

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1687 Insurers (Public Adjusters; Division of Rehabilitation and Liquidation)  
**SPONSOR(S):** Bogdanoff  
**TIED BILLS:** None **IDEN./SIM. BILLS:** SB 3024

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Insurance Regulation (Sub)	11 Y, 0 N	Tinney	Cooper
2) Insurance			
3) Judiciary			
4) Finance & Tax			
5) Commerce & Local Affairs Approp. (Sub)			
6) Appropriations			

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### SUMMARY ANALYSIS

The bill amends provisions of law governing public adjusters. Specifically, a public adjuster is:

- Prohibited from representing an injured party regarding issues relating to damages, tort claims, statutory interest, costs, attorney fees, and other matters not covered by the affected person's insurance policy;
- Required to provide to the insurer and its representatives a copy of the adjuster's contract with the claimant or insured, including any amendments to the original contract entered during the claim-settlement process;
- Required by the bill to disclose to his or her client and to the insurer any interest the adjuster may have in any person or company hired by the claimant to perform services or repairs, including any fee or other consideration the adjuster may receive from the service or repair person or company;
- Required to speak or meet with the insurer or its representative (the adjuster may not refuse such meeting or discussion); and
- Required to provide a recorded statement or sworn testimony if so requested by the insurer or its agent or representative.

The bill also amends and revises various sections of chapter 631, F.S., relating to insurer insolvency, rehabilitation, and receivership. All receiverships in Florida are required by the bill to be filed in the Second Judicial Circuit in Leon County. Alleged breaches of contract or other disputes arising in receivership cases are subject to arbitration before proceeding to court. Certain liens or transfers occurring between 4 months and 1 year of a company entering receivership will be void if the lien or transfers inures to specified employees or affiliates of the affected insurance company.

The primary fiscal impact relating to the bill results from the creation of the Closed Estate Account. Under current law, proceeds from closed accounts, approximately \$279,000 per year, are deposited into the Unclaimed Property Trust Fund of DFS for transfer into the State School Trust Fund. Those monies will be retained by DFS for use in paying expenses associated with rehabilitation and receivership of insurance companies.

The bill takes effect upon becoming a law.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

**STORAGE NAME:** h1687a.in.doc  
**DATE:** April 1, 2004

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. DOES THE BILL:

- |                                      |                              |                             |   |
|--------------------------------------|------------------------------|-----------------------------|---|
| 1. Reduce government?                | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 2. Lower taxes?                      | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. Expand individual freedom?        | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. Increase personal responsibility? | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. Empower families?                 | 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. EFFECT OF PROPOSED CHANGES:

##### Public Adjuster Background

Part III, chapter 624, F.S., a portion of the Florida Insurance Code, contains the general requirements an insurer must follow to receive a certificate of authority to transact business in Florida. The Department of Financial Services (DFS) and the Financial Services Commission regulate the insurance industry in Florida. Chapter 626, F.S., regulates insurance field representatives and operations. Part VI of the chapter governs insurance adjusters.

The law recognizes various types of adjusters, including public adjusters, independent adjusters, company-employee adjusters, and catastrophe or emergency adjusters. Nonresident adjusters of each type also are recognized and regulated by the Office of Insurance Regulation (OIR) of the Financial Services Commission.

The law, in s. 626.854, F.S., defines a public adjuster as any person, except a licensed attorney, who prepares or files an insurance claim for an insured or third-party claimant. Similarly, the law recognizes that a public adjuster represents an insured or third-party claimant in negotiations with the insured's insurance provider with the goal of settling a claim. A public adjuster is hired and paid by the insured to act on his or her behalf.

DFS reports that following the damage inflicted by Hurricane Andrew in 1992, there was an influx of nonresident and unlicensed public adjusters who descended on South Florida in search of business. As a result of that experience, several amendments regulating public and unlicensed adjusters were adopted to the Florida Insurance Code by the Legislature in 1993 and after.

##### Changes Proposed by the Bill Relating to Public Adjusters

Limits in addition to those already prescribed by law are imposed by the bill on the activities of public adjusters. A public adjuster is prohibited from representing an injured party regarding issues relating to damages, tort claims, statutory interest, costs, attorney fees, and other matters not covered by the affected person's insurance policy.

A public adjuster is required to provide to the insurer and its representatives a copy of the adjuster's contract with the claimant or insured, including any amendments to the original contract entered during the claim-settlement process. A public adjuster also is required by the bill to disclose to his or her client and to the insurer any interest the adjuster may have in any person or company hired by the claimant to perform services or repairs. This includes any fee or other consideration the adjuster may receive from the service or repair person or company.

A public adjuster is required by the bill to speak or meet with the insurer or its representative; the adjuster may not refuse such meeting or discussion. This requirement also specifies that the public adjuster must provide a recorded statement or sworn testimony, if so requested by the insurer or its agent or representative.

### **Insurance Rehabilitation and Receivership: Background**

Chapter 631, F.S., relates to insurer insolvency and guaranty payments and governs the receivership process for insurance companies in Florida. OIR oversees active insurance companies and monitors their financial health. Federal law specifies that insurance companies cannot file for bankruptcy. Instead, they are either "rehabilitated" or "liquidated" by the Division of Rehabilitation and Liquidation (the Division) of DFS.

By law, a delinquency proceeding is initiated by the Division against any insurer believed to be insolvent or experiencing an impairment of its capital reserves or surpluses. A delinquency proceeding may include liquidation, rehabilitation, reorganization, or conservancy. Staff of the Division indicates that rehabilitation and liquidation are the two most common delinquency proceedings. By law, the Division of Rehabilitation and Liquidation files all delinquency proceedings in the Circuit Court in Leon County.

In a rehabilitation, the Division attempts to correct the problems that are threatening the assets and cash reserves of an insurer. If the Division is successful, the affected company will emerge from the process able to continue operating as an insurance company. If the problems facing an insurance company cannot be addressed adequately, the Division orders the company to liquidate its assets in order to settle outstanding claims. At the end of the liquidation process, generally there are no assets remaining with which to operate the insurance company, so it ceases to exist.

The Division administers the receivership estates. By law, for the most part, all receivership expenses are paid for out of the assets of the receivership estates, rather than from state funds. Once the Division is appointed "Receiver" by the court, the Division, in effect, acts as the insurance company. The Receiver takes possession of all of the assets of the company and has the power to hire outside attorneys, accountants, and other experts to audit the accounts and policies of the impaired insurer. The court must approve the use of any company funds to hire professionals to aid in the receivership process.

The law states the primary purposes of insurer rehabilitation and liquidation are to apportion equitably any unavoidable losses and to maximize the recovery of assets for the benefit of policyholders, creditors, the public, and other claimants against the receivership estate.

Parts II, III, IV, and V of chapter 631, F.S., provide for the creation and administration of guaranty funds to govern the liquidation and rehabilitation of the different types of insurance companies licensed to conduct business in Florida. For example, the law creates a guaranty fund for health and life companies, for health maintenance organizations, and for workers' compensation insurance, among other funds. The various guaranty funds typically also are involved the receivership process.

Once the Division successfully places an insurer into receivership, staff and any contractors hired by the Division spend their time marshalling the assets of the company and paying claims. Marshalling the assets includes selling real property and other assets of the company and prosecuting lawsuits against, for example, negligent actuaries, auditors, and company directors and officers. The Division also collects any reinsurance that is due because such reinsurance generally is one of a company's largest assets.

Staff of the Division indicate that receivership can be a long-term process since it includes sending out "proof of claims," analyzing the claims, litigating objections to the Division's analysis of the claims, among other similar duties. The entire liquidation process can last 10 years or longer.

### **Changes Proposed by the Bill Relating to Rehabilitation and Receivership**

Section 631.021(6), F.S., is amended to give the receivership court exclusive jurisdiction with respect to assets or property of any insurer subject to rehabilitation or liquidation, and of claims against the insurer's assets or property. All Florida insurance receiverships are filed in the Second Judicial Circuit in Leon County. Currently, certain real property actions involving a company in receivership can be filed in the county where the property is actually located. The Division reports this increases the costs to the receivership estate and decreases the funds available to pay claims. The bill specifies that all receivership matters must be filed in the Second Judicial Circuit.

Section 631.041, F.S., is amended to provide for damages, including costs and attorneys' fees, for injuries caused by any willful violation of an applicable stay or injunction. Currently, the law provides for an automatic stay to protect the insolvent insurance company when it is placed into receivership. In other words, when a company is placed in receivership, all lawsuits against the company are put on hold. According to the Division, occasionally creditors ignore the stay and file actions outside the Second Judicial Circuit in an effort to avoid the stay. The Division, acting as the Receiver, is forced to appear in these actions, thus incurring costs that further deplete receivership assets. Although DFS reports it is generally able to successfully end those cases, costs incurred are paid from receivership assets. The expenditure of receivership assets to appear in actions filed outside of Leon County results in less money available to distribute to the creditors and policyholders. This amendment adds a penalty for those individuals who choose to willfully violate the automatic stay.

Section 631.0515, F.S., is amended to clarify that a managing general agent or holding company with a controlling interest in a Florida domestic insurer is subject to jurisdiction of the court under the provisions of s. 631.025, F.S. DFS explains this change will grant the court jurisdiction over "shell corporations" that are created to shelter the assets of insurance companies. DFS reports the intervention of shell corporations into receivership matters has been an increasing problem over the past several years. The Division indicates that any asset a shell corporation is able to remove from the pool of available assets may lead to a depletion of the assets so that fewer assets are available to settle the legitimate debts and claims outstanding once an insurer is in receivership.

Section 631.141(7)(a), F.S., is amended to clarify that the expenses of the Receiver in connection with a delinquency proceeding are administrative expenses and are recoverable by the Receiver in any action in which the Receiver is authorized to recover its expenses.

Section 631.205, F.S., is amended to specify that an order of conservation, rehabilitation, or receivership may not be considered an anticipatory breach of a reinsurance contract. The Division reports that some reinsurers require provisions in reinsurance contracts stating the placement of an insurance company into receivership violates the contract. The changes proposed by the bill clarify that the entry of an order of conservation, rehabilitation, or liquidation is not sufficient grounds for voiding the contract.

Section 631.206, F.S., is amended to limit arbitration clauses relating to insurance companies in rehabilitation or liquidation. The changes govern the rules by which the arbitration process takes place, ensuring the process is fair to both the insurance company in receivership and the other affected parties.

Section 631.261, F.S., is amended to specify that any transfer of or lien upon an insurer that is made between 4 months and 1 year before the commencement of a delinquency proceeding is void if the transfer or lien benefited a director, officer, employee, stockholder, or other similar affiliate of the affected insurer. The law is further amended to specify that a "transfer" does not actually take place

until the insurer or affiliate actually acquires rights in the property that is transferred. DFS reports the timing of a transfer is important in determining whether it may be voided by the Receiver. Other sections of law also are amended to conform to the changes governing a transfer and lien.

Section 631.400, F.S., creates a Closed Estate Account to receive assets resulting from past judgments and other essentially abandoned property from closed receivership estates. Proceeds deposited into the Closed Estate Account may be used in receivership matters, including funding for delinquency proceedings in estates that have insufficient funds to finance a receivership. Under current law, the Division sends abandoned property to the Unclaimed Property Section of DFS.

#### C. SECTION DIRECTORY:

**Section 1** amends s. 626.854, F.S., relating to the regulation of public adjusters.

**Section 2** amends s. 631.021(6), F.S., to give the receivership court exclusive jurisdiction with respect to assets or property of any insurer subject to rehabilitation or liquidation, and of claims against the insurer's assets or property

**Section 3** amends s. 631.041, F.S., to provide for damages, including costs and attorneys' fees, for injuries caused by any willful violation of an applicable stay or injunction.

**Section 4** amends s. 631.0515, F.S., to clarify that a managing general agent or holding company with a controlling interest in a Florida domestic insurer is subject to jurisdiction of the court under the provisions of s. 631.025, F.S.

**Section 5** amends s. 631.141(7)(a), F.S., to clarify that the expenses of the Receiver in connection with a delinquency proceeding are administrative expenses and are recoverable by the Receiver in any action in which the Receiver is authorized to recover its expenses.

**Section 6** amends s. 631.205, F.S., to clarify that the entry of an order of conservation, rehabilitation, or liquidation is not sufficient grounds for voiding a reinsurance contract.

**Section 7** creates s. 631.206, F.S., to specify the conditions under which arbitration clauses relating to insurance companies in rehabilitation or liquidation may operate.

**Section 8** amends s. 631.261, F.S., to remove the "intent" element of the current statute. The amendment states that a "transfer" does not actually take place until the insurer or affiliate actually acquires rights in the property that is transferred.

**Section 9** amends s. 631.262(2)(e), F.S., to conform to the changes governing a transfer and determining whether it may be voided.

**Section 10** amends s. 631.263(6), F.S., to conform to the changes governing a transfer and determining whether it may be voided.

**Section 11** amends s. 631.400, F.S., to create a Closed Estate Account using previously issued judgments and other essentially abandoned property from closed receivership estates for use in receivership matters, including funding for delinquency proceedings in estates that have insufficient funds to finance a receivership.

**Section 12** provides that the bill takes effect upon becoming law.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

#### 1. Revenues:

DFS reports there is a potential impact to the State School Trust Fund as a result of the proposed creation of the Closed Estate Account in **Section 11** of the bill. The proposed Closed Estate Account would be funded from unclaimed assets of a liquidated insurer or the recovery of assets after the estate of a liquidated insurance company has been closed. As a result, these funds would not revert to the Unclaimed Property Trust Fund, which deposits receipts into the State School Trust Fund. The amount of potential reduction to the Unclaimed Property Trust Fund/State School Trust Fund varies from year to year.

Due to the sporadic and unpredictable nature of the unclaimed proceeds resulting from insurance company liquidations, the variation in unclaimed property amounts from each insurance estate, the amount of available assets by estate, the age of the estate, and the instructions from the court in each estate, DFS is unable to quantify the actual amount of the potential reduction. DFS reports the following **annual** amounts have been transferred to the Unclaimed Property Trust Fund for subsequent transfer into the State School Trust Fund:

FY 2001-02	\$177,412
FY 2002-03	\$207,485
FY 2003-04	<u>\$451,708</u> (through 2/29/2004)
TOTAL	<u>\$836,605</u>

#### 2. Expenditures:

DFS reports that the proposed amendments to ss. 631.0515, 631.147(7), and 631.205, F.S., are clarifications of existing practice and are not anticipated to have any fiscal impact on state government, local government, or the private sector.

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

#### 1. Revenues:

None.

#### 2. Expenditures:

There is a potential fiscal impact to the Circuit Court of Leon County as a result of the proposed amendment to Section 631.021(6). The amendment provides that Leon County Circuit Court will have exclusive jurisdiction in cases regarding assets or property of a domestic insurer subject to a receivership proceeding. The fiscal impact is estimated to be minimal since most cases of this type are already heard in Leon County Circuit Court. There would be a potential reduction in expenses to other circuit courts as a result of this amendment by clarifying the jurisdiction and eliminating filings, duplicate filings, and argument on this issue; however the amounts to Leon County and the other judicial circuits are indeterminate.

### C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The amendments to Sections 631.041(6), 631.261, 631.262, 631.263, 627.846, and 626.561 have a potential fiscal impact to persons in the private sector found by the court to have damaged an estate in receivership. There is a corresponding benefit to the estate and its claimants for any recoveries made

based on these amendments. Recoveries made as a result of these amendments are expected to be made on a non-routine basis. Because such recoveries are not a routine part of receivership proceedings, DFS has insufficient information to estimate their fiscal impact.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None. DFS reports it has sufficient rulemaking authority under current law to adopt any rules necessary to implement the provisions of the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/COMMITTEE SUBSTITUTE CHANGES

On March 23, 2004, the Subcommittee on Insurance Regulation adopted two amendments.

Amendment 1: Provisions in Section 1 of the bill regulating Public Adjusters are changed. Many of the bill's original provisions regulating public adjusters are repealed by the amendment. Rather, public adjusters now are limited to representing only claimants who have claims against their own insurers. This means a public adjuster may not represent claimants with liability claims. Some activities of public adjusters continue to be limited: as part of the existing prohibition on the practice of law by public adjusters, they are not be able to act on behalf of a claimant with respect to damages outside of the scope of the insurance policy, unfair claims practices violations, tort claims, or statutory interest, costs, or fees. Public adjusters still will be able to consult with attorneys and testify in court. Public adjusters will be required to ensure that contractors and other professionals are licensed. This codifies a rule of the Department of Financial Services currently in force.

The former provisions requiring public adjusters to provide information to a client's insurance company are removed by the amendment. The amendment also deletes the requirements for a public adjuster to disclose any relationship with a contractor or other service provider recommended by the adjuster.

Amendment 2: Adds s. 635.081, F.S., relating to accounting, investments, and deposits by insurers to the bill for amendment. Credit disability insurance is exempt from the pro rata gross unearned premium reserve requirement. Repeals s. 625.131, F.S., relating to the special reserve bases for credit life and disability policies; the provisions of that section are added elsewhere by the same amendment. Allows a morbidity reserve for single premium disability insurance in lieu of an unearned premium reserve. DFS is authorized to adopt new mortality tables approved by the National Association of Insurance Commissioners (NAIC) to value credit life policies. DFS also is authorized to adopt new mortality tables, approved by NAIC, for ordinary life

policies, total and permanent disability policies, accidental death benefits, individual annuity and pure endowment policies, and for group annuity and pure endowment policies.