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HOUSE OF REPRESENTATIVES
COUNCIL FOR COMPETITIVE COMMERCE
ANALYSIS

BILL #: CS/CS/HB 193
RELATING TO: Insurer Rehabilitation & Liquidation
SPONSOR(S): Committee on Judicial Oversight, Committee on Insurance, and Representatives Gannon and Kallinger
TIED BILL(S): CS/HB 195

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) INSURANCE YEAS 13 NAYS 0
- (2) JUDICIAL OVERSIGHT YEAS 8 NAYS 0
- (3) COUNCIL FOR COMPETITIVE COMMERCE
- (4)
- (5)

I. SUMMARY:

When solvency protections fail, the Department of Insurance (Department) may seek to be appointed Receiver of an insurer through a judicial proceeding (i.e., a delinquency proceeding) for the purpose of rehabilitating an impaired insurer or, if rehabilitation is unsuccessful or otherwise inappropriate, liquidating the insolvent company. The Department, as Receiver, is placed in control of the impaired or insolvent insurer. If the assets of liquidated insurers are not sufficient to meet their obligations to policyholders, then the appropriate guaranty fund must levy assessments against other insurers to pay these obligations. Changes related to the insurer rehabilitation and liquidation process include:

- specifically granting the receivership court (i.e., the Circuit Court in Leon County) jurisdiction over third parties (e.g., insurers other than the one in receivership, policyholders, agents, brokers, current or former officers), for the purposes of delinquency proceedings, in lieu of collateral actions in other venues;
- tolling the statutes of limitation for actions by or against the insurer to benefit the estate or others, by as much as 4 years beyond current statutes of limitation;
- authorizing the Department, as Receiver, to exercise rights of certain third parties to maximize the value of the estate;
- allowing the Department, as Receiver, to recover additional costs from third parties in certain circumstances;
- allowing the Department, as Receiver, to investigate the causes of an insolvency;
- expanding the scope of the Department's examination authority to include certain third parties currently or formerly associated with the insurer, such as agents, brokers, and officers;
- creating a civil cause of action, including treble damages, and additional criminal penalties, for certain fraudulent acts.

This bill may decrease state government expenditures. See Section III.D., Fiscal Comments. This bill does not appear to have a fiscal impact on local governments.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|---|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input checked="" type="checkbox"/> | No <input type="checkbox"/> | N/A <input type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

The bill would create new governmental authority and power within the Department of Insurance, both as regulator and Receiver, when investigating or overseeing an insolvent insurer, extends statutes of limitation, and adds civil causes of action and criminal penalties for certain specified fraudulent acts.

B. PRESENT SITUATION:

The Florida Insurance Code¹ (the Insurance Code) regulates the business of insurance in Florida. Under the Insurance Code, the Department of Insurance (Department) has a wide range of options when it determines through financial reports, examinations, or other sources that an insurer has failed, or is at risk of failing, any of the solvency tests or is otherwise in unsound financial condition. General powers of the Department include the authority to suspend or revoke an insurer's certificate of authority; impose administrative fines; issue cease-and-desist orders; and remove, suspend, or restrict the activities of those individuals operating or directing the affairs of the insurer.

In addition to these general powers, the Department may place insurers of "unsound condition"² under administrative supervision or attempt to place the insolvent insurer³ in receivership, with or without the consent of the insurer.⁴ Administrative supervision is an administrative proceeding in which the Department, with the consent of a financially troubled insurance company, supervises the management of the insurance company in an attempt to cure the company's troubles rather than close it down. Receivership is a judicial proceeding in which the Department is placed in control of the insurer for the purpose of rehabilitating or liquidating the insurer. The Department may seek to

¹ Chapters 624-632, 634, 635, 641, 642, 648, and 651 constitute the "Florida Insurance Code." S. 624.01, F.S.

² "Unsound condition" means any of the following conditions: (a) The insurer's required surplus, capital, or capital stock is impaired to an extent prohibited by law; (b) The insurer continues to write new business when it has not maintained the required surplus or capital; or (c) The insurer attempts to dissolve or liquidate without first having made provisions, satisfactory to the Department, for liabilities arising from insurance policies issued by the insurer. S. 624.80(2), F.S.

³ While insolvent insurers are not the only insurers placed in receivership, this analysis will use the term "insolvent insurer" interchangeably with the other instances where the Department may seek to be named Receiver. Other grounds for the Department to be named Receiver include: failure to comply with departmental orders; engaging in business practices or creating conditions hazardous to policyholders, creditors, stockholders, and the public; failure to submit to examination or inspection; concealment or removal of records; managerial deadlock; unauthorized merger; willful violation of corporate charter or law; under the control of dishonest or untrustworthy individuals, as determined by the Department; failure to pay court judgments in a timely manner; and unreasonable delay of settlement payments. Sections 631.051, 631.061, 631.071, 631.081, 631.091, F.S.

⁴ Part VI of Ch. 624, F.S.

be appointed Receiver⁵ through a delinquency proceeding in court for the purpose of rehabilitating an impaired insurer or, if rehabilitation is unsuccessful or otherwise inappropriate, liquidating the insolvent company. The primary goal of rehabilitation is to restore the financial solvency of the insurer; the primary goal of liquidation is to secure and maximize the assets of the insolvent company for the benefit of its policyholders.

A delinquency proceeding under Ch. 631, F.S., is the “sole and exclusive method of liquidating, rehabilitating, reorganizing, or conserving an insurer.”⁶ Delinquency proceedings against insolvent insurers must be brought in Leon County Circuit Court, while other collateral actions against third parties (e.g., insurers other than the one in receivership, policyholders, agents, brokers, current or former officers) relating to the underlying insolvency may occur in other parts of the state where jurisdiction is appropriate.

Because an insurance company may not be a debtor under federal bankruptcy laws, see 11 U.S.C. § 109, state court receivership is the only method for liquidation, rehabilitation, or reorganization of an insurance company. Receivership practice and procedure is similar to bankruptcy practice and procedure.

The Department as Receiver

It is important to differentiate between the Department in its usual role as the state insurance regulator and the Department in its role as the court-appointed Receiver. As the state insurance regulator, the Department is empowered by law to protect the health, safety and welfare of the citizens of Florida. As the court-appointed receiver, the Department is an officer of the court and is empowered by the court and statute to protect the individualized rights and assets of the insurer’s estate, as well as, the rights of the insurer’s creditors and policyholders. According to the Department, once the court exercises its jurisdiction over the insurer by granting the delinquency petition, the insurer is no longer under the general regulatory authority of the Department and the Receiver only has the authority conferred upon it by Part I of Ch. 631, F.S., the court, or common law.

As of October 30, 2001, the Division of Rehabilitation and Liquidation within the Department was administering the receivership of fifty-five companies. This includes the ancillary receivership of Reliance Insurance Company, a Pennsylvania company, which is expected to be the largest insurance company failure in history

⁵ A receiver is “a person appointed by a court for the purpose of preserving property of a debtor pending an action against him, or applying the property in satisfaction of a creditor’s claim, whenever there is danger that, in the absence of such an appointment, the property will be lost, removed or injured.” Black’s Law Dictionary, 7th Ed. 1990. In this case the debtor is the insolvent insurer and the creditor is the claimant policyholder (and/or others such as lenders, lienholders, and contractors). Since the Receiver in a delinquency proceeding under Ch. 631, F.S., may exercise powers and duties beyond the scope of a traditional receiver, s. 631.011(15), F.S., defines “Receiver” to mean receiver, liquidator, rehabilitator, or conservator.

⁶ S. 631.021(3), F.S.

Investigation Authority

While there is no express statutory authority for the Receiver to conduct an inquiry into the reasons for the insolvency, the Receiver has the authority and responsibility to conduct the affairs of the insolvent insurer. The Receiver has implicit authority under s. 631.391, F.S., to conduct investigations "preliminary or incidental to the [delinquency] proceeding."

The Department has the authority pursuant to s. 624.316, F.S., to "examine the affairs, transactions, accounts, records, and assets of each authorized insurer . . . as often as it deems advisable." These so-called "desk exams" may occur any time the Department deems it necessary to protect policyholders; however, all insurers must be examined on a schedule that depends on the length of time they have held a certificate of authority. Also, the Department is authorized to conduct "investigations of insurance matters . . . as it deems proper."⁷ The Department also has the authority to administer oaths, and compel attendance of witnesses or the production of materials.⁸ Additionally, the Division of Insurance Fraud is authorized to investigate violations of the Insurance Code by administering oaths, compelling attendance of witnesses or production of materials, and collecting of evidence. The Division's investigators have general arrest powers, may execute warrants, and serve subpoenas.⁹

Protection and Collection of Insurer Assets, Funds, and Property and Payment of Claims

When the insolvent insurer is placed under the Receiver's control, the Receiver "steps into the shoes" of the company and marshals all of the insurer's assets and property to accomplish the rehabilitation or liquidation. The Receiver takes over the day-to-day management of the insurer and is given title to all "property, contracts, rights of action, and all of the books and records, of the insurer, as of the date of entry of the [court's] order"¹⁰ Also, the Receiver is empowered to recover the property of the insurer from others (e.g., affiliates, third party administrators, and certain purchasers). The Receiver must issue a written demand for the return of funds or property from third parties. The third party is required to either deliver the funds or property or assert its right to retain the funds or property by filing a petition with the receivership court within twenty days of the Receiver's demand. Third parties who fail in their claim to retain property are liable for costs necessary to the recovery effort.¹¹

The Receiver also may void certain transfers of property. The Receiver may void transfers within a year prior to the delinquency proceeding upon a showing that the transfer was fraudulent. Transfers within six months of the delinquency are presumed fraudulent and the burden of proof is shifted to the property holder to show otherwise.

Innocent third parties who receive legitimate transfers of insurer property can retain the property. A legitimate transfer involves a "bona fide holder for value" or other person who in "good faith" has provided "fair consideration" for the property.¹² Transfers occurring after the delinquency petition is

⁷ S. 624.307(3), F.S.

⁸ S. 624.321, F.S.

⁹ S. 626.989, F.S.

¹⁰ S. 631.141(2), F.S.

¹¹ S. 631.154, F.S.

¹² S. 631.262, F.S. "Bona fide holder for value," "good faith," and "fair consideration" are not defined for these purposes.

filed are only valid if the recipient has acted in “good faith” and provided “present fair equivalent value.”¹³

After the Receiver has liquidated the insolvent insurer, the Receiver distributes the estate in accordance with a plan authorized by the court. Claims are paid in a priority order established in statute.¹⁴ Every claim in each class is paid in full before those in the next class may be paid. The first class of claims paid is the costs and expenses of the Receiver, followed by the expenses incurred by a guaranty association in handling claims. Funds, assets and property that cannot be disposed of in a cost-effective or economical manner are turned over to the Comptroller as abandoned property and placed in the Unclaimed Property Trust Fund.

Claims Payments by Guaranty Associations

Three guaranty funds¹⁵ exist to pay the covered claims of insolvent insurers to the extent the assets of the insolvent insurer after liquidation are insufficient to do so or the terms of any takeover or purchase by another insurer do not provide for the assumption of this obligation. Payment of these claims is funded by assessments against insurers, up to specified limits, and, ultimately, individual policyholders in the form of a premium surcharge or higher premiums.

Delaying the liquidation of an insolvent insurer frequently can increase the size of the insolvency and increase the size of any necessary assessment. Rehabilitation enables the insurer to continue to participate in the market without burdening the applicable guaranty association.

Guaranty Association Obligations¹⁶

Florida Insurance Guaranty Association

34 companies, as of November 30, 2001
4,933 claims files
\$17,825,747 in claims paid for 2001, through October 31, 2001
\$36,096,047 in reserves, as of November 30, 2001

Florida Workers' Compensation Insurance Guaranty Association

49 companies, as of December 6, 2001
3,264 claims files
\$44,837,163 in claim paid for 2001, through October 31, 2001
\$247,747,414 in reserves, as of October 31, 2001

¹³ S. 631.263, F.S. “Good faith” and “present fair equivalent value” are not defined for these purposes. While this statute does not define “good faith,” it does identify one situation where a person is not acting in good faith. As to persons who engage in a transfer of property or asset from an impaired or insolvent insurer after the filing of a delinquency petition, those persons with actual knowledge of the delinquency proceeding are deemed not to be acting in good faith. This means that, rather than the Receiver having to prove bad faith, the transferee has to prove good faith. The burden of proof has shifted by operation of statute.

¹⁴ S. 631.271, F.S.

¹⁵ The Florida Insurance Guaranty Association pays the claims of insolvent property and casualty insurers other than workers' compensation. The Florida Workers' Compensation Insurance Guaranty Association pays the claims of insolvent workers' compensation insurers other than individually self-insured employers. The Florida Life and Health Insurance Guaranty Association pays the claims of life and health insurers.

¹⁶ Not including Reliance Insurance Company.

Florida Life and Health Insurance Guaranty Association

50 companies (est.), as of December 17, 2001
Not Available number of claimants
\$7,558,818 in claims paid for 2001, through September 30, 2001
\$86,706,667 in reserves, as of September 30, 2001

Civil and Criminal Sanctions

All generally applicable civil and criminal statutes also apply to activities occurring in the transaction of insurance. For example, theft is punishable under s. 812.014, F.S., and fraudulent practices are punishable under Ch. 817, F.S. However, the Insurance Code imposes specific civil and criminal penalties, as well.

Under the Insurance Code, a person is guilty of a third degree felony for knowingly and willfully filing, or signing for filing, with the Department a materially false or materially misleading financial statement or supporting document with the intent to deceive.¹⁷

Generally, a violation of the Insurance code is a second-degree misdemeanor, unless a greater penalty is provided.¹⁸ Other relevant criminal activities and associated penalties are: diverting or misappropriating funds – ranges from a first degree misdemeanor to a first degree felony depending on the amount involved;¹⁹ unlawful removal of records – third degree felony;²⁰ failure to record or preserve records of transfers prior to delinquency petition – first degree misdemeanor;²¹ failure to comply with insolvency notice requirements, by unlicensed, registered, or authorized persons – first degree misdemeanor;²² failure of cooperation by certain persons and obstruction by others of the Department in a delinquency proceeding – first degree misdemeanor.²³

The Insurance Code also imposes civil penalties. Activities subject to civil penalties include; unfair claim settlement practices, illegal premiums, illegal refusal to insure, illegally favoring an agent or insurer, illegal dealings in life or disability insurance, failure to settle claims in good faith, and payment of benefits without disclosing coverage.²⁴ Victims of prohibited acts may recover actual damages. Punitive damages may be recovered if the activity is proven to be a general business practice. Also, unauthorized insurers and persons representing or aiding them are subject to up to a \$1,000 fine per non-willful violation and up to a \$10,000 fine per willful violation of any Department order or provision of the Insurance Code.²⁵

C. EFFECT OF PROPOSED CHANGES:

Protection and Collection of Insurer Assets, Funds, and Property and Payment of Claims

Certain operative terms would be defined to help identify legitimate transfers of insurer funds, assets, and property and aid in recovering funds and property that have been inappropriately transferred in accordance with the provisions of Ch. 631, F.S. The stated jurisdiction of the receivership court would be expanded to include actions against third parties involved in insurance,

¹⁷ S. 634.3101, F.S.
¹⁸ S. 624.15, F.S.
¹⁹ S. 626.561, F.S.
²⁰ S. 628.271, F.S.
²¹ S. 631.262, F.S.
²² S. 631.341, F.S.
²³ S. 631.391, F.S.
²⁴ S. 624.155, F.S.
²⁵ S. 626.910, F.S.

in lieu of collateral actions for related matters in other courts in other parts of the state. Statutes of limitation would be tolled to prevent the loss of rights that might not be immediately apparent to the Receiver. The Receiver would be specifically authorized to exercise the rights of certain third parties that could add to the value of the estate. Also, the Receiver would be allowed to recover costs "expended in," rather than "necessary to," the recovery of funds and property from third parties.

Investigation Authority

The Department, as Receiver, would be allowed to conduct an investigation into the cause of the insolvency during the delinquency proceeding. The scope of the Department's authority to examine books, records and documents of authorized insurers would be expanded to include those of third parties currently or formerly associated with the insolvent insurer, other than reinsurance companies.

Civil and Criminal Sanctions

New civil and criminal penalties would be created and applied to certain persons for specified fraudulent acts that are a significant cause of the delinquency proceeding.

Claims Payments by Guaranty Associations

In addition to the current prohibition on claims for subrogation,²⁶ claims for contribution²⁷ and indemnity²⁸ against the Florida Insurance Guaranty Association by reinsurers, insurers, insurance pools, or underwriting associations would be prohibited. The defenses available to insurers in defending claims would be specifically granted to the Florida Insurance Guaranty Association.

For further discussion of the changes proposed by the bill, please see Section II.D., Section-by-Section Analysis.

D. SECTION-BY-SECTION ANALYSIS:

Section 1: Amends paragraph (w) of subsection (1) of s. 626.9541, F.S., to make technical cross-reference changes.

Section 2: Substantially rewrites s. 631.001, F.S., the statement of the purposes of part I of Ch. 631, F.S., to support revisions proposed by the bill.

Section 3: Amends s. 631.011, F.S., to apply the existing definition of "assets" to all of part I of Ch. 631, F.S., because of the addition of several phrases using that term. This section also would define "bona fide holder for value," "fair consideration," "good faith," and "property." These terms operate to qualify or void the transfer of property, assets, or funds from an insurer prior to or during insolvency.

Section 4: Creates s. 631.015, F.S., to establish substantive reciprocity by statute, rather than as a statement of legislative intent, for the treatment of policyholders among Florida and other states that enact specified model or uniform legislation.

²⁶ Subrogation is the principal under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy. Black's Law Dictionary, Abridged 7th Ed. 2000.

²⁷ Contribution is the right to demand that another who is jointly liable for a third party's loss supply part of what is required to compensate the third party (in proportionate share). Black's Law Dictionary, Abridged 7th Ed. 2000.

²⁸ Indemnity is the right of a party that is secondarily liable for reimbursement from the party that is primarily liable for reimbursements paid to a third party (in the entire amount). Black's Law Dictionary, Abridged 7th Ed. 2000.

Section 5: Creates s. 631.025, F.S., to identify those persons, other than the insolvent insurer, over whom the receivership court could exercise jurisdiction. This could enable the Receiver to avoid having to pursue collateral actions against those parties in other parts of Florida. The receivership court would be authorized to exercise jurisdiction over certain third parties currently or formerly operating in the insurance industry.

Section 6: Amends paragraph (d) of subsection (1) of s. 631.041, F.S., to make technical cross-reference changes.

Section 7: Creates s. 631.042, F.S., to preserve rights of action, both by and against the insurer, which may expire between the time the Department files its petition to be appointed Receiver and the court issues its order granting or denying the request. Answering a delinquency petition may require all of the insurer's attention and resources resulting in the insurer, and others, sitting on or overlooking legal rights. Statutes of limitations would be tolled for up to four years from the date the court places the insurer in receivership to preserve the insolvent insurer's rights of action. This provision also would prevent the accrual of rights or running of statutes of limitations while the insurer's management is acting against the company's interests or while operative facts are concealed from the Department or the insurer's management. Time periods for actions, such as those established by contract or court order, that would benefit the value of the estate would be extended for 180 days.

Section 8: Renumbers subsections (6) – (9) and creates a new subsection (6) of s. 631.141, F.S., to allow the Receiver to exercise the third party rights of policyholders and creditors to aide the Receiver in maximizing the value of the estate. This provision would not extend to individual claims that are personal and unique to the third party that would not increase the value of the estate.

Since the Receiver does not currently have the express authority to enforce the rights of third parties, parties opposing the Receiver's attempt to recover property or assets may assert that the Receiver lacks standing to enforce the rights of third parties. Accordingly, the Receiver must litigate its standing to pursue recovery actions based upon third party rights.

Section 9: Amends s. 631.154, F.S., to conform the term "funds or property" to "funds, assets or property," as it is used in other portions of the bill, and to allow the Receiver to recover costs "expended in," rather than those "necessary to," actions to recover the insurer's funds and property from third parties. This would expressly include the Department's in-house costs. While this would remove the court's oversight in determining what costs are "necessary to" recovery of insurer funds and property, additional costs that are currently borne by the estate would be shifted to the third party that failed in a claim to retain to those funds or property.

Section 10: Creates s. 631.156, F.S. This section provides that the Department may investigate the causes of insolvency. The Department may, in general, investigate the books and affairs of any insurance company, insolvent or not.²⁹ This section provides that the investigation of an insolvent insurance company may extend to an examination and review of the books, records, and documents of third parties associated with the insolvent insurer. These third parties include affiliates, officers, directors, managers, employees, agents, adjusters, independent contractors, and persons currently or formerly in control of the company. A reinsurance company will not generally be considered to be in control of the insurance company for purposes of this investigation authority. The receivership court is required to monitor the process, provide for an expedited schedule, and may sanction delay, or loss or damage to records.

²⁹ The Department, as the insurance regulator rather than Receiver, does have the authority pursuant to s. 631.316, F.S., to "examine the affairs, transactions, accounts, records, and assets of each authorized insurer . . . as often as it deems advisable."

Section 11: Creates s. 631.157, F.S., to allow the Receiver to pursue civil damages, within 4 years of the date of the initial order of rehabilitation or liquidation, or the close of the action, whichever is earlier, against persons engaged in specified fraudulent activities. Recovered damages would be added to the value of the estate. Also, the Receiver, after prevailing on a claim under this section, would be entitled to recovery of costs, including attorney's fees and the costs of department staff.

Under this provision, the Receiver would be immune from awards of attorney's fees and costs to a prevailing "small business party" under s. 57.111, F.S. A "small business party" is defined as a business with fewer than 25 employees or a net worth up to \$2 million.

Section 12: Creates s. 631.3915, F.S., to specifically grant the Receiver the authority to pursue damages, or other recoveries, on behalf of the insurer or the insureds, creditors, or claimants of the insurer.

Section 13: Amends subsection (3) of s. 631.54, F.S. The definition of "covered claim," for the purposes of the Florida Insurance Guaranty Association Act, would be amended specifically to exclude claims for contribution or indemnification, in addition to the current exclusion of claims for subrogation, by reinsurers, insurers, insurance pools, or underwriting associations. Florida case law has established that subrogation in the context of this section of statute does not include contribution and indemnity.³⁰

Section 14: Amends s. 631.57(1)(b), F.S. to specifically grant the Florida Insurance Guaranty Association the same defenses to a claim that the insurer would have been able to assert against the claim.

Section 15: Creates s. 817.2341, F.S. to establish additional criminal penalties for the fraudulent reporting of information and to combine these additional criminal penalties with the criminal penalties currently found in s. 624.3101, F.S., relating to false or misleading financial statements.

Section 16: Repeals s. 624.3101, F.S., relating to criminal penalties based upon false or misleading financial statements. These criminal penalties would be transferred to Ch. 817, F.S., Fraudulent Practices, by section 15 of the bill.

Section 17: Provides that the bill would take effect on July 1, 2002.

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

See III.D., Fiscal Comments.

³⁰ See McKenzie Tank Lines v. Empire Gas Corp., 538 So.2d 482 (Fla. 1st DCA 1989).

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Insurers

To the extent that this bill could increase the value of insolvent estates, the financial impact on insurer members of the guaranty associations and their policyholders will be lessened through a reduced need for assessments on premium.

Private Individuals

Claimants may see an increase in benefits to the extent the value of the insolvent estate is increased.

Third parties opposing the efforts of the Receiver to recover funds, assets, and property of the insolvent insurer could bear greater costs since the Receiver would be able to recover the costs "expended in" the recovery action, not just those "necessary to" the recovery action. This would specifically include the cost and expense of the Department's in-house staff, in addition to outside counsel.

D. FISCAL COMMENTS:

The bill may decrease state government expenditures by allowing the Receiver to recover the costs of recovering funds, assets, and property of the insolvent insurer, including department staff salaries and expenses. While s. 631.271, F.S., allows the costs and expenses of the Receiver to be recovered from the estate prior to all other claimants, the costs and expenses of the Receiver are borne by state government to the extent that the estate is insufficient to fund this obligation.

IV. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

The committee substitute would allow the Department, an executive agency acting as the court's appointed receiver, to determine the scope of discovery applicable to certain information and third parties specified in the new s. 631.156, F.S., that would be created by the committee substitute (section 10 of CS/HB 193). Objecting parties would be able to move the court for a protective order within ten days of the Department's request for information. The court would issue a protective order if the objecting party proves that the Department has abused its discretion. Currently, the civil discovery process is generally governed under Rule 1.280, Florida Rules of Civil Procedure. Under the Rule, the court may issue a protective order for good cause shown. It does not limit the time allowed for seeking a protective order. Since the committee substitute may affect court procedure, a separation-of-powers issue may arise as to portions of section 10 of the committee substitute.³¹

Under the Florida Constitution, one branch of government is prohibited from exercising the powers of another branch, unless expressly authorized by the Florida Constitution.³² The Florida Constitution expressly grants the judicial branch legislative authority to adopt rules regarding court practice and procedure.³³ In sum, the Legislature has power over substantive law while the judiciary has power over practice and procedure.³⁴ The Florida Supreme Court has stated that an enactment by the Legislature is an unconstitutional violation of separation-of-powers when the "legislatively imposed 'procedure' is *interfering with* and *intruding upon* the procedures and processes of this Court and *conflicts with this Court's own rule* regulating the procedure."³⁵ Therefore, the determining factor in whether the proposed language represents an unconstitutional violation of separation-of-powers would appear to be whether the proposed language interferes with, intrudes upon, and conflicts with current court rules.

B. RULE-MAKING AUTHORITY:

The bill does not create specific rulemaking authority; however, it is not apparent whether the Department will require rulemaking authority to implement the provisions of the bill.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On December 3, 2001, the Committee on Insurance approved five amendments and reported the bill favorably as a committee substitute.

The committee substitute differs from the original bill in that the committee substitute corrects technical and grammatical inconsistencies; creates a definition for the term "receivership," an undefined term

³¹ The Court will not hold an entire act unconstitutional if the offensive provision is severable. Gross v. Albertson's, Inc., 591 So.2d 311, 17 Fla. L. Weekly D92 (Fla. 4th DCA, 1991).

³² art. II, sec. 3, Fla. Const.

³³ art. V, sec. 2, Fla. Const.

³⁴ Johnson v. State, 336 So.2d 93, (Fla. 1976); art. V. sec. 2, Fla. Const. The Court has termed practice and procedure as the "machinery of the judicial process as opposed to the product thereof." In Re Florida Rules of Criminal Procedure, 272 So.2d 65, 66 (Fla. 1972) The Court further stated that this includes "all rules governing the parties, their counsel and the Court throughout the progress of the case. . . ." Id.

³⁵ Looney v. State, 2001 WL 1338488, 11 (Fla.) citing Jackson v. Florida Dep't of Corrections, 790 So.2d 381 (Fla.2000) (emphasis in original).

used in current and proposed language; combines the proposed criminal penalties with the current s. 624.3101, F.S., relating to false or misleading financial reporting, and places them together in Ch. 817, F.S., Fraudulent Practices; and removes provisions that would be superfluous to current statutory authority of the Department of Insurance. The committee substitute also creates a reciprocity provision, removes section 12 of the original bill, which would have redirected property of the estate that cannot be disposed of in a cost effective manner from the Unclaimed Property Trust Fund to the Closed Estate Trust Fund and removes several provisions addressing the limits of the Florida Insurance Guaranty Association's liabilities.

On January 24, 2002, the Committee on Judicial Oversight adopted 4 amendments to CS/HB 193. Those amendments:

- Remove the mandatory investigation into the cause of insolvency, and provide that a department investigation into the causes of insolvency is to be supervised by the receivership court rather than being conducted solely at the receiver's discretion.
- For purposes of determining the persons and entities subject to the investigation authority of the department, the existence alone of a reinsurance contract will not constitute the exercise of control over the insolvent insurance company.
- Makes grammar and technical changes.
- Removes the department control over the timing and manner of discovery directed at the insolvent insurance company and the persons and entities related to that insolvent insurance company. Instead, the receivership court is to order an expedited discovery schedule and may impose sanctions for discovery violations and for loss or damage to records.

The bill was then reported favorably as a committee substitute.

VII. SIGNATURES:

COMMITTEE ON INSURANCE:

Prepared by:

Eric Lloyd

Staff Director:

Stephen Hogge

AS REVISED BY THE COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

Nathan L. Bond, J.D.

Staff Director:

Nathan L. Bond, J.D.

AS FURTHER REVISED BY THE COUNCIL FOR COMPETITIVE COMMERCE:

Prepared by:

Leonard Schulte

Council Director:

Matthew M. Carter II

STORAGE NAME: h0193s2.ccc.doc

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