SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based only on the provisions contained in the legislation as of the latest date listed below.)

BILL: CS/SB 746

SPONSOR: Banking and Insurance Committee and Senator Grant

SUBJECT: Title Insurance

DATE: March 17, 1999 REVISED: ________ ________ ________ ________

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Deffenbaugh	Deffenbaugh	BI	Favorable/CS
2.				
3.				
4.				
5.				

I. Summary:

Committee Substitute for Senate Bill 746 would prohibit title insurers and their agents from paying a rebate of the agent's, agency's, or title insurer's share of the premium or any charge for related title services below the cost for providing such services, or provide any special favor or advantage, or any monetary consideration or inducement whatsoever to a person obtaining a title insurance policy.

In the case of Butler et al. v. State of Florida, et al, the Circuit Court of the Second Judicial Circuit for Leon County, held as unconstitutional the current statutes and Department of Insurance rule that prohibit title insurance agents from rebating commissions or fees. It is not clear if this bill would cure the constitutional defects as determined by the Circuit Court. The bill may add to the argument that such rebating may be constitutionally prohibited for title agents by making legislative findings and changes that emphasize the differences between the services rendered by title insurance agents and services rendered by agents for other lines of insurance, such as the new definition of "primary title services" that includes determining insurability in accordance with sound underwriting practices.

The bill also revises the authority for the Department of Insurance to adopt rules related to title insurance rates to specify that the department adopt rules specifying the "premium" rather than the current requirement to adopt the "risk premium" and "services incident thereto." The bill retains the current authority of the department to establish, by rule, limitations on such reasonable charges made in addition to the [risk] premium based upon the expenses associated with the services rendered and other relevant factors.

The bill adds a definition of "primary title services" which means determining insurability in accordance with sound underwriting practices based upon evaluation of a reasonable search and examination of the title, determination and clearance of underwriting objections and requirements to eliminate risk, preparation and issuance of a title insurance commitment setting forth the requirements to insure, and preparation and issuance of the policy.

The bill adds a provision that prohibits any portion of the premium attributable to a primary title service from being paid to or retained by any person who does not actually perform or is not liable for the performance of such services, for any transaction subject to the Real Estate Settlement Procedures Act of 1974 (RESPA).

This bill substantially amends the following sections of the Florida Statutes: 624.509, 626.841, 626.8411, 627.7711, 627.777, 627.7773, 627.7776, 627.780, 627.782, 627.783, 627.7381, 627.784, 627.7841, 627.7842, 627.7845, 627.786, 627.791, and 627.792. This bill creates section 627.793 of the Florida Statutes.

II. Present Situation:

In the recent case of Butler, et al. v. State of Florida, Department of Insurance, et al, (Case No. 94-1428, February 26, 1999) the Circuit Court of the Second Judicial Circuit for Leon County, issued a final summary judgement, declaring as unconstitutional as violative of the due process provisions of Article 1, Section 9, of the Florida Constitution, the current statutes and Department of Insurance rule that prohibit title insurance agents from rebating commissions or fees. On March 11, 1999, the court put a temporary stay on this judgment, and clarified that only the agents' share of the premium was subject to rebate or negotiation, not the entire premium. At a future hearing (March 23) the court will decide whether to grant a permanent stay (and the amount of any bond) while the case is on appeal.

In an earlier order in the same case, the court found that s. 626.572, F.S., which generally allows rebating of agent commissions under certain conditions, was not applicable to title insurance agents. The earlier order also found that other sections of the Florida Insurance Code, ss. 627.780(1), 627.782, and 627.783, F.S., taken in conjunction, prohibit title insurance agents from rebating any portion of the risk premium for title insurance absent an order being entered by the Department of Insurance authorizing a deviation from the adopted risk premium as provided by s. 627.783, F.S. (Butler, cited above, December 23, 1997)

The earlier order in the Butler case, regarding the applicability to title insurance agents of s. 626.572, F.S., which generally allows rebating of agents commissions under certain circumstances, arose due to the lack of clarity in the statutes. Section 626.8411, F.S., specifies the provisions of part I of chapter 626 that do not apply to title insurance agents. The rebating statute, s. 626.572, F.S., is not in this specified list, which would appear to indicate that the rebating statute does apply to title agents. However, as noted, the Circuit Court found otherwise, due primarily to the other statutes cited which specifically apply to title insurance that indicate that title agents may not rebate any portion of the risk premium adopted by rule by the Department of Insurance.

The more recent order in the Butler case, which held as unconstitutional the statutory prohibition against title agents rebating, was based on the Florida Supreme Court case in 1986 which found as unconstitutional the laws that had previously prohibited life insurance agents from rebating commissions, Department of Insurance v. Dade County Consumer Advocate's Office, 492 So.2d 1032 (Fla. 1986). In response to this case, the Florida Legislature in 1990 (Ch. 96-303, L.O.F.) repealed the statutes that prohibited rebating and adopted s. 626.572, F.S., which allows rebating of agent commissions, but only under specified conditions. These conditions remain quite

restrictive, such as requiring that the rebate be uniformly applied so that all insureds who purchase the same policy through the agent for the same amount of insurance receive the same percentage rebate. This statute also prohibits rebates with respect to a policy from an insurer that prohibits its agents from rebating commissions, among many other conditions. (The 1990 legislation also amended the unfair trade practice statute prohibiting rebating, s. 626.9541, F.S., to conform, by referring to “unlawful” rebating.)

In its order in the recent Butler case, the court wrote:

> Were it not for the case of Department of Insurance v. Dade County Consumer Advocate’s Office [cite omitted], I would be inclined to find the State’s interest in maintaining a “viable and orderly private sector market for property insurance in this state”, justifies the regulation of rates and rebates as set forth in the challenged provisions. However, though I have considered the arguments by the Defendant and Defendant/Intervenors that there are significant and important difference between life insurance companies and their agents (which was the subject of the Dade case), and title insurance companies and their agents, I just cannot conclude that the differences are such as to make the authority of the above case inapplicable to this one.

Title insurance is regulated by the Department of Insurance pursuant to part XIII of chapter 627 (ss. 627.7711-627.792, F.S.). The department is required to adopt rules specifying the “risk premium” to be charged by title insurers (s. 627.782, F.S.). All title insurers must charge the same risk premium, as promulgated by the department. The department may also specify the percentage or amount of the risk premium required to be *maintained* by the title insurer, which *may not be less than 30 percent* of the risk premium for policies sold by agents. This minimum 30% retention of the risk premium by the title insurer, effectively imposes a maximum 70% of the risk premium that can by paid by title insurers to agents as commission or fees for their services. This provision was enacted in 1992 (Ch. 92-318, L.O.F.) due to concerns regarding the solvency of title insurers and the increasing percentage of the risk premium that was being paid to title agents.

In addition to the “risk premium” a title agent will typically impose other charges for related title services, such as examination of title, conducting the closing, preparation of documents, etc., which generally are negotiable items with the purchaser, subject to the requirement by rule of the department that an agent may not charge below the actual cost of providing such related title services. (4-186.003(13)(a), F.A.C.) The department is authorized by s. 626.782, F.S., to establish limitations on “such reasonable charges made in addition to the risk premium based upon the expenses associated with the services rendered and other relevant factors,” but the department has not adopted any such rules. Further, the federal Real Estate Settlement Procedures Act of 1974 (RESPA), prohibits any portion of the premium attributable to a “primary title service” from being paid to any person who does not actually perform or is not liable for the performance of such services, for any transaction subject to RESPA (12 U.S.C., s. 2601 et seq.).

Other aspects of the current law affected by this bill are addressed in the section by section analysis, below.

III. Effect of Proposed Changes:

Legislative Findings are made in the "Whereas" clause of the bill, that regulation of insurance is in the public interest and that it promotes the public health, safety and welfare by assuring the solvency and soundness of insurers; that determination of insurability of title to real property prior to insuring such property is essential to the maintenance of the solvency and soundness of title insurers; and that because title insurance agents determine insurability on behalf of title insurers, there is a direct relationship between the determination of insurability performed by title agents and the public interest.

These legislative findings may be relevant to the issue of the constitutionality of the prohibition against title agents rebating fees; see Constitutional Issues, below.

Section 1 amends s. 6247.509, F.S., relating to the premium tax, to make a technical conforming change.

Section 2 amends s. 626.841, F.S., revising the definition of "title insurance agent" and "title insurance agency" to delete references to title agents issuing binders or guarantees of title, but retaining the reference to issuing commitment or policies of title insurance, which reflects the actual practice and terminology used.

Section 3 amends s. 626.8411, F.S., to provide that section 626.572, relating to rebating of agent's commissions, when allowed, does not apply to title insurance agents or agencies. The referenced statute allows insurance agents to rebate commissions, subject to certain requirements. As described in more detail in Present Situation, above, the current law is unclear as to the applicability of s. 626.572, F.S., to title insurance agents, but a circuit court order held that this statute did not apply to title insurance agents, as specified by this bill. See Section 4, below, which prohibits title insurance agents from rebating any of its share of the premium or any charge for related title services below the cost for providing such services.

Section 4 amends s. 626.9541, F.S., relating to unfair methods of competition and unfair or deceptive acts or practices, to amend the provisions that currently prohibit unlawful rebates of premiums, commissions, or other valuable consideration not specified in the contract, as an inducement to an insurance contract.

The current statute prohibits title insurers or agents (and related persons) from paying an unlawful rebate of the charge made incident to the issuance of insurance, or to give any special favor or advantage, or any monetary consideration or inducement whatsoever. The words "charge made incident to the issuance of such insurance" encompass underwriting premium, agent's commission, abstracting charges, title examination fee, and closing charges. However, this does not preclude abatement of an attorney's fee charged for services rendered incident to the issuance of such insurance.

As amended, the prohibition on title insurers and agents (and related persons) paying an unlawful rebate would apply to the "agent's, agency's, or title insurer's share of the premium or any charge for related title services below the cost for providing such services," or provide any special favor

or advantage, or any monetary consideration or inducement whatsoever. See the bill's definition of "related title services" in Section 5, below.

Section 5 amends s. 627.7711, F.S., to amend the definition of "related title services" and to add a definition of "primary title services." The bill amends the current definition of "risk premium," for the substitute term "premium."

The amended definition of "related title services" means services performed by a title insurer or title insurance agent or agency, in the agent's or agency's capacity as such, including but not limited to certain specified services. The amended definition includes all of the related title services in the current definition, except that the current reference to "preparing or obtaining title information" is changed to "preparing or obtaining a title search, examining title," (etc.).

The new definition of "primary title services" means determining insurability in accordance with sound underwriting practices based upon evaluation of a reasonable search and examination of the title, determination and clearance of underwriting objections and requirements to eliminate risk, preparation and issuance of a title insurance commitment setting forth the requirements to insure, and preparation and issuance of the policy.

The amended definition of "premium" (currently, "risk premium") means the charge, as specified by rule of the department, for a title insurance policy, including the charge for performance of primary title services by a title insurer or title insurance agent or agency, and incurring the risks incident to such policy, (etc.). The bill further adds that the term "premium" for title insurance does not include a commission. The current definition of "risk premium" means the charge, as specified by rule of the department, made by a title insurer for assumption of the risk and specifically excludes other charges incidental to title insurance.

See Section 10, below, for the primary use of the terms defined in this section.

Section 6 amends s. 627.777, F.S., relating to approval of title insurance forms by the department. The bill deletes references to title insurers issuing title insurance binders or preliminary reports and deletes the prohibition against the department disapproving a title guarantee or policy form on the ground that it has on it a blank form for an attorney's opinion of the title.

Section 7 amends s. 627.7773, F.S., relating to accounting and auditing of forms by title insurers, to include references to title agencies, where the term title agent is currently used.

Section 8 amends s. 627.7776, F.S., relating to furnishing of supplies, to include references to title agencies, where the term title agent is currently used.

Section 9 amends s. 627.780, F.S., relating to illegal dealings in premiums, to change the reference from "risk premium" to "premium," as this term is defined in Section 5 of the bill. This section prohibits any person from quoting or charging a [risk] premium for title insurance other than the [risk] premium adopted by the department.

Section 10 amends s. 627.782, F.S., relating to adoption of rates by the department. The bill revises the authority for the department to adopt rules related to title insurance rates to specify that the department adopt rules specifying the "premium" rather than the current requirement to adopt the "risk premium." The bill specifies that this premium is for the title insurance contract, deleting the additional reference to "and services incident thereto." See Section 5, above, for the bill's definition of "premium."

The bill maintains (but re-words) the current authority of the department to specify the percentage of the premium (currently, risk premium) required to be retained by the title insurer, which may not be less than 30 percent.

The bill retains the current authority of the department to establish, by rule, limitations on such reasonable charges made in addition to the premium (currently, risk premium) based upon the expenses associated with the services rendered and other relevant factors. The department has not adopted any such limitations.

The bill adds a provision that prohibits any portion of the premium attributable to a "primary title service" from being paid to or retained by any person who does not actually perform or is not liable for the performance of such services, for any transaction subject to the federal Real Estate Settlement Procedures Act of 1974, as amended from time to time. This is currently required by the cited federal law. See Section 5, above, for the bill's definition of "primary title services."

The factors that the department must consider in adopting premium rates are revised. The current law requires the department to consider a reasonable margin for underwriting profit and contingencies sufficient to earn a rate of return on capital that will attract and retain adequate capital investment in the title insurance business. As amended, the bill adds that the department must additionally consider a reasonable margin for profit that would "maintain an efficient title insurance delivery system."

Section 11 amends s. 627.783, F.S., relating to rate deviations that may be approved by the department, to include reference to a title agency in addition to a title agent; to clarify that a deviation that may be filed or approved from "other services" is a deviation from "related title services"; and to specify that an order granting a petition for a rate deviation constitutes an amendment to the adopted premium only as to the petitioners named in the order.

Sections 12 through 19 amend ss. 627.7831, 627.784, 627.7841, 627.7842, 627.7845, 627.786, 627.791, and 627.792, F.S., to make technical and conforming changes.

Section 20 creates s. 627.793, F.S., which authorizes the department to adopt rules implementing the provisions of this part (part XIII of chapter 627, Title Insurance Contracts).

Section 21 provides that this act shall take effect July 1, 1999.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The current law prohibition against rebating title agent commissions or fees was declared unconstitutional on February 26, 1999, by the Circuit Court for Leon County in the Butler case, described in more detail in Present Situation, above. The court held that the current statutes and rule which prohibit title insurance agents from rebating any of their commissions are unconstitutional as violative of the due process provisions of Article 1, Section 9, of the Florida Constitution. The bill's more explicit prohibition against title insurance agents rebating their fees may still be unconstitutional under the reasoning of the Circuit Court. However, the bill may add to the argument that such rebating may be constitutionally prohibited for title agents by making legislative findings and changes that emphasize the differences between the services rendered by title insurance agents and services rendered by agents for other lines of insurance, such as the new definition of "primary title services" that includes determining insurability in accordance with sound underwriting practices that affect the solvency of the title insurer.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

By prohibiting title insurance agents from rebating any portion of their fees, the bill would prevent purchasers of title insurance policies from the economic benefit of a reduction in the charge for the title insurance policy. Any such benefit would have been most likely for purchasers of commercial property and other large premium transactions.

By prohibiting title insurance agents from rebating any portion of their fees, the bill would economically benefit title insurers and title agents, by protecting them from losing business to competitors who are willing to provide rebates. Title insurers may further benefit, due to the fact that title agents who reduce or rebate their fees may perform a lower quality of

underwriting services that could expose the title insurer to a greater amount of losses under the policy.

The private sector impact, discussed above, may also be the effect of the current law if it is interpreted as prohibiting title agents from rebating and if the circuit court order declaring the law unconstitutional is reversed on appeal. Therefore, the bill has such effects to the extent that it makes this result more likely.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.

This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.