SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

BILL: CS/CS/SB 432

SPONSOR: Judiciary and Banking and Insurance Committees and Senator Klein

SUBJECT: Insurer Rehabilitation and Liquidation

DATE: March 1, 2002 REVISED: _____ _____ _____ _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Emrich	Deffenbaugh	BI	Favorable/CS
2.	Forgas	Johnson	JU	Favorable/CS
3.			AGG	
4.			AP	
5.				
6.				

I. Summary:

Under current law, the Department of Insurance has specified procedures when it determines through financial reports, examinations, or other sources that an insurance company has failed certain solvency tests or is otherwise in unsound financial condition. The department may place certain insurers of "unsound condition" under administrative supervision. Such supervision allows the department, with the consent of a financially troubled insurance company, to supervise the management of the insurance company in an attempt to cure the company's troubles rather than close it down.

However, when such protections fail, the Department of Insurance may seek to be appointed as the Receiver of an insurance company through a judicial proceeding (e.g., 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. State law provides for the "sole and exclusive method of liquidating, rehabilitating, reorganizing, or conserving an insurer" under part I of ch. 631, F.S.

Committee Substitute for CS/SB 432 amends ch. 631, F.S., to provide for the following changes to the insurer rehabilitation and liquidation process:

- revises the "purposes" section to clarify statutory interpretation of the rehabilitation and liquidation chapter;
- specifically grants 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;
- tolls the statutes of limitation for actions by or against the insurer to benefit the estate or others;
- authorizes the Department, as Receiver, to exercise rights of certain third parties to maximize the value of the estate;
- allows the Department, as Receiver, to recover additional costs from third parties in certain circumstances;
- authorizes the Department, under the direction and supervision of the receivership court, to investigate the causes of an insolvency;
- provides that any person who was an officer or director of an insurer doing business in this state, and who served in that capacity within the two-year period prior to the date the insurer became insolvent, for any insolvency that occurs on or after July 1, 2002, may not thereafter serve as an officer or director of an insurer authorized in Florida;
- expands 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; and
- creates a civil cause of action, including treble damages, and additional criminal penalties, for certain fraudulent acts.

The Committee Substitute for CS/SB 432 also amends s. 624.430, F.S., which pertains to the withdrawal of insurers, to provide that a solvent insurer can submit a plan for withdrawal to the Department of Insurance and, upon approval of the plan, the insurer may initiate corporate dissolution proceedings pursuant to ch. 607, F.S.

Additionally, the Committee Substitute for CS/SB 432 amends s. 631.904, F.S., which provides definitions applicable to the Florida Workers' Compensation Insurance Guaranty Association, to revise the definition of the term "covered claim" to exclude any return of premium for retrospective rating plans.

The bill amends the following sections of the Florida Statutes: 624.430, 626.9541, 631.001, 631.011, 631.041, 631.141, 631.154, 631.54, 631.57, and 631.904. The bill creates the following sections of the Florida Statutes: 631.015, 631.025, 631.042, 631.156, 631.157, 631.1571, 631.3915, and 817.2341. The bill repeals section 624.3101, Florida Statutes.

II. Present Situation:

The Florida Insurance Code[1] regulates the business of insurance in the state. Under the 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.

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

In addition to these general powers, the Department may place insurers of "unsound condition"[2] under administrative supervision or attempt to place the insolvent insurer[3] 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 be appointed Receiver[5] 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 while 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.

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 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

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[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 but are not limited to: 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. See sections 631.051, 631.061, 631.071, 631.081, and 631.091, F.S.

[4] Part VI of Ch. 624, F.S.

[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. Also, insurers generally are exempt from federal bankruptcy laws.

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 January 6, 2002, the Department's Division of Rehabilitation and Liquidation was administering the receivership of fifty-four companies. This includes the ancillary receivership of Reliance Insurance Company, a Pennsylvania company, which is expected to be the largest insurer failure in history. During the past 3 years, a total of 17 companies have gone into receivership.

Investigatory 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]

[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.

The Receiver also may void certain transfers of property.[12] 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.[13] Transfers occurring after the delinquency petition is filed are only valid if the recipient has acted in "good faith" and provided "present fair equivalent value."

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 funds[15] 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 Obligations[16]

Florida Insurance Guaranty Association

35 companies, as of December 31, 2001
6,069 claims files as of December 31, 2001
$19,744,259 in claims paid for 2001, through November 30, 2001
$55,151,760 in reserves, as of December 31, 2001

[12] S. 631.262, F.S.
[13] S. 631.262, F.S. These terms are not defined for these purposes.
[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 Workers' Compensation Insurance Guaranty Association

52 companies, as of January 4, 2002
1,981 claims files
$215,058,535 in claims paid for 2001, through November 30, 2001
$266,167,868 in reserves, as of November 30, 2001

Florida Life and Health Insurance Guaranty Association

42 companies, as of January 4, 2002
Not Available, third party administrator (TPA) handles claims files
$8,041,805 in claims paid for 2001, through December 31, 2001
$89,801,009 in reserves, as of November 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; unlawful removal of records – third degree felony; failure to record or preserve records of transfers prior to delinquency petition – first degree misdemeanor; failure to comply with insolvency notice requirements, by unlicensed, registered, or authorized persons – first degree misdemeanor; failure of cooperation by certain persons and obstruction by others of the Department in a delinquency proceeding – first degree misdemeanor.[19]

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.[20] 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

[17] S. 624.3101, F.S.
[18] S. 624.15, F.S.
[19] See ss. 626.561, 628.271, 631.262, 631.341, and 631.391.
[20] S. 624.155, F.S.

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.[21]

Miscellaneous

- Section 631.021(3), F.S., provides that a delinquency proceeding pursuant to ch. 631, F.S., constitutes the sole and exclusive method of liquidating an insurer. Although it is not expressly stated, s. 631.021(3), F.S., presumably only requires a delinquency proceeding for the liquidation of an insolvent insurer, as opposed to the liquidation of a solvent insurer. Section 624.430, F.S., which applies to solvent insurers, contains provisions related to insurers withdrawing from doing business in the state and requires such insurers to surrender their certificates of authority. The withdrawing insurer is required to give the department written notice setting forth its reasons for withdrawal. The notice must be provided to the department 90 days prior to the planned withdrawal. Rule 4-141.020, F.A.C., sets forth the requirements applicable to the content of the notice and provides that the department may disapprove the surrender if it is in violation of any law or rule. While the Insurance Code imposes requirements incident to the dissolution of an insurer, the department does not have jurisdiction regarding the process by which the business entity is terminated. For example, if the insurer is a corporation, the insurer seeking to dissolve must do so in compliance with statutes and rules administered by the Secretary of State. *See* s. 607.1402, et. seq., F.S.

- Section 631.904, F.S., provides definitions for the Florida Workers' Compensation Insurance Guaranty Association Act, which is contained in ss. 631.901-631.932, F.S. Subsection (2) of s. 631.904, F.S., defines the term "covered claim" to mean an unpaid claim, including a claim for return of unpaid premiums, which arises out of, is within the coverage of, and is not in excess of the applicable limits of, an insurance policy to which the Act applies, which policy was issued by an insurer and which claim is made on behalf of a claimant or insured who was a resident of this state at the time of the injury. The term does not include any amount due any reinsurer, insurer, insurance pool, or underwriting association, as subrogation recoveries or otherwise.

III. Effect of Proposed Changes:

Section 1. Amends s. 624.430, F.S., to expressly provide that, if the department determines, based upon its review of the notice and other required information, that the plan of an insurer withdrawing from this state makes adequate provision for the satisfaction of the insurer's obligations, and is not hazardous to policyholders or the public, the department shall approve the surrender of the insurer's certificate of authority. Upon department approval of the surrender of the certificate of authority of a domestic property and casualty insurer which is a corporation, the insurer may then initiate the dissolution of the corporation in accordance with the applicable provisions of ch. 607, F.S. The department is given rulemaking authority to implement the provisions of this section.

[21] S. 626.910, F.S.

Section 2. Amends paragraph (w) of subsection (1) of s. 626.9541, F.S., to make technical cross-reference changes.

Section 3. 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. According to representatives with the department, the revisions to this section are designed to clarify statutory interpretation and eliminate a number of spurious defenses that have been raised against the Department over the years. The language of the "purposes" section forms the decisional basis for opinions on nearly every unsettled aspect of insurance insolvency. For example, language has been added to explain that the entire chapter is part of the "regulation of the business of insurance," a phrase designed to avoid any threat of Federal preemption by fitting within the specific language of the McCarran-Ferguson Act. The phrase "vital public interest and concern" will help give an expansive interpretation to the department's powers in delinquency proceedings and help avoid Federal interference. Also, language is added to clarify that the department, as Receiver, has the authority to maximize recovery of assets on behalf of the policyholders, creditors, other claimants, and the estate. This provision is added to eliminate frivolous litigation which had challenged the departments right to bring such claims.

Section 4. 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," "property," and "receivership" because the meaning of these words has been litigated and it is important for the department to establish clear definitions as to these terms. The term "property" is defined to include the property of the insolvent insurer which is subject to being brought back into the estate by the various powers of the Receiver or through litigation, as improper transfers, preferences, fraudulent conveyances, or otherwise. According to Department representatives, this provision will avoid any question of the Receivership court's jurisdiction over certain claims, and will allow more claims to utilize the cost-effective recapture provisions within the insolvency statutes. Substantial resources have been spent in litigating such matters, and recoveries have been delayed.

Section 5. 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 the National Association of Insurance Commissioners Rehabilitation and Liquidation Model Act or the Uniform Insurers Liquidation Act.

Section 6. 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 third parties currently or formerly operating in the insurance industry.

Section 7. Amends paragraph (d) of subsection (1) of s. 631.041, F.S., to make technical cross-reference changes.

Section 8. Creates s. 631.042, F.S., entitled Extension of Time, 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.

According to Department officials, this provision is needed because there are recent Florida court cases holding that the tolling of a limitations period may not be recognized unless specifically authorized by statute. Also, such a tolling provision is needed when the insurer is controlled by parties acting contrary to the company's interests or when facts giving rise to the claim are fraudulently concealed from the Department or members of the company's management.

Section 9. 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 aid 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 10. 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 "incurred 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 those funds or property.

Section 11. Creates s. 631.156, F.S. This section would expand the Department's investigatory authority,[22] at least with respect to investigations conducted by the Department as the Receiver. It would authorize the Department, under the direction and supervision of the receivership court, to conduct an investigation into the reasons for the insolvency, if the court grants the receivership petition. The scope of the Department's authority would be expanded from examinations of authorized insurers to examination and review of any and all documents, books, and records 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. It further clarifies that

[22] 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."

contracts of reinsurance between the insurer and a reinsurer would not constitute the exercise of control by the reinsurer over the insurer for purposes of this section.

The Department would be permitted to share investigatory information with the Department's Division of Insurance Fraud and other appropriate state and federal agencies without waiving any privilege or rule preventing disclosure.

The receivership court, upon motion of the department, shall enter an order expediting discovery. The court may impose appropriate sanctions and penalties for noncompliance with the expedited discovery order, including penalties and sanctions for the loss, destruction, or spoliation of any evidence that occurs after entry of such order.

Section 12. Creates s. 631.157, F.S., to create a civil cause of action by the Receiver. The Receiver would be authorized to pursue a civil cause of action against specified persons, including officers, directors, agents or employees of any person engaged in the business of insurance, within 4 years after the entry of the initial order of rehabilitation or liquidation, but such cause must be filed before the time the receivership proceeding is closed or dismissed. It specifies that any person who is engaged in the business of insurance or who acts as an officer, director, agent, or employee of any person engaged in such insurance in a transaction of such business and who willfully obtains or uses, as defined in s. 812.102(3), F.S., any funds, assets or property of an insurer, shall be liable to the department as receiver for the use and benefit of an insolvent insurer's estate, creditors, and policyholders, as follows:

- if such obtaining or using did not jeopardize the safety and soundness of an insurer and was not a significant cause of such insurer being placed in receivership, such person shall be liable only for the full amount of any funds obtained or used, plus prejudgment interest provided by law;
- if such obtaining or using jeopardized the safety and soundness of an insurer or was a significant cause of such insurer's being placed in receivership, such person is liable for *triple the full amount* of any funds obtained or used, plus prejudgment interest provided by law on the original amount.

Any person engaged in the business of insurance who has actual knowledge or constructive knowledge of the financial condition of the insurer and misreports a material fact in any book, report or statement of the insurer, with the intent to deceive such insurer, the department, or any agent appointed by the department, shall be liable to the department as receiver for the use and benefit of the insolvent insurer's estate, creditors, and policyholders, as follows:

- if such misreporting did not jeopardize the safety and soundness of an insurer and was not a significant cause of such insurer's being placed in receivership, such person is liable only for the full amount of any asset misreported, or
- if such misreporting jeopardized the safety and soundness of an insurer or was a significant cause of such insurer's being placed in such receivership, such person is liable for *triple the full amount* of any asset misreported.

This section also specifies that if the asset or property that has been obtained was reported to the department as an admitted asset and such asset is unavailable for payment of obligations, then the obtaining or using shall be presumed to have jeopardized the safety and soundness of the insurer.

If the Receiver is successful in establishing a claim, the Receiver is entitled to costs, investigative expenses, salaries of the department's in-house staff and attorney's fees. 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 and is entitled to recover attorney's fees from the state under s. 57.111, F.S., when the small business party is the prevailing party in any judicial action or administrative proceeding initiated by the state.

The above provisions would allow an expedited prosecution of direct claims against wrongdoers, and would eliminate, in the clear instances of misconduct, many of the defenses related to the Receiver's capacity or the causation of damages.

Section 13. Creates s. 631.1571, F.S., to provide that any person who was an officer or director of an insurer doing business in this state, and who served in that capacity within the two-year period prior to the date the insurer became insolvent, for any insolvency that occurs on or after July 1, 2002, may not thereafter serve as an officer or director of an insurer authorized in Florida.

Section 14. Creates s. 631.3915, F.S., to specifically grant the Receiver the authority to pursue damages, or other recoveries, on behalf of the insurer's estate and the insurer's policyholders, creditors, or other claimants.

Section 15. 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.[23]

Section 16. 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 17. Amends s. 631.904, F.S., to revise the definition of the term "covered claim" in the Florida Workers' Compensation Guaranty Association Act to exclude any return of premium for retrospective rating plans or any return of premium resulting from a policy that was not in force on the date of the final order of liquidation.

Section 18. Creates s. 817.2341, F.S., to establish additional criminal penalties for the fraudulent reporting of specified information and to combine these additional (and more severe) criminal penalties with the criminal penalties currently found in s. 624.3101, F.S., relating to false or misleading financial statements. (See section 17 of this bill.) This section specifies that a person would be guilty of a third degree felony who:

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

- willfully files with the department, or willfully signs for filing with the department, a materially false or misleading financial statement or document, with the intent to deceive and with knowledge that the statement or document is materially false;
- makes a false entry of a material fact in any book, report, or statement relating to a transaction of an insurer or entity organized under ch. 624 or ch. 641, with the intent to deceive any person about the financial condition of the insurer or entity;
- knowingly makes a material false statement or report to the department; or
- knowingly and materially overvalues any property reported to the department.

A person would be guilty of a first-degree felony who:

- makes a false entry of material fact with the intent to deceive any person about the impairment of the insurer's or entity's capital, as defined in s. 631.011, F.S.;
- makes a false entry of material fact that is the significant cause of the insurer or entity being placed in conservation, rehabilitation or liquidation by a court;
- makes a false statement or report with the intent to deceive any person about the impairment of capital of an insurer or entity organized under ch. 624 or ch. 641; or
- is the significant cause of the insurer or entity being placed in receivership by a court.

Section 19. Repeals s. 624.3101, F.S., relating to criminal penalties based upon false or misleading financial statements. The criminal penalties under s. 624.3101, F.S., are third degree penalties, and would be transferred to Ch. 817, F.S., Fraudulent Practices, by section 18 of this bill.

Section 20. Provides that the bill would take effect on July 1, 2002.

According to officials with the department, the above revisions to chapter 624, F.S., are derived from a proposed model statute drafted by the National Association of Insurance Commissioners (NAIC) entitled the "Uniform Insurers Liquidation Act." There are also provisions regarding jurisdiction and tolling and extension of limitations periods which are patterned after the Uniform Receivership Law. Other provisions were designed by the department to eliminate various problems which have been encountered in insurer delinquency proceedings and related litigation in the past decade.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Economic Impact and Fiscal Note:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Policyholders of insolvent insurers would benefit because the bill allows the Department of Insurance, as Receiver, to establish efficient asset collection procedures so as to provide more capital to fund policyholder's claims.

Third parties opposing the efforts of the Department as 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 Department in-house staff, in addition to outside counsel.

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 would be lessened through a reduced need for assessments on premium.

The bill would impact persons who serve as officers or directors of an insolvent insurance company for two years prior to the company becoming insolvent, from serving thereafter as an officer or director of an insurer authorized in this state. This provision would become effective for companies which become insolvent on or after July 1, 2002.

C. Government Sector Impact:

The bill may decrease state government expenditures by allowing the Department as Receiver to recover the costs of recovering funds, assets, and property of the insolvent insurer, including department staff salaries and expenses. According to representatives with the Division of Rehabilitation and Liquidation, they have a budget of $30.8 million for the current fiscal year with 93 employees. Should this bill become law, they estimate that their expenditures could be reduced by 20 percent ($6.16 million) due to their recovery efforts.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Amendments:

None.