

To: Sam Miller

Subject: Sinkhole Tail Fix Option Using Asbestos Framework

Here is one proposal we will be reviewing Thursday during the all-industry summit at the Governor's Club in Tallahassee. We will send other material as it becomes available. **Please distribute to your members who are participating** in the meeting.

We need to advise you the meeting will begin promptly at 1 p.m. Thursday and end at 4 p.m. We are in the main dining room, second floor, and the Governor's Club has that scheduled for a reception that evening.

The material below came from Angel Bostick, ASI.

In anticipation of our all-industry meeting on Wednesday, attached please find (1) a document which briefly outlines the option to address the sinkhole tail issue by mirroring the 2005 asbestos law and (2) a draft sinkhole tail bill which tracks the 2005 asbestos law.

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**OPTION:
CREATE A “SINKHOLE COMPENSATION FAIRNESS ACT”**

Why the Asbestos and Silica Compensation Fairness Act (“ASCFA”) framework?

- A number of current legislators and some of the current leadership worked on and have experience with the 2005 Asbestos law.
- As was the case when the Asbestos law passed, the mandated property peril coverage for sinkhole is promoting unintended awards and results.
- The Asbestos framework was successful in reducing unintended claims or awards.
- The Asbestos law contained a provision that applied the framework to pending cases where the trial had not yet commenced. This timeframe of eliminating an existing cause of action that was filed prior to the enactment of the asbestos law has been challenged and has been found constitutional by the Third District Court of Appeal (*DaimlerChrysler Corp. v. Hurst*, 949 So.2d 279 (Fla. 3d DCA 2007)) and found unconstitutional by the Fourth District Court of Appeal (*Williams v. American Optical*, 985 So. 2d 23 (Fla. 4th DCA 2008)). Oral arguments were held before the Florida Supreme Court in February 2010, but no decision has been published. However, regardless of the ruling, we can avoid its application to any law we draft by changing the timeline for when an action is extinguished. For example, we could draft the law so that the Sinkhole Act applies to claims filed after the effective date of the law.

How the Asbestos framework could be applied to the Sinkhole problem:

- Given that sinkhole coverage is mandated by the Legislature, that the occurrence policy form is mandated by the OIR, and that the five year reporting period was also mandated by the OIR, clarifying legislation utilizing the Asbestos framework could be deployed to reduce unintended sinkhole tail claims.
- Clarifying legislation that includes an exercise of the police power would best position the industry for the constitutional challenges that will follow.
- The sinkhole tail legislation would apply to property owners seeking to report a new loss from an expired prior-year policy. As a condition to filing this claim, the insured would have to provide a prima facie showing that:
 - There was “Structural Damage” to the insured property;

- Evidence that the Structural Damage to the insured property was caused by covered “sinkhole activity”; and,
 - Proof the loss occurred during the policy or endorsement period.
- It is anticipated that the legislation will require that the prima facie showing will include the following:
 - A clear and accurate sworn proof of loss establishing that the claim was the result of structural damage to the insured property;
 - A clear and accurate sworn proof of loss identifying the components of the structure (i.e. foundation, walls, rafters, roof, etc.) damaged as a result of loss from the covered “sinkhole activity”;
 - A clear and accurate sworn statement by the insured attesting to the date the damage that is the subject of the proposed claim was discovered;
 - A clear and accurate sworn statement by a professional engineer(s) as defined in §627.706(2)(d) certifying that the structural damage to the insured property occurred during the policy or endorsement period as a result of sinkhole activity.

Constitutional protections for the sinkhole tail fix:

- Declare the legislation to be a clarification to address unintended consequences flowing from the recent amendments to the sinkhole law.
 - Include an exercise of the police power in the proposed law. Examples justifying the exercise are:
 - A finding that there is an overpowering public necessity requiring this act to halt the current sinkhole claims crisis and to remove incentives for filing claims that were never intended to be covered by the legislative mandate for sinkhole coverage;
 - A finding that there is an overpowering public necessity to defer claims for unintended damage or loss in order to preserve, now and for the future, the public health, safety, and welfare; and,
 - A finding that using sinkhole insurance claim proceeds for repairing or replacing sinkhole damaged property will protect and promote the revenues of the state and local governments which are needed to provide for the public welfare.
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A bill to be entitled

An act relating to sinkhole claims; providing a short title; providing purposes; providing definitions; requiring actual structural damages resulting from sinkhole loss during the policy period as an essential element of a claim; providing criteria for prima facie evidence of sinkhole loss during the policy period for claims and certain actions; providing exceptions; providing additional requirements for evidence relating to sinkhole loss during the policy period; providing for the protection of the ad valorem tax base; specifying absence of certain presumptions at trial; providing procedures for claims and certain actions; providing for venue; providing for preliminary proceedings; requiring sinkhole claims to include certain information; specifying certain limitation periods for certain claims; providing an effective date.

WHEREAS, sinkhole coverage became legislatively mandated in 1981, and

WHEREAS, sinkholes are the result of a unique geological structure of land, and

WHEREAS, insurance claims filed for sinkhole damages or losses have consistently and exponentially risen since the mandate for coverage of this peril, including a nearly 1200 percent increase from 1999 to 2010, and

WHEREAS, the prior mandate for sinkhole coverage is being improperly applied to result in significant awards for unintended claims for minor and non-structural damage, and

WHEREAS, the majority of insureds receiving sinkhole insurance claim payments do not use the funds to repair or replace the damaged property, and

WHEREAS, the cost of compensating individuals with unintended claims for minor and non-structural damages jeopardizes the ability of defendants to compensate people with serious sinkhole-related claims, now and in the future, and

WHEREAS, The December 2010 Florida Senate Interim Report 2011-104, "Issues Relating to Sinkhole Insurance," shows that the sinkhole insurance market in Florida is broken, it is affecting every homeowner in the state, a sinkhole claims cottage industry has arisen, the explosion in sinkhole claims jeopardizes the solvency of property insurance companies and will result in higher insurance premiums for almost all insured homeowners in this state, property values are plummeting in some counties and the financial stability of local governments is negatively effected, and

WHEREAS, the November 2010 Florida Office of Insurance Regulation Report on Review of the 2010 Sinkhole Data Call indicates that sinkholes claims have increased nearly three-fold from 2006 to 2010 and that sinkhole claims are spreading geographically across Florida, and

WHEREAS, the improper application of the prior mandate for sinkhole coverage to unintended claims has contributed to the current instability in the Florida insurance market and has resulted in unsustainable sinkhole claim trends for both the private insurance market and the state-run insurer, Citizens Property Insurance Corporation, and

WHEREAS, the Legislature finds that an overpowering public necessity requires it to act to halt the current sinkhole claims crisis and to remove incentives for filing claims that were never intended to be covered by the legislative mandate for sinkhole coverage, and

WHEREAS, the Legislature finds that there is an overpowering public necessity to defer claims for unintended damage or loss in order to preserve, now and for the future, the public health, safety, and welfare, and

WHEREAS, the Legislature finds that using sinkhole insurance claim proceeds for repairing or replacing sinkhole damaged property will protect and promote the revenues of the state and local governments which are needed to provide for the public welfare, NOW, THEREFORE,

Be It Enacted by the Legislature of the State of Florida:

Section 1. Short title.--This act may be cited as the "Sinkhole Compensation Fairness Act".

Section 2. Purpose.--It is the purpose of this act to:

- (1) Create the Sinkhole Compensation Fairness Act to ensure the orderly payment of sinkhole claims that might arise from prior occurrence based insurance policies that were legislatively mandated to protect sinkhole damage, to ensure sinkhole coverage is being applied only to the type of claims that were intended to be covered by the mandate, to provide for the repair or replacement of sinkhole property damage and to protect the ad valorem tax base for Floridians and Florida businesses.
- (2) Clarify the longstanding intent of the mandate requiring authorized insurers in this State to make sinkhole coverage available, as well as subsequent regulatory directives regarding sinkhole forms and rates, by deterring unintended claims for minor and non-structural property damage;
- (3) Reduce cost drivers for sinkhole claims, encourage repair or replacement of sinkhole damages, stabilize the land, and remove incentives for filing spurious claims;
- (4) Give priority to true victims under the mandated sinkhole coverage, claimants who can demonstrate actual structural damage caused by a sinkhole;
- (5) Fully preserve the rights of claimants who demonstrate actual structural damage caused by a sinkhole; and,
- (6) Enhance the ability of the judicial system to supervise and control sinkhole claims.

Section 3. Definitions.--As used in this act, the term:

- (1) "Sinkhole" means a landform created by subsidence of soil, sediment, or rock as underlying strata are dissolved by groundwater. A sinkhole forms by collapse into subterranean voids created by dissolution of limestone or dolostone or by subsidence of

surface soils as these strata are dissolved.

- (2) "Catastrophic Ground Cover Collapse" ("CGCC") shall be defined in accordance with s. 627.706(2)(a).
 - (3) "Sinkhole loss" means structural damage to the covered building, including the foundation, caused by sinkhole activity. Contents coverage shall apply only if there is structural damage to the building caused by sinkhole activity.
 - (4) "Sinkhole activity" means settlement or systematic weakening of the earth supporting the covered building only when such settlement or systematic weakening results from active movement or raveling of surficial soils, sediments, or rock materials into subterranean voids created by the effect of water on a limestone or similar rock formation. Sinkhole activity does not include lateral or vertical ground movement of surficial soils caused by earthquake, landslide, volcanic eruption, soil conditions, soil erosion, soil freezing and thawing, improperly compacted soil, material characteristics of soil, construction defects, roots of trees and shrubs, rupture or breakage of water pipes, or collapse of storm and sewer drains.
 - (5) "Professional engineer" means a person, as defined in s. 471.005, who has a bachelor's degree or higher in engineering and has successfully completed at least five courses in any combination of the following: (1) geotechnical engineering, (2) structural engineering, (3) soil mechanics, (4) foundations, or (5) geology. A professional engineer must also have experience in the identification of sinkhole activity as well as other potential causes of damage to the covered building.
 - (6) "Professional geologist" means a person, as defined by s. 492.102, who has a bachelor's degree or higher in geology or related earth science and experience in the identification of sinkhole activity as well as other potential geologic causes of damage to the covered building.
 - (7) "Sinkhole stabilization contractor" means a licensed general contractor, as defined by s. 489.113, who has at least 5 years experience in performing subsurface stabilization repairs to residential buildings in the state of Florida under the supervision of a professional engineer and who carries at least \$5 million in professional liability coverage. Preference will be given to those sinkhole stabilization contractors holding an active Florida Department of Transportation certification.
 - (8) "Tail" is that period of time beyond the expiration of the underlying insurance policy or endorsement during which an insured may file a notification to the insurer of the claim.
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- (9) "Sinkhole Tail Claim" means a claim for "sinkhole loss" that is reported after the expiration of the applicable policy or endorsement but occurred during the policy or endorsement period.
 - (10) "Structural Damage" for purposes of a "sinkhole tail claim" means (a) damage to a

covered building, including the foundation, that prevents the primary structural members and/or primary structural systems from supporting the loads and forces they were designed to support and (b) vertical floor variance resulting from sinkhole related displacement that is greater than the maximum allowable variance or deflection permitted by the Florida Building Code in effect on the date of loss. “Structural damage” for purposes of a “sinkhole tail claim” exists only if both (a) and (b) are satisfied. To effect the longstanding intent of the legislative mandate for sinkhole coverage and to ensure consistent application of the mandate, this definition of “structural damage” applies to all “sinkhole tail claims” regardless of the underlying policy language regarding structural damage, actual physical loss, direct physical loss, or similar language.

Section 4. Sinkhole Tail Claim.—

- (1) Essential elements of a sinkhole tail claim are:
 - a. “Structural Damage” to the insured property; and,
 - b. Evidence that the Structural Damage to the insured property was caused by covered “sinkhole activity”; and,
 - c. Proof the loss occurred during the policy or endorsement period.
 - (2) A person may not report or file a sinkhole tail claim in the absence of a prima facie showing that the essential elements exist and are a part of the proposed claim. The prima facie showing must include all of the following:
 - a. A clear and accurate sworn proof of loss establishing that the claim was the result of structural damage to the insured property;
 - b. A clear and accurate sworn proof of loss identifying the components of the structure (i.e. foundation, walls, rafters, roof, etc.) damaged as a result of loss from the covered “sinkhole activity”;
 - c. A clear and accurate sworn statement by the insured attesting to the date the damage that is the subject of the proposed claim was discovered;
 - d. A clear and accurate sworn statement by a professional engineer as defined in §627.706(2)(d) certifying that the structural damage to the insured property occurred during the policy or endorsement period as a result of sinkhole activity.
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