT.* § 627.3511 (1997) (encouraging insurers to remove policies from the Residential JUA through the payment of an incentive bonus of \$100 per policy). As a result, on August 31, 1997, there were 603,463 policies written by the Residential JUA. See *Williams Interview*, *supra* note 15.

18. *FLA. STAT.* § 627.351 (1997) (providing for residual market mechanisms which allow insurers in the state to allocate “uninsurable” risks among themselves).

19. “Windstorm insurance” includes coverage against damage caused directly by windstorms and hail. See *FWUA, AMENDED AND RESTATED PLAN OF OPERATION AND ARTICLES OF AGREEMENT 2* (1995) (on file with author) [hereinafter *FWUA PLAN*].

20. See *FLA. STAT.* § 627.351(5)(a) (Supp. 1970) (current version at *FLA. STAT.* § 627.351(2) (1997)).

21. See *id.* § 627.351(2)(a) (1997).

private market can purchase insurance through the FWUA.<sup>22</sup> In addition to the inability to obtain coverage in the voluntary market, to qualify for FWUA coverage an area must demonstrate that the lack of available windstorm coverage adversely affects the economic growth and development of the community, and that "mortgages are in default, and financial institutions are unable to make loans."<sup>23</sup> The area must also show that it is enforcing the structural requirements of the Florida Minimum Building Codes.<sup>24</sup> Lastly, the area must demonstrate that extending windstorm insurance coverage is consistent with coastal management regulation.<sup>25</sup>

The FWUA, governed by a board consisting of insurance company representatives, provides windstorm insurance as a direct writer and has the authority to issue policies, collect premiums, and pay claims, as well as collect regular and emergency assessments from all property insurers operating in the state.<sup>26</sup> The premium rates are set by the board, subject to approval by the Department of Insurance, so long as rates are calculated with the objective of generating sufficient funds to pay all anticipated claims.<sup>27</sup> In addition to the premiums paid by policyholders, program costs are supplemented by the imposition of assessments on property insurers in Florida.<sup>28</sup> These assessments are determined on a pro rata basis according to the amount of business the individual insurance companies write in the state.<sup>29</sup>

When the claims exceeded the regularly assessed amounts plus the premiums paid under the program, the shortfall was historically borne by the property insurers doing business in Florida through deficit assessments.<sup>30</sup> Since 1995, however, insurers can pass any deficit assessments on to the rates of all policyholders.<sup>31</sup> Thus, the FWUA represents a compromise of public policy to assure access to windstorm insurance in high risk areas and a mandated subsidy from other insureds (i.e., policyholders) throughout the state.<sup>32</sup> The FWUA, unlike the Residential JUA, was intended to operate over an extended period in limited areas that lacked a voluntary windstorm

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22. See *id.*

23. *Id.* § 627.351(2)(c)(2)(a).

24. See *id.* § 627.351(2)(c)(2)(b).

25. See *id.* § 627.351(2)(c)(2)(c).

26. See *id.* § 627.351(2)(b).

27. See FWUA PLAN, *supra* note 19, at 7.

28. See FLA. STAT. § 627.351(2)(b) (1997).

29. See *id.* § 627.351(2)(b)(2)(a) (stating that regular assessments, with some exceptions, are based on the proportion of net direct premiums written in the previous year).

30. See *id.* § 627.351(2)(b)(2) (1993).

31. See *id.* § 627.351(2)(b)(2)(d) (1997).

32. As of January 1997, the FWUA carried 283,000 policies with a total insured value of structure and contents of \$49 billion. See Fla. S. Comm. on Banking & Ins., CS for SB 794 (1997) Staff Analysis 3 (Mar. 5, 1997) (on file with comm.) [hereinafter Staff Analysis].

insurance coverage market.<sup>33</sup> The FWUA initially operated in the Florida Keys, but over time it expanded to other high risk areas along the coast that demonstrated a need for windstorm insurance.<sup>34</sup>

Despite the narrow intent of the FWUA, it has grown considerably. Insurers have taken advantage of the opportunity to nonrenew some property insurance policies including windstorm coverage, and have rewritten some policies without windstorm protection, which is then provided by the FWUA. Using the FWUA has allowed insurance companies to shed some of their exposure and equitably apportion their risk, particularly in overexposed areas such as Dade, Broward, and Palm Beach counties.<sup>35</sup>

Because the Residential JUA and the FWUA have surpassed their intended purposes, Florida's 1997 property insurance legislation focused on incremental, operational modifications to these insurance mechanisms.<sup>36</sup>

### III. A NEED FOR MODIFICATIONS TO THE RESIDENTIAL JUA AND FWUA

The public policy behind these insurance mechanisms—to make property insurance available to all persons in the state—conflicts with the traditional notions of “risk-pooling.” As typically understood, risk pooling reflects an allocation of apparently similar or homogeneous risk into different pools that are then rated according to each pool's relative risk characteristics and loss expectations.<sup>37</sup> The Legislature established insurance pools to make coverage available when the private market would not or could not do so.<sup>38</sup> However, some observers believe that the government's efforts to make insurance available has inhibited the private market's ability to provide coverage.<sup>39</sup>

Although homeowners' premiums have risen by a statewide average of eighty-eight percent over the past four years to cover the greater expectations for potential loss, many property owners cannot purchase insurance through the private market.<sup>40</sup> Two competing views emerge as to the effect that increased premium rates have on the availability of insurance. Some insurance companies and trade associations argue that if rates for property insurance were sufficient

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33. See FLA. STAT. § 627.351(2)(c)-(d) (1997).

34. See FLA. S. COMM. ON BANKING & INS., ESTABLISHING GEOGRAPHICAL BOUNDARIES FOR THE FLORIDA WINDSTORM UNDERWRITING ASSOCIATION 2 (1997) (on file with comm.) [hereinafter GEOGRAPHICAL BOUNDARIES].

35. See *id.* at 15-17.

36. See FLA. STAT. § 627.351 (1997).

37. See KENNETH S. ABRAHAM, INSURANCE LAW & REGULATION 2 (2d ed. 1995).

38. See FLA. STAT. § 627.351(2),(6) (1997).

39. See *id.* § 627.3511(1).

40. See Staff Analysis, *supra* note 32, at 3.

to cover the new estimates for potential exposure to loss and not suppressed by governmental regulation, these rates would attract adequate capital to make insurance available.<sup>41</sup> Others argue that tax laws and private investor expectations, further complicated by rate regulations, make it impractical for private investors to charge enough to cover current costs, pay taxes on profit, distribute profit to investors, and still place enough reserve to pay claims in the event of a major catastrophe, making government intervention necessary.<sup>42</sup> The Florida insurance environment and market activities support the latter view.<sup>43</sup> Consequently, both the FWUA and Residential JUA have continued to grow well beyond their original intent, impeding the recovery of the voluntary insurance market.

The 1996 Florida Legislature recognized that there were a number of problems with the existing residual market mechanisms, and that some residual market mechanism would need to continue to provide hurricane coverage for the foreseeable future to certain hurricane prone areas.<sup>44</sup> Implicit in the Legislature's findings was the conclusion that neither the current FWUA nor the Residential JUA was designed to last indefinitely. Moreover, neither entity could sustain and support a large number of policies.<sup>45</sup>

In response, the 1996 Legislature created a Working Group on Residual Property Insurance Markets (Working Group), directed at developing recommendations for a permanent residual market mechanism to replace the existing Residential JUA and FWUA.<sup>46</sup> The permanent replacement would maximize the role of the private sector and minimize public sector responsibilities.<sup>47</sup> The Working Group's recommendations for modifying the FWUA and Residential JUA served as the basis for the new law.<sup>48</sup> Accordingly, the new law addressed some of the elements necessary to make these residual market entities operate more efficiently and to reduce the overall number of Residential JUA and FWUA policies issued.<sup>49</sup>

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41. See Interview with Vince Rio, Counsel, State Farm Mutual Co., in Tallahassee, Fla. (Nov. 3, 1997) [hereinafter Rio Interview].

42. See *id.*

43. See Staff Analysis, *supra* note 32, at 2. That is, in spite of the large rate increases, property insurance is not widely available in high risk areas today because insurers still believe they need to reduce their exposure in hurricane prone areas.

44. See FLA. STAT. § 215.555 (1) (1997).

45. See *id.*

46. See Act effective May 21, 1996, ch. 96-194, § 9, 1996 Fla. Laws 602, 602.

47. See FLA. STAT. § 215.555 (1) (1997).

48. See FINAL REPORT, *supra* note 2.

49. See FLA. STAT. § 627.351 (1997).

#### IV. THE 1997 PROPERTY INSURANCE LEGISLATIVE REFORM PACKAGE

The Senate Committee on Banking and Insurance and the House Committee on Financial Services developed legislative packages designed to implement the Working Group's recommendations. The House and the Senate, in coordination with the insurance industry, consumer groups, and the Department of Insurance, agreed on a final package that became law as chapter 97-55, Florida Laws.<sup>50</sup>

##### A. Major Changes to the Residential Property and Casualty Joint Underwriting Association Program.

The 1997 legislative modifications to the Residential JUA centered on its ability to secure financing to cover major weather-related events or pre-events planning,<sup>51</sup> and to foster continued efforts to shrink the Residential JUA population.<sup>52</sup> While the Residential JUA is not allowed to form the myriad of new entities permitted by the FWUA,<sup>53</sup> most of the alternative financing mechanisms such as bonds and indebtedness are still available.<sup>54</sup> The Residential JUA has the authority to pledge the recoveries from the Florida Hurricane Catastrophe Fund, despite lacking provisions concerning lien priority and continuance of assessments if the program defaults.<sup>55</sup>

The new law also established standards for the sale of bonds by either the FWUA or the Residential JUA.<sup>56</sup> Prior to entering the bond market, the FWUA and Residential JUA must develop the ability to publicize and procure the requisite financial services.<sup>57</sup> Further, the potential financial advisors or underwriters must provide disclosure statements containing a litany of information,<sup>58</sup> and are prohibited from paying any finders fees, bonuses, or other gratuities for the FWUA or Residential JUA business.<sup>59</sup>

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50. See Act effective May 9, 1997, ch. 97-55, 1997 Fla. Laws 322 (amending FLA. STAT. § 627.351 (Supp. 1996)).

51. See *id.* at 339 (amending FLA. STAT. § 627.351(6)(c)(3) (Supp. 1996)).

52. See *id.* at 328 (amending FLA. STAT. § 627.351(2)(b)(2)(a) (Supp. 1996), codified at FLA. STAT. § 627.351(2)(b)(2)(a)(VI) (1997)).

53. See FLA. STAT. § 627.351(2)(b)(6)(a) (1997).

54. See *id.* § 627.351(6)(b)(3)(c), (6)(c)(3).

55. See *id.* § 627.351(6)(c)(3). The Florida Hurricane Catastrophe Fund was created by the Florida Legislature during the November 1993 special session. The Catastrophe Fund is a trust fund under the control of the State Board of Administration. Each property insurer pays premiums to the fund, based proportionately on the insurer's hurricane exposure. In exchange for these premiums, the Fund promises to pay a certain percentage of the insurer's hurricane losses. The main purpose of the Catastrophe Fund is to permit the tax-free accumulation of hurricane reserves. See generally *id.* § 215.555.

56. See *id.* § 627.3513.

57. See *id.* § 627.3513(2).

58. See *id.* § 627.3513(3) (including expected expenses and fees incurred by participating in the program).

59. See *id.* § 627.3513(4).

While existing law provides a “market equalization charge” for assessments imposed by the Residential JUA on Residential JUA policyholders, the new law includes assessments imposed by the FWUA.<sup>60</sup> Residential JUA policyholders are thus treated similarly when the FWUA levies assessments on insurers, which are passed on to policyholders.

The new law also allows insurers to revise the hurricane deductibles offered in policies to condominium associations and apartment buildings to a minimum of three percent and a maximum of five or ten percent.<sup>61</sup> This modification encourages private insurers to continue writing policies for commercial property because the payment difference may affect the capital an insurer is willing to risk.

As previously mentioned, insurers may recoup deficit assessments imposed by residual market entities by passing the assessments through to policyholders.<sup>62</sup> The new law clarifies how the assessment is passed through to policyholders by requiring insurers to calculate separate assessment percentage factors for personal lines in residential policies, and for commercial lines in residential policies.<sup>63</sup> In making this calculation, an insurer may not use an assessment factor that is more than three percent higher than the state-wide average assessment percentage.<sup>64</sup> If an insurer fails to recoup the full amount in one year, it may recoup the deficit in subsequent years.<sup>65</sup>

Notwithstanding this apparent limitation, the new law authorizes assessments of approximately forty percent of current property insurance premiums on all policyholders in the state.<sup>66</sup> The Legislature has thus authorized ten percent regular and emergency assessments for the FWUA and the Residential JUA.<sup>67</sup> Because the cost of the emergency assessments imposed upon insurers can be passed along to all policyholders, all insured property owners in Florida face financial hardship should another catastrophic storm strike. Further, because credit against the assessments is given to insurers taking policies out of the residual markets, the base of policies for which assessments can be made is restricted.<sup>68</sup> As the assessment policy base is restricted, the assessment potential per policy increases. As a re-

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60. See *id.* § 627.351(6)(c)(10).

61. See *id.* § 627.701(8).

62. See *supra* text accompanying note 31.

63. See FLA. STAT. § 627.3512(1) (1997).

64. See *id.* § 627.3512(2).

65. See *id.*

66. See Florida DOI, HIGHLIGHTS OF THE HOMEOWNERS RATE RELIEF ACT 1 (1997) (on file with the Fla. DOI) [hereinafter HIGHLIGHTS].

67. See FLA. STAT. § 627.351 (2)(b)(2)(d), (6)(b)(3).

68. See *id.* § 627.3511(2).

sult, the cost of providing insurance to some is potentially borne by all. Now that Florida has entered the insurance business, Florida's premium-paying policyholders are exposed to extraordinary assessments.

#### B. Major Changes to the Florida Windstorm Underwriting Association Program

The new law made several changes to the FWUA. The FWUA normally collects premiums for the coverage it provides; however, when a loss sustained by the FWUA exceeds its catastrophe reserves and a deficit is incurred, the FWUA is authorized to levy assessments on member insurers.<sup>69</sup> Prior to the enactment of the new law, the FWUA statute permitted the FWUA to levy regular assessments on insurers when the deficit exceeds ten percent of the aggregate statewide direct premiums for property insurance.<sup>70</sup> It also permitted a levy of another ten percent of premiums to fund deficits not adequately funded by the regular assessments.<sup>71</sup>

The new law clarifies that if a deficit assessment is ten percent or less of the aggregate statewide direct written premium for property insurance, an assessment may be levied on member insurers in an amount equal to the deficit.<sup>72</sup> The new law clearly indicates that the emergency assessments may be passed through to all policyholders, and that insurance companies may raise their premiums to recoup the amount of the FWUA deficit assessments.<sup>73</sup> This new language is patterned after previous existing language in the JUA subsection,<sup>74</sup> and it was designed to quell insurers' fears that FWUA deficits would be paid by the carrier without the ability to recoup the assessments in its rates every time a carrier increased its market share by writing additional property insurance in the state.<sup>75</sup>

The 1997 revision also specifically allows the FWUA Board to make exceptions to the public policy of "coverage for all" by permitting the Board to determine that some risks are uninsurable even through the residual market.<sup>76</sup> In addition, the law provides that if

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69. See *id.* § 627.351(2)(b)(2)(d).

70. See *id.* § 627.351(2)(b)(2)(d)(I) (Supp. 1996).

71. See *id.* § 627.351(2)(b)(2)(d)(II).

72. See *id.* § 627.351(2)(b)(2)(d) (1997).

73. See *id.* § 627.351(2)(b)(2)(d)(III).

74. See *id.* § 627.351(6)(b)(3)(d) (Supp. 1996) ("Upon a determination by the board of governors that a deficit in an account exceeds the amount that will be recovered through regular assessments of insurers . . . , the board shall levy, after verification by the department, emergency assessments to be collected by insurers, including joint underwriting associations, upon issuance or renewal of policies in the year or years following levy of the regular assessments.").

75. See Rio Interview, *supra* note 41.

76. See FLA. STAT. § 627.351(2)(b)(5)(d) (1997).

persons covered by the FWUA are offered a "take out" policy, such that an insurer is willing to replace the FWUA policy with a regular private market policy, the person is no longer eligible for FWUA coverage.<sup>77</sup> This could result in a significant cost increase for consumers because the commercial policy may be rated significantly higher based on their approved rate structure. This might also result in giving companies willing to underwrite the windstorm coverage an advantage over those choosing to exclude it, even though the cost of a policy providing windstorm coverage would be greater than the cost of a policy excluding windstorm coverage, and greater than the cost of the FWUA's windstorm coverage.

Before the enactment of the new law, FWUA rates were not governed by specific requirements. However, the 1997 legislation contained language governing the premium rates charged by the FWUA.<sup>78</sup> It was previously understood that rates charged by the FWUA were governed by the standard rating statute, which provides that rates shall not be excessive, inadequate, or unfairly discriminatory.<sup>79</sup> Conversely, the Residential JUA statute required the rates of the Residential JUA to match the highest rate in the county charged by one of the twenty largest insurers.<sup>80</sup> This ensured that Residential JUA rates were not competitive with the private market, and that Residential JUA would only be a last resort. The legislative intent behind the new law provided that FWUA rates should not be competitive with private market rates and that the rates must be actuarially sound.<sup>81</sup>

### 1. FWUA Freeze and Exemption Policies

In order to allow the FWUA to make the adjustments required in the new law and to prevent expansion of the FWUA into new areas of eligibility, a one-year freeze on expansion of the program will run until October 1, 1998.<sup>82</sup> Insurance companies and consumer advo-

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77. See *id.* § 627.351(2)(b)(5)(e).

78. See *id.* § 627.351(2)(b)(5)(b):

It is the intent of the Legislature that the rates for coverage provided by the association be actuarially sound and not competitive with the approved rates charged in the admitted voluntary market such that the association functions as a residual market mechanism to provide insurance only when the insurance cannot be procured in the voluntary market. The plan of operation shall provide a mechanism to assure that, beginning no later than January 1, 1999, the rates charged by the association . . . are reflective of the approved rates in the voluntary market for hurricane coverage . . . in the various areas eligible for association coverage.

*Id.*

79. See *id.* § 627.062 (Supp. 1996).

80. See *id.* § 627.351(6)(d)(2).

81. See *id.* § 627.351(2)(b)(5)(b) (1997).

82. See *id.* § 627.351(2)(e) (to be repealed on October 1, 1998).

cates resisted this provision. Proponents of the measure argued that the growth of the FWUA was expanding at an uncontrollable rate and time was needed to satisfy statutory changes.<sup>83</sup> Opponents countered that the merits of a petition for FWUA eligibility can be evaluated on a case-by-case basis by the Department of Insurance before eligibility is declared,<sup>84</sup> and thus the “freeze” was not necessary.

Additionally, while prior law did not authorize the FWUA to exempt insurers from FWUA assessments as an incentive to remove policies from the Residential JUA, the FWUA did so with the approval of the Department of Insurance.<sup>85</sup> The new law authorizes the FWUA to grant an exemption from FWUA assessments for a period not to exceed three years as an incentive to Residential JUA depopulation.<sup>86</sup> To be eligible for this exemption, no more than fifteen percent of the removed policies may exclude windstorm coverage.<sup>87</sup> At least forty percent of the policies removed from the Residential JUA must be from Dade, Broward, and Palm Beach counties or at least thirty percent from these counties and an additional fifty percent in other coastal counties.<sup>88</sup> The exemption can be extended for an additional year with approval by the Department of Insurance if the insurer agrees to guarantee another year of renewability.<sup>89</sup> The new law also clarifies that the insurer is exempt from regular deficit assessments but is not exempt from the emergency assessments imposed by the Residential JUA.<sup>90</sup>

## 2. FWUA Assessment Policies

As discussed above, the FWUA can assess insurers when it sustains deficits, and insurers are able to pass these assessments on to policyholders.<sup>91</sup> Conversely, the FWUA is not subject to assessment by other residual market entities and thus does not pass the deficits through to its policyholders.<sup>92</sup> The new law allows the FWUA to levy a “market equalization charge” upon its policyholders that assures equal treatment between voluntary market policyholders and FWUA policyholders not otherwise subject to residual market assessments.<sup>93</sup>

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83. See GEOGRAPHICAL BOUNDARIES, *supra* note 34, at 1.

84. See FLA. STAT. § 627.351(2)(c)(2) (1997).

85. See Staff Analysis, *supra* note 32, at 10.

86. See FLA. STAT. § 627.351(2)(b)(2)(a)(VI) (1997).

87. See *id.*

88. See *id.*

89. See *id.*

90. See *id.* § 627.351(6)(g)(3)(c); see also *id.* § 627.3511(3)(b)-(c).

91. See *supra* text accompanying note 31.

92. See FLA. STAT. § 627.351(2)(b) (1997).

93. See *id.* § 627.351(6)(g)(3)(b).

### 3. FWUA Debt Management Policies

The recently enacted provisions also enhanced the FWUA's ability to manage debt in several ways. First, the emergency assessments will continue until all indebtedness is retired.<sup>94</sup> In addition, assurances are provided that the financing and collection of assessments will remain in place notwithstanding any default or financial failure of the FWUA.<sup>95</sup> The FWUA emergency assessments were given priority over other liens on any underlying property because these provisions are critical to the FWUA's ability to secure alternative, flexible financing mechanisms such as lines of credit and bonds.<sup>96</sup> The FWUA should thus be able to continue collecting the assessments necessary to address whatever situation arises.

Second, the new law provided that any local government with residents insured by the FWUA may issue bonds to meet related financial obligations, regardless of whether any losses occurred within the territorial jurisdiction of the particular local government.<sup>97</sup> While historically bonds could have been issued by an affected local governmental entity, the intent of the new provision is to prevent the "proliferation, duplication, and fragmentation of such assistance programs."<sup>98</sup>

Third, the FWUA was allowed to form a partnership, trust, limited liability company, or a private, nonprofit mutual company, as the entity empowered to borrow money or issue bonds.<sup>99</sup> This allows greater flexibility in the type of organization that may be formed, enhancing the FWUA's ability to achieve the best bond rate possible since rates for private entities are often more favorable than for government entities.

Lastly, the FWUA was given express authorization to issue bonds or incur indebtedness in the absence of a hurricane or other weather-related event.<sup>100</sup> This provision is particularly critical for the creation of a more viable, responsible entity, so that funds may be secured prior to the arrival of a devastating storm.

## V. SUGGESTIONS FOR THE 1998 LEGISLATIVE SESSION

Recently, Florida Insurance Commissioner Bill Nelson proposed that both the Residential JUA and FWUA be phased out by the private market, which would assume more policies in exchange for an

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94. See *id.* § 627.351(2)(b)(2)(d)(III).

95. See *id.* § 627.351(2)(b)(9)(e).

96. See *id.*

97. See *id.* § 627.351(2)(b)(6)(b).

98. *Id.* § 627.351(2)(b)(2)(e).

99. See *id.* § 627.351(2)(b)(6)(a).

100. See *id.* § 627.351(2)(b)(6)(b).

expanded Hurricane Catastrophe Fund.<sup>101</sup> The proposal rests on the assumption that private insurers would be more willing to provide insurance in high risk areas knowing that the potential exposure to risk would be limited under the modified Catastrophe Fund program.<sup>102</sup> Even if the private insurance companies are not willing, then the Department of Insurance would assign the risky policies among the private insurers.<sup>103</sup> Accordingly, the assessments under the Residential JUA and FWUA would be eliminated, but the Catastrophe Fund assessment would potentially increase from four percent to ten percent of the premium. For homeowners, the potential for assessments, emergency or otherwise, would be reduced from the current level of forty-four percent to twelve percent of the total premium.<sup>104</sup>

While at first glance the proposal may be appealing to homeowners because the risk of significant rate assessments is reduced, the assignment of policies—which the private insurers are steering clear of at the moment—would be a huge component of the proposal. Further, the level of damages at which the Catastrophe Fund program would go into effect is critical, especially for small and medium-sized insurers. If set too high, insurers could face huge losses without any off-set for the newly acquired high risk policies. Therefore, if forced into taking the riskier policies, insurers may believe that significant rate increases are essential. However, the cost of the rate increases may counter the potential savings in assessments. In addition, the basis for the Catastrophe Fund is an assessment on all insurance,<sup>105</sup> not simply property insurance, so all insureds may save on their homeowners assessment while other types of coverage is adversely affected.

At a minimum, the discussion raises the awareness of the continuing property insurance crisis. One alternative may be to continue the freeze on growth of the FWUA<sup>106</sup> and encourage the voluntary reduction of both the Residential JUA and FWUA. Once policies move out of the underwriting associations, a cap on assessments could be imposed while expanding the new Catastrophe Fund program. This would allow the insurance industry to continue to recover while newer, more viable, and efficient mechanisms are developed.

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101. See *What's Covered?*, ST. PETE. TIMES, Sept. 24, 1997, at A12.

102. See *id.*

103. See HIGHLIGHTS, *supra* note 66, at 1.

104. See *id.*

105. See FLA. STAT. § 215.555 (1997).

106. See *id.* § 627.351(2)(e).

## VI. CONCLUSION

The residual property insurance market mechanisms have enhanced the availability of insurance to Florida homeowners as indicated by the number of policies issued. Both programs have frequently run deficits and issued assessments that have stifled the private market recovery. The new law allows the residual market entities greater flexibility to obtain funds to compensate for the lack of programmatic reserves, but ultimately all Florida property insurance policyholders may be responsible for paying increased rates for these programs for years to come.<sup>107</sup>

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107. See *id.* § 627.3512.