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**HOUSE OF REPRESENTATIVES
AS REVISED BY THE COMMITTEE ON
STATE ADMINISTRATION
ANALYSIS**

BILL #: CS/HB 195
RELATING TO: Public Records/Insurers Records
SPONSOR(S): Committee on Insurance and Representatives Gannon and Kallinger
TIED BILL(S): CS/HB 193

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

- (1) INSURANCE YEAS 13 NAYS 0
- (2) STATE ADMINISTRATION YEAS 4 NAYS 0
- (3) COUNCIL FOR COMPETITIVE COMMERCE
- (4)
- (5)

I. SUMMARY:

Under Article I, Section 24, Florida Constitution, records and meetings of public bodies must be open to the public in the absence of an express exemption created by the Legislature.

The Department of Insurance may institute a delinquency proceeding by petitioning the court for an order appointing it Receiver and directing it to liquidate, conserve, or rehabilitate an insolvent or impaired insurer. The department as Receiver has a duty to maximize the value of the insurer for the benefit of claimants and to protect guaranty associations from having to pay the claims of insolvent or impaired insurers. In a delinquency proceeding, all assets and property of the insurer come under the control of the Receiver, and the Receiver pursues recovery actions to return property and assets to the estate of the insurer.

The committee substitute exempts from public disclosure certain records held by the Department of Insurance as Receiver, or a guaranty association. Such records are not subject to disclosure under the public records law when held by the insurer, prior to receivership. The following records held by the department as Receiver, or a guaranty association, are made exempt from public disclosure:

- Underwriting files;
- Records that would not be discoverable in a civil proceeding, but for the receivership;
- Medical records;
- Non-managerial personnel and payroll records; and
- Personally-identifying claims information.

This exemption is subject to the Open Government Sunset Review Act of 1995 and stands repealed on October 2, 2007, unless reenacted by the Legislature.

This committee substitute would not have a fiscal impact on state or local governments.

See "Other Comments" section for comments by the Committee on State Administration.

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|-----------------------------|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" 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 type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" 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:

B. PRESENT SITUATION:

Public Records Law

Florida Constitution

Article I, s. 24(a), Florida Constitution, expresses Florida's public policy regarding access to government records as follows:

Every person has the right to inspect or copy any public records made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution. This section specifically includes the legislative, executive, and judicial branches of government and each agency or department created thereunder; counties, municipalities, and districts; and each constitutional officer, board, and commission, or entity created pursuant to law or this Constitution.

Article I, s. 24(c), Florida Constitution, does, however, permit the Legislature to provide by general law for the exemption of records from the requirements of s. 24. The general law must state with specificity the public necessity justifying the exemption (public necessity statement) and must be no broader than necessary to accomplish its purpose.

Florida Statutes

Public policy regarding access to government records is also addressed in the Florida Statutes. Section 119.07(1)(a), F.S., provides:

Every person who has custody of a public record shall permit the record to be inspected and examined by any person desiring to do so, at a reasonable time, under reasonable conditions, and under supervision by the custodian of the public record or the custodian's designee.

Open Government Sunset Review Act of 1995

Section 119.15, F.S., the Open Government Sunset Review Act of 1995, provides that an exemption may be created or maintained only if it serves an identifiable public purpose and may be no broader than is necessary to meet the public purpose it serves. An identifiable public purpose is served if the exemption meets one of the following purposes, and the Legislature finds that the purpose is sufficiently compelling to override the strong public policy of open government and cannot be accomplished without the exemption:

1. Allows the state or its political subdivisions to effectively and efficiently administer a governmental program, which administration would be significantly impaired without the exemption;
2. Protects information of a sensitive personal nature concerning individuals, the release of which information would be defamatory to such individuals or cause unwarranted damage to the good name or reputation of such individuals or would jeopardize the safety of such individuals. However, in exemptions under this subparagraph, only information that would identify the individuals may be exempted; or
3. Protects information of a confidential nature concerning entities, including, but not limited to, a formula, pattern, device, combination of devices, or compilation of information which is used to protect or further a business advantage over those who do not know or use it, the disclosure of which information would injure the affected entity in the marketplace.

The Department of Insurance as Receiver¹

Generally, records held by an insurer are considered confidential proprietary business information. Furthermore, insurers are private entities and are not subject to Florida's public records laws. The Department of Insurance receives a limited number of insurer records pursuant to statute or rule. Records received by this department are public records unless they are made exempt by law.

Furthermore, the department receives an insurer's records as a result of that insurer's insolvency or impairment. In this event, records that were confidential when held by the insurer become public. When solvency protections under the State Insurance Code fail, the department may seek to be appointed receiver through a judicial proceeding for the purpose of rehabilitating an impaired insurer or, if rehabilitation is unsuccessful or otherwise inappropriate, liquidating the insolvent company. The goal of rehabilitation is to restore the financial solvency of the insurer; the 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."²

The Receiver assumes control of the insurer and marshals all of the insurer's assets and property to accomplish the rehabilitation or liquidation. The records of the insurer are among the property marshaled by the Receiver. Those records include information that is subject to the attorney-client

¹ 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.

² Section 631.021(3), F.S. Also, insurers are generally exempt from federal bankruptcy laws.

privilege³ and attorney work product⁴. These records are developed by the Receiver when investigating the insolvency and are public records under chapter 119, F.S., and the Florida Constitution.

Private Records and Discovery in Civil Suits

Rule 1.280(b) of the Florida Rules of Civil Procedure defines the scope of discovery in civil matters brought before Florida courts. Under this rule, an insurer has to disclose information relevant to a pending action. However, an insurer generally is not required to disclose information that is privileged or protected against discovery (e.g., attorney work product, trial preparation materials, and the identity and work of non-testifying experts).⁵ "Privileged" information includes information that is confidential because it was communicated in reliance upon the attorney-client relationship. "Attorney work product" includes the mental impressions, conclusions, opinions, or legal theories of an attorney concerning or anticipating litigation.

Presently, there is no specific exemption from the public records law for privileged attorney-client information or attorney work product that comes into the possession of the Department of Insurance as Receiver for an insurer. While s. 119.07(3)(l), F.S., exempts attorney work product prepared by or at the express direction of an agency attorney, attorney work product produced for or by an insurer prior to receivership is not included. Similarly, there is no exemption for sensitive personal information of customers and employees of the insolvent insurer contained in business records transferred to the department acting as Receiver. Underwriting files, personnel files, medical records, and claims records contain sensitive personal information. Since there is no exemption applicable to these public records, the department as Receiver is required to permit the public, including parties to lawsuits brought by or against the Receiver, to copy or inspect this information.

C. EFFECT OF PROPOSED CHANGES:

Public Records

The following records held by the Department of Insurance as Receiver, or a guaranty association, are made exempt from public disclosure:

- Underwriting files of a type customarily maintained by an insurer transacting lines of insurance similar to those lines transacted by the insurer subject to delinquency proceedings. [*Stated justification: underwriting files contain sensitive personal information.*]
- Records not otherwise available to others under the Florida Rules of Civil Procedure, or other applicable law, but for their status as public records in the hands of the Receiver. [*Stated justification: these records contain attorney work product and privileged information; the release of otherwise undiscoverable information would undermine the legitimate receivership function of maximizing the value of the estate and prejudice claimants of the receivership estate.*]

³ Section 90.502 of the Florida Evidence Code, provides that communications between an attorney and a client are confidential if it is not intended to be disclosed to a third person, except those persons to whom disclosure is in furtherance of the legal services or those necessary to the transmission of the communication.

⁴ Under the "work product rule," any notes, working papers, memoranda, or similar materials, prepared by an attorney in anticipation of litigation, are protected from discovery. Black's Law Dictionary, 7th Ed. 1990. The Florida Supreme Court codifies this in Rule 1.280(b) of the Florida Rules of Civil Procedure.

⁵ Some protected trial preparation materials and the identity and work of non-testifying experts are discoverable upon a showing that the party requesting the discovery cannot obtain the substantial equivalent of the information without undue hardship. In the event that the requisite showing is made, the attorney work product contained therein will remain protected from discovery.

- All medical records. [*Stated justification: medical records contain sensitive personal information.*]
- Non-managerial personnel records and non-managerial payroll records. [*Stated justification: personnel and payroll records contain sensitive personal information.*]
- Claims information that identifies an insured or a claimant. [*Stated justification: personally identifying information is sensitive personal information.*]

Sunset Review

The public records exemption is made subject to review in accordance with the Open Government Sunset Review Act and stands repealed on October 2, 2007, unless reviewed and saved from repeal through reenactment by the Legislature.

Statement of Public Necessity

As required by Article I, s. 24, Florida Constitution, the committee substitute includes a public necessity statement. As noted above, the public necessity justifying the exemption of these public records includes the need to protect sensitive private personal information and avoid undermining the legitimate receivership function of maximizing the value of the estate.

D. SECTION-BY-SECTION ANALYSIS:

See "Effect of Proposed Changes."

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None

2. Expenditures:

None

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None

2. Expenditures:

None

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

None

D. FISCAL COMMENTS:

None

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

A. APPLICABILITY OF THE MANDATES PROVISION:

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

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

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

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None

B. RULE-MAKING AUTHORITY:

None

C. OTHER COMMENTS:

Committee on State Administration

This committee substitute raises constitutional concerns.⁶ The committee substitute creates an exemption for an insurer's underwriting file when held by the Department of Insurance (DOI) as Receiver or a guaranty association. The public necessity statement states that such file should be made exempt from public disclosure because it contains sensitive personal information. Not all of the information contained in an insurer's underwriting file is considered sensitive personal information, therefore, this exemption could be considered overly broad. The exemption should be for an insured's or claimant's identifying information contained in such files in order to comport with the public necessity statement. The committee substitute also creates an exemption for nonmanagerial payroll records held by DOI as Receiver. The public necessity statement states that such records should be made exempt from public disclosure because those records contain sensitive personal information. Not all of the information contained in an insurer's nonmanagerial payroll records is considered sensitive personal information therefore, this exemption could be considered overly broad. The exemption should be for personal identifying information contained in an insurer's nonmanagerial payroll records in order to comport with the public necessity statement. Additionally, the public necessity statement provides that the entire claims file is made exempt by

⁶ Article I, s. 24(c) of the Florida Constitution, requires that the exemption be no broader than necessary to accomplish the stated purpose of the law.

this committee substitute. However, the exemption only makes an insured's or claimant's identifying information contained in claims files held by DOI as Receiver or a guaranty association. *The sponsor has filed an amendment to address these concerns.*

This committee substitute exempts records held by DOI as Receiver that are "privileged" or "protected" against discovery in the hands of an insurer, pursuant to Rule 1.280(b), Florida Rules of Civil Procedure, or other applicable rule or law. The public necessity statement addresses the need for the exemption of records of such Receiver that are "privileged", but does not address the need for an exemption of records that are considered "protected". *The sponsor has filed an amendment to address this concern.*

Finally, this committee substitute contains unnecessary language. *The sponsor has filed an amendment to address this concern.*

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

On December 3, 2001, the Committee on Insurance approved the bill as a committee substitute. The committee substitute differs from the bill to the extent that the committee substitute:

- Expands the proposed exemption relating to information that is not otherwise subject to discovery from "privileged" information to "privileged or protected" information. The bill's statement of public necessity evidences the sponsor's intent to exempt "protected" attorney work product. Since Rule 1.280(b), Florida Rules of Civil Procedure, identify "privileged" information separately from "protected" information, the exemption that would be created by the bill may not extend to "protected" information, unless expressly referenced.
- Revises the proposed language that would create an exemption for personally identifying claims information. The language proposed by the bill references the type of information to be exempted but does not reference the type of record that contains this information. The revised language would also mirror the proposed statement of public necessity contained in the bill.
- Inserts the bill number to which this bill is linked for purposes of the contingent effective date already contained in the bill. The bill would be "linked" to HB 193, or similar legislation.

On January 24, 2002, the Committee on State Administration reported CS/HB 195 favorably with one amendment. That amendment is traveling with the committee substitute. The amendment narrows the public records exemption contained in the committee substitute. The amendment only exempts the personal identifying information contained in underwriting files, nonmanagerial personnel records, and nonmanagerial payroll records held by the Department of Insurance as receiver, or a guaranty association, instead of the whole record. The amendment redrafts the public necessity statement to comport with the exemption language. The amendment adds language to make the exemption retroactive and removes unnecessary language contained in the committee substitute.

VII. SIGNATURES:

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