



# 2023 Top Tier Issue: Tort Reform

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**A**IF takes on a wide array of issues impacting the business community every year. Although each of those issues are important, some rise to the level of being considered an AIF “top-tier issue” due to the broad impact to Florida businesses.

For the 2023 Regular Session, the Florida Legislature is uniquely positioned to take on civil justice reform. The Governor and both presiding officers have stated their desire for significant changes in this area, and AIF has been unwavering in its support. With an opportunity now on the table, tort reform is a “top-tier issue” for AIF during the 2023 Legislative Session.

This past December, Governor DeSantis called a special session on

property insurance. The legislature passed bills that removed the one-way attorney fee statute and eliminated assignment of benefits in the property market. As these excellent reforms are critical to the business community, they should continue to be built upon during the 2023 Regular Session.

Frivolous lawsuits, inflated damages, and a pervasive litigious climate have impacted costs for both businesses and consumers. Pages 14-17 of the *2023 AIF Session Priorities* outline specific ways the Legislature can enact significant tort reform that is beneficial for Florida’s vast business community, their employees, and the areas they support.

# Tort Reform

For years, Florida has been identified as an outlier on civil justice. Often referred to as a “judicial hellhole,” the status of the state’s tort climate is a troubling cohort to the disasters not of our making, like hurricanes. Governor DeSantis has appointed several textualists to the state’s highest court, in addition to many other similar appointments to lower courts. With this return to the strict construction of the law, civil justice progress is being made, aligning Florida with federal courts on admissibility of expert evidence, availability of summary judgment, and in protecting employers from discovery fishing expeditions.

However, these jurists’ commitment to the rule of law means that they will not engage in policymaking, reaffirming the importance of the legislature to intervene on significant civil justice matters.

In 2022, Gov. DeSantis called two special sessions to deal with the most persistent problem for the property market: the one-way attorney fee statute. The same reforms should be extended to other first party coverages with haste. Additionally, focus should be on the insurance drivers plaguing businesses, which are most commonly found in liability coverages. This includes the introduction of trumped-up medical damages in personal injury suits, rejecting any new causes of action, and addressing issues that plague the state’s worsening housing affordability crisis.

Fortunately, the life and health markets are stable, and continue to promote sensible policies that increase access, promote affordability, and enhance competition.

**AIF** will continue to **SUPPORT** responsible measures that remove cost drivers, increase regulatory efficiency, and foster stability for the insurance-buying public.

## Civil Justice Reforms

### First-Party Reforms: Complete One-Way Fee Repeal and Eradicate Frivolous Assignment of Benefits (AOB) and Related Gamesmanship

First-party insurance disputes are enforced by a party to the contract. They include things such as property insurance, personal injury protection (PIP), and auto physical damage coverages.

While the legislature has done significant work to improve the property insurance market, from making the one-way attorney fee statutes non-assignable in May 2022, to extinguishing the one-way fee for property insurance contracts in December 2022, this same amendment to the one-way fee statute should be extended to all first-party coverages.

Litigation continues to escalate on issues regarding manufactured price disputes, intended solely to access the one-way attorney fee statute, for auto physical damage (i.e., auto glass) as well as in personal injury protection policies. Many of these law-

yers file thousands, sometimes tens of thousands, of first party AOB lawsuits over small dollar disputes that are often inflated simply to access lucrative attorney’s fees. This has created a solicitous industry for certain glass repair shops, who have been found encouraging consumers to file insurance claims for the replacement of perfectly intact windshields. For PIP, it threatens to jeopardize Florida’s ability to keep a first-party medical payments coverage in auto insurance, as PIP becomes increasingly expensive for a low dollar coverage. These abuses should be eliminated so that the abundantly unfair wealth transfer—from every single person who pays for auto insurance in Florida, to a few first-party plaintiff’s attorneys—comes to a screeching halt.

**AIF SUPPORTS** consistent reforms to the one-way attorney fee statute.

## Other Reforms

The Florida Legislature has rightly focused on property insurance, but the litigation insurance tax persists in other coverages as well. Many of the reforms that are required involve third-party and liability coverages and are summarized below. The people and businesses who will be positively affected by these reforms include anyone who purchases liability insurance: be it for their car, their furniture store, their trucking fleet, their real estate project, or for protection in their professional endeavors. Many of these reforms will help address the problem of “nuclear verdicts,” meaning verdicts which are so high as to defy logic and require much imagination to achieve—for example, in the form of trumped-up medical damages. These reforms will also go a long way to stabilizing the cost of other insurance coverages, which have continued to increase, and in some cases, become unattainable.

## Inflated Damages Reform

Trial lawyers and a few doctors currently game judges and juries by entering into evidence fake medical bills under what is commonly referred to as letters of protection (LOPs). These LOPs are used to inflate medical expenses, driving up economic damages, and causing a domino effect on the amount of noneconomic damages. Florida law should require that if medical expenses have already been paid, only evidence of the amount actually paid for medically necessary treatments is admissible. Florida law should also recognize common sense evidentiary principles, such as allowing a trier of fact to hear factors such as reasonableness, necessity, and customary charges for future treatment. The legislature should also reject the last Florida Supreme Court’s wayward decision in *Worley* and allow evidence of an attorney or law firm’s ongoing referral relationship with treating physicians to create parity with the manner in which doctors called by the defense are treated.

**AIF SUPPORTS** policies to ensure that only real medical damages are used as evidence in personal injury cases.



**AIF SUPPORTS** rules in liability cases that are clear, fair, and uniform. Unfortunately, Florida law allows third party claimants' lawyers to game the system, while first parties are governed by a statutory system that at least provides some minimal parameters of fair dealing.

### Fair Settlement

Another classic trial lawyer game manifests itself in liability cases in an effort to access extra-contractual damages. This game was made even easier by the departing Florida Supreme Court in *Harvey*, which essentially ruled that mere negligence by an employee of an insurer can transform a \$10,000 insurance policy into millions.

**AIF SUPPORTS** common sense rules for how extracontractual damages can be awarded in insurance cases. **AIF SUPPORTS** legislation that establishes a period during which an insurer may investigate a claim and, if warranted, tender policy limits to settle. An offer of policy limits should be legally sufficient to demonstrate a "good faith" effort by the insurer to settle in the interests of its policyholder. Further, lawyers for claimants should also be held to a good faith standard and evidence of gamesmanship on their part should preclude an award of extra-contractual damages.

### Litigation Financing

Injured parties are currently being preyed upon by speculators who provide up-front cash investments, then take a portion of litigation recoveries and charge exorbitant interest rates. These "investments" put undue incentive on plaintiffs to recover much more than what they are actually owed to make them whole, due to the fact that they have to repay a predatory loan.

**AIF SUPPORTS** requiring parties to disclose copies of these agreements to other parties so that these speculators cannot operate in the shadows.

### Construction Defects

Intended to allow parties to resolve disputes prior to litigation, the Chapter 558 pre-suit process has been diluted by the former Florida Supreme Court, hampering the ability of parties to resolve concerns about construction defects. **AIF SUPPORTS** a legislative solution in the form of a transparent, meaningful pre-suit process by which parties can attempt to remedy defect concerns, thereby avoiding unnecessary litigation and allowing for a positive impact on commercial insurance premiums. Further, **AIF SUPPORTS** alternative dispute resolution processes by which parties can attempt to avoid litigation and also receive a fair and comprehensive remedy.

### Premises Liability

Businesses and landowners offer valuable services to Floridians — from housing to groceries and everything in between. They want to protect their customers and residents in order for their

business to prosper and thrive. Unfortunately, sometimes bad things do happen. However, consideration should be given to creating a more balanced standard for proving liability on the part of a premises owner when such unfortunate incidents occur. Currently, Florida's comparative fault statute does not allow juries to consider the fault of a third-party actor in many cases, shifting liability for that person's actions completely onto a premises owner for failing to prevent the third party's actions. Juries should be able to hear all relevant evidence and appropriately assess the culpability of all parties involved. Similarly, a new standard of proof for such cases, akin to the one for slips and falls on transitory substances, should be explored.

**AIF SUPPORTS** a level playing field for premises liability, whereby owners are only charged with preventing the preventable.

### Liability Protection Parity

Those who provide the most critical services—from skilled nursing to affordable housing—should not be penalized for taking on the toughest tasks in our state. To this end, any liability protections should extend across the board to all industries. For example, much like necessary protections exist for hospitals and physicians, they should exist for other providers performing similar services, such as assisted living facilities and nursing homes. A patchwork civil justice system results in exploitative litigation conduct, driving costs for the end users of the good or service.

**AIF SUPPORTS** ensuring that industries receive consistent civil justice rules and regulations.

### Oppose New Causes of Action

Florida has seen a number of proposals over the years to expand civil liability, harming businesses while enriching trial lawyers. Any drive down I-75 will confirm that the trial bar is doing just fine. For this, and a multitude of other reasons, those who create products, offer necessary services, deliver desired goods, and improve the quality of life in Florida should not be taxed through additional litigation.

For example, the business community takes data privacy very seriously, and is supportive of enhancing protections for private information. However, creating a new private right of action will only shift expenses and costs to paying lawyers, instead of to the infrastructure and tools that aid the prevention of cyberattacks and data breaches.

Common sense regulation can be accomplished without expanding causes of action. The business community welcomes conversations to address needs as they emerge to create a framework that protects consumers while not creating a cost shift.

**AIF OPPOSES** any new causes of action that enrich trial lawyers at the expense of businesses that produce goods and services on which all Floridians rely.

## Property Insurance Market

### The Florida Hurricane Catastrophe Fund

The Florida Catastrophe Fund is a state-run program that provides reinsurance coverage. Over the last decade, its capable management has allowed Florida to benefit from this reinsurance backup without the need to resort to assessments on private insurance policies. Despite this, some seek to change the operation of the CAT Fund to include more coverage at lower levels.

Given the state of the market, the legislature has authorized two temporary programs—RAP and FORA—at levels of coverage for which the private reinsurance market, at present, has little capacity. AIF is grateful that the legislature chose to create these programs outside of the main structure of the CAT Fund, protecting its cash on hand and bonding abilities. We are hopeful that, upon the Florida market's return to a semblance of health after recent litigation reforms become fully effective, both RAP and FORA will have served their purpose as an effective bridge to a more stable and competitive market. Importantly, a market that the global reinsurance market can again support, shifting the stress of potential assessments off of Florida businesses.

### Citizens Property Insurance Corporation

Much like the CAT Fund, Citizens Property Insurance Corporation's leadership has led to a dramatic, but positive, realignment of risk from the state to the private market. Citizens has, to the extent possible, attempted to return to its original goal of being an "insurer of last resort." The rate cap, in conjunction with unfortunate market developments such as the proliferation of litigation and the deterioration of the private market, took Citizens on an unsustainable trajectory relative to its significant policy count growth. In December 2022, the legislature enacted reforms to ameliorate some of Citizens' rate needs, which will inevitably minimize the potential of assessments. AIF is supportive of the legislature's work to return Citizens to a true residual market entity and fixing the litigation problems that created its quick expansion.

## Other Insurance

### Health Insurance

In recent years, proposals that seek to make health care more expensive have proliferated in the Florida Legislature. These include limitations on effective step-therapy protocols, restraints on mail order pharmacy fills, restrictions on necessary formulary updates, and reforms that would inappropriately incentivize un-reimbursable care. **AIF OPPOSES** legislation that increases the cost of health care, or that discourages safe, effective, and proven methods that achieve cost savings without jeopardizing high quality health services or positive patient outcomes.

Further, consistent with the experience of many other states, Florida has experienced a severe opioid crisis. **AIF SUPPORTS**

the efforts of our Governor and political leaders to provide common sense solutions to this public health epidemic. These include limiting the availability of addictive opioids, promoting nonaddictive alternatives, and expanding access to opioid antagonists that can save lives while promoting appropriate therapeutic care for victims.

### Life Insurance

Life insurance is a product purchased to protect family members and loved ones upon passing. Akin to every other type of insurance, risk is a factor in how premiums are calculated for life insurance. Therefore, medical documentation is routinely reviewed before a life insurance policy is bound to ensure the appropriateness of the premium.

Recently, with the advent of genetic testing, some are advocating that such information not be included as part of a medical review. This creates a tremendous cost shift in the marketplace and allows for adverse selection, which has the very real potential of creating significant rate distortions for premium payers. AIF believes that all insurers, due to their inherent business goal of covering risk, must be allowed to fully evaluate that risk before they then decide to risk its capital, which is supported by all other premium payers. Not doing so ignores the practical reality of insurance and creates market aberrations.

**AIF SUPPORTS** a strong and competitive life insurance market.

### Workers' Compensation

Although Florida's workers' compensation marketplace was dealt several curveballs from the Florida Supreme Court, which pose a great risk to the litigiousness of the system, rates have not yet borne out the full brunt of the associated costs. Positive loss experience has led to several rate decreases in the most recent National Council on Compensation Insurance (NCCI) annual filings. However, the industry is bracing for the eventual impact of unchecked attorney's fees, which are likely to erode the moderating effects of the rate decreases. AIF and its Workers' Compensation Coalition are actively monitoring the trends in this system to ensure that action is taken, as appropriate, for the benefit of employers and employees.



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