

# 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/SB 2588

SPONSOR: Banking and Insurance Committee and Senator Diaz de la Portilla

SUBJECT: Insurance Agents (Nonresidents)

DATE: March 26, 2004 REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Deffenbaugh</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Fav/CS</u>
2.	_____	_____	<u>FT</u>	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

Committee Substitute for Senate Bill 2588 deletes certain statutory restrictions on non-resident insurance agents licensed in Florida, in response to the recent U.S. District Court ruling that such provisions are unconstitutional to the extent that they deny to nonresident insurance agents the same rights and privileges that they afford to resident insurance agents. The bill makes the following changes:

- Deletes the requirement that all insurance policies written under a nonresident general lines agent's license be countersigned by an agent who is a resident of this state;
- Deletes the requirement that a nonresident agent must pay part of his or her commission to the countersigning resident agent;
- Deletes the prohibition against a nonresident agent having an office or place of business in this state and from having any pecuniary interest in any insurance agent or agency licensed as a resident of this state;
- Deletes the prohibition against a nonresident agent soliciting, negotiating, or effecting insurance contracts in this state unless accompanied by the countersigning resident agent; and
- Deletes the prohibition against a nonresident agent being licensed as a surplus lines agent and establishes requirements for licensure of nonresident surplus lines agents

This bill substantially amends the following sections of the Florida Statutes: 624.425, 624.426, 624.428, 626.025, 626.741, 626.752, 626.753, 626.929, 626.930, 626.933, and 626.935.

The bill creates section 626.9292 of the Florida Statutes.

The bill repeals sections 626.792(3) and 626.835(3) of the Florida Statutes.

## II. Present Situation:

### **U.S. District Court Ruling that Non-Resident Agent Statutes are Unconstitutional**

In September 2003, the U.S. District Court, Northern District of Florida, ruled that certain provisions of the Florida Insurance Code relating to the licensure and regulation of nonresident insurance agents were unconstitutional. The Court, in the case of *Council of Insurance Agents & Brokers v. Gallagher*,<sup>1</sup> determined that certain statutory provisions violate the Privileges and Immunities Clause and Equal Protection Clause of the U.S. Constitution to the extent that they deny to Florida-licensed nonresident insurance agents the same rights and privileges that they afford to Florida-licensed resident agents. The case cited U.S. Supreme Court precedent for the *clear teaching . . . that the state cannot ordinarily condition a professional license on residency within the state.*<sup>2</sup>

The three statutes determined by the District Court to be unconstitutional are:

- Section 624.425, F.S., which requires policies of property, casualty, or surety insurance for subjects of insurance located or to be performed in this state to be issued by or through, and be countersigned by an agent who is a resident of this state.<sup>3</sup>
- Section 626.741, F.S., which similarly requires that all insurance policies written under a nonresident general lines agent's license (primarily property, casualty, or surety insurance) on risks or property located in this state be countersigned by an agent who is a resident of this state, and further provides that:
  - the nonresident agent must pay part of his or her commission to the countersigning resident agent;<sup>4</sup>
  - a nonresident agent is prohibited from having an office or place of business in this state and from having any pecuniary interest in any insurance agent or agency licensed as a resident of this state; and that
  - A nonresident agent is prohibited from soliciting, negotiating, or effecting insurance contracts in this state unless accompanied by the countersigning resident agent.

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<sup>1</sup> 287 Fed Supp. 2d, 1302, U.S. Dist. Ct., N.D. Fla.(2003).

<sup>2</sup> Id, at 1311; citing, *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985), which struck down the state law requirement that one had to be a resident of New Hampshire in order to become a member of the State Bar as a prerequisite to practicing law in the state.

<sup>3</sup> Exceptions to the resident agent and countersignature law are provided in s. 624.426, F.S., which include: 1) contracts of reinsurance; 2) policies of insurance on the rolling stock of railroad companies; 3) U.S. Customs surety bonds issued by a corporate surety approved by the U.S. Department of Treasury and that name the U.S. as the beneficiary; 4) policies issued by insurers whose agents represent only one company or group of companies under common ownership if a company within the group is transferring policies to another company within the group and the agent of record remains the same; and 5) policies issued by insurers whose agents represent only one company or group of companies under common ownership and for which a Florida resident agent is the agent of record and the application has been lawfully submitted to the insurer.

<sup>4</sup> For property insurance policies, the resident agent must receive at least 50 percent of his or her usual commission or 50 percent of the nonresident agent's commission, whichever is less. For all other policies, including motor vehicle, workers' compensation, liability, and other specified types of insurance, the resident agent must receive at least 25 percent of his or her usual commission or 25 percent of the nonresident agent's commission, whichever is less. The provision regarding commission splitting does not apply to insurance purchased by a person whose premiums in the preceding year exceeded \$250,000.

- Section 626.752, F.S., which prohibits a nonresident agent from being licensed as a surplus lines agent. This is a section of the Surplus Lines Law<sup>5</sup> that allows for insurance to be written with a surplus lines insurer if the insurance cannot be procured from an authorized (licensed) insurer, subject to certain conditions. Surplus lines insurers must be approved by the Office of Insurance Regulation subject to meeting certain financial requirements, but are generally not otherwise subject to requirements that apply to authorized insurers, such as rate and form approval. Only licensed surplus lines agents may place business with a surplus lines insurer.

In addition to the obvious benefit or protection to resident insurance agents, the current law also provides protection and security to Florida policyholders, according to the Department of Financial Services (Department), the agency that licenses and regulates insurance agents. Requiring a Florida agent to countersign a policy sold by a nonresident agent presumably helps ensure that the specifics of the Florida Insurance Code and related rules are followed. Also, an agent residing in the state can more easily be personally contacted by the policyholder and the records examined by the Department if questions or problems arise concerning the coverage. However, none of the arguments presented to the Court provided adequate support for the statutes' discrimination against non-resident agents.

Though not directly the subject to the Court's ruling, ss. 626.792 and 626.835, F.S., prohibit a nonresident life or health insurance agent, respectively, from having a place of business in Florida or being an officer, director, stockholder, or partner in a Florida agency.

### **Licensure of Insurance Agents in Florida**

Insurance agents transact insurance on behalf of an insurer or insurers. Agents must be licensed by the Department of Financial Services to act as an agent for an insurer, and be appointed (i.e., given the authority by an insurance company to transact business on its behalf) by at least one insurer to act as the agent for that particular appointing insurer or insurers. Requirements vary by line and based upon resident or nonresident license type.

*General lines agents* are authorized under state law to transact any or all of the following lines of insurance: property, casualty, surety, and marine insurance. A general lines agent may also sell health insurance without being separately licensed as a health agent only for those insurers also represented by that same agent as to property and casualty insurance.<sup>6</sup>

Although requirements vary by line of authority, general requirements for agent licensure include being 18 years of age; submitting an application; paying required fees; satisfying pre-licensing examination requirements when applicable; complying with requirements as to knowledge, experience, or instruction; and submitting fingerprints. Applicants for a resident agent license must be Florida residents. Applicants for a nonresident license must be licensed in good standing in their home state, but generally do not have to pass a pre-licensing examination because Florida has reciprocity agreements with all states to waive that requirement.

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<sup>5</sup> Sections 626.913-626.937, F.S.

<sup>6</sup> Section 626.015(5), F.S.

*Nonresident general lines agents* are licensed by the Department pursuant to s. 626.741, F.S. This section and others were amended in 2002 in the act<sup>7</sup> intended to bring Florida into compliance with the uniformity and reciprocity provisions of the federal Gramm-Leach-Bliley Act (GLB Act), while preserving certain “consumer protection” laws. Under the GLB Act, certain state regulation over insurance agent licensing is preempted to the National Association of Registered Agents and Brokers unless a majority of the states and territories achieve uniformity or reciprocity by November 12, 2002. The GLB Act requires states and territories either to enact uniform producer licensing laws or to ensure non-discriminatory treatment through reciprocity for non-resident agents. The Department believes that the Florida law is in compliance with the National Association of Insurance Commissioner’s Producer Licensing Model Act, but has not yet received NAIC approval.

This section authorizes the Department to enter into reciprocal agreements with states waiving the examination requirement for nonresident agent license applicants if:

- The nonresident applicant’s home state extends a similar privilege to Florida residents seeking licensure as a nonresident agent in the applicant’s home state without discrimination;
- The nonresident applicant holds a valid license as a resident agent in his or her home state; and,
- The nonresident applicant satisfies the examination requirement or is exempt from the requirement. Under s. 626.221, F.S., applicants are exempt from the examination requirement if they have completed “substantially equivalent” examination requirements in their home state or hold certain professional designations.

*Surplus lines agents* are licensed pursuant to s. 626.927, F.S. Under current law, a Florida resident may apply to the Department for approval to sell surplus lines policies only being licensed as a general lines agent. Additionally, an applicant for a surplus lines agent license also must have worked with a surplus lines insurer for at least 1 year within the 4 years previous to applying for a license to sell surplus lines. If an applicant does not possess the 1 year of experience, he or she must have completed 60 hours of course work and passed a written examination specific to surplus lines. Both the coursework and the examination must be approved by the Department. According to the Department, Florida is one of ten states that require a surplus lines agent to first be licensed as a general lines agent, then to have 1 year of experience in the surplus lines market or to have passed the surplus lines licensing examination. Most states require either licensure as a general lines agents, experience in the surplus lines market, or successful passage of an approved exam. The Florida law also requires each surplus lines agent to file with the Department a \$50,000 surety bond (s. 626.928, F.S.).

The *Florida Surplus Lines Service Office*, created by s. 626.921, F.S., is a non-profit association overseen by a Board of Governors composed of nine members appointed by the Department, seven of whom represent surplus lines insurers or agents. The role of the Service Office is to permit better access by consumers to surplus lines insurers; to provide advice to consumers, surplus lines agents, insurers, and government agencies concerning the operation of the surplus lines market; and to collect the 5 percent surplus lines tax from surplus lines agents and the 0.3

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<sup>7</sup> Chapter 2002-206, L.O.F.

percent fee for the cost of operation of the Service Office All licensed surplus lines agents must be a member of the association. If a surplus lines agent does not timely pay the tax or service fee, the Department is authorized to bring suit against the surplus line agent and the surety insurer that issued the agent's required surety bond.

### III. Effect of Proposed Changes:

#### **Deletion of Restrictions on Nonresident Agents**

The bill amends those statutes held to be unconstitutional in *Council of Insurance Agents & Brokers v. Gallagher*, to delete provisions found by the U.S. District Court to be unlawfully discriminatory against nonresident insurance agents. Specifically, the bill:

- Deletes the requirement that all insurance policies written under a nonresident general lines agent's license on risks or property located in this state be countersigned by an agent who is a resident of this state;
- Deletes the requirement that a nonresident agent must pay part of his or her commission to the countersigning resident agent;
- Deletes the prohibition against a nonresident agent having an office or place of business in this state and from having any pecuniary interest in any insurance agent or agency licensed as a resident of this state;
- Deletes the prohibition against a nonresident agent soliciting, negotiating, or effecting insurance contracts in this state unless accompanied by the countersigning resident agent; and
- Deletes the prohibition against a nonresident agent being licensed as a surplus lines agent.

#### **Requirements for Licensure as a Nonresident Surplus Lines Agent**

The bill establishes requirements for licensure of nonresident surplus lines agents to an individual licensed in his or her home state as a general lines agent and as a surplus line agent, and if the individual's home state licenses residents of Florida in a similar manner as a nonresident surplus lines agent .

The bill requires that a non-resident surplus lines agent meet all the requirements that apply to a resident surplus lines agent, including the experience, education, examination, and surety bond requirements, summarized above. Requiring passage of an examination is in contrast to the reciprocity provisions that apply to licensure of non-resident general lines agents under s. 626.741, F.S., which exempt nonresident applicants from the examination requirement if they have completed "substantially equivalent" examination requirements in their home state.

The nonresident surplus lines license is limited to the specific lines of authority granted in the license issued by the agent's home state and the lines authorized under the Florida nonresident license. The nonresident agent is subject to the same requirements that apply to resident surplus lines agents, including the requirement for a \$50,000 bond in favor of the Department of Financial Services (Department), as required by s. 626.928, F.S.

The bill also specifies that a nonresident surplus lines agent who relocates to Florida as his or her home state may continue to sell insurance for 90 days under the nonresident license, but must become licensed as a resident agent within that time to continue transacting business in Florida.

A nonresident surplus lines licensee must maintain records of all surplus lines transactions in this state or, if the nonresident agent does not have an office in this state, in the office of nonresident agent's state of residence. Such records must be maintained for 5 years in the same manner required of resident agents.

**Section 1** amends s. 624.425, F.S., (which applies to insurers) to delete the requirement that insurance policies sold in Florida by nonresident general lines insurance agents be countersigned by an agent who is a Florida resident. As amended, the law would require a property, casualty, or surety insurance policy as to a subject of insurance resident, located, or to be performed in this state to be countersigned by an agent who is regularly commissioned and is currently licensed as an agent and appointed for the insurer.

**Section 2** amends s. 624.426, F.S., which provides exceptions to the resident agent and countersignature law, to conform to Section 1.<sup>8</sup> As amended, the same exceptions would continue to apply to the countersignature requirements of s. 624.425, F.S., as amended. However, the exception in subsection (5) for policies of insurance issued by insurers whose agents represent, as to property, casualty, and surety insurance, only one company or group of companies under common ownership, if the application has been lawfully submitted to the insurer, would no longer be subject to the additional condition that a Florida resident agent must be the agent of record.

**Section 3** amends s. 624.428, F.S., which currently requires a life insurer issuing or delivering a life insurance or health insurance policy or contract in this state to have the application for such policy, the delivery of such policy, and the servicing of such policy through an insurance agent licensed in Florida. The bill clarifies that this must be a "resident or nonresident" insurance agent.

**Section 4** amends s. 626.025, F.S., to eliminate from the list of "consumer protections" in the current law the reference to the prohibition against nonresident general lines agents having a place of business in Florida or a pecuniary interest in a Florida agency. The bill adds to the list of "consumer protections" a reference to s. 626.927, F.S., which establishes the requirements for licensure as a surplus lines agent. This section listing "consumer protections" was created in the 2002 act<sup>9</sup> intended to bring Florida into compliance with the uniformity and reciprocity provisions of the federal Gramm-Leach-Bliley Act (GLB Act), while preserving certain "consumer protection" laws. Under the GLB Act, certain state regulation over insurance agent licensing is preempted to the National Association of Registered Agents and Brokers unless a majority of the states and territories achieve uniformity or reciprocity by November 12, 2002. The GLB Act requires states and territories either to enact uniform producer licensing laws or to ensure non-discriminatory treatment through reciprocity for non-resident agents.

**Section 5** amends s. 626.741, F.S., to delete the prohibition against nonresident general lines agents having a place of business in Florida or a pecuniary interest in a Florida agency; eliminates the requirement that nonresident general lines agents be accompanied by a resident agent if the nonresident agent comes into Florida to solicit Florida residents; and eliminates the

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<sup>8</sup> See, footnote 3 for the current exceptions.

<sup>9</sup> Chapter 2002-206, L.O.F.

requirement that nonresident general lines agents pay part of their commission to the Florida agent who countersigns the policy. This section is also amended to clarify that nonresidents are not required to have an office in Florida, although current law requires resident agents to maintain an office in the state.

**Section 6** amends s. 626.752, F.S., to allow insurers to furnish application forms and related insurance documents to nonresident agents in the same manner as resident agents. The forms and related documents are used in brokering insurance with an insurer with which the agent does not hold an appointment.

**Section 7** amends s. 626.753, F.S., to delete the provision that allows nonresident and resident agents to share commissions subject to the requirements of s. 626.741, F.S. Such agents would be permitted to share commission under the general authority of paragraph (1)(a) that allows an agent to share commissions only with other agents appointed and licensed to write the same kind or kinds of insurance.

**Section 8** repeals subsection (3) of s. 626.792, F.S., to delete the prohibition against a nonresident life insurance agent having a place of business in Florida or being an officer, director, stockholder, or partner in a Florida agency.

**Section 9** repeals subsection (3) of s. 626.835, F.S., to delete the prohibition against a nonresident health insurance agent having a place of business in Florida or being an officer, director, stockholder or partner in a Florida agency.

**Section 10** creates s. 626.9272, F.S., to provide for the licensing and regulation of nonresident surplus lines insurance agents, as detailed above.

**Section 11** amends s. 626.929, F.S., to delete the requirement that only resident general lines agents may engage in surplus lines insurance transactions in Florida. The law would continue to require that a surplus lines agent also be licensed as a general lines agent.

**Section 12** amends s. 626.930, F.S., to specify that a nonresident surplus lines agent must maintain records of all surplus lines transactions in this state or, if the nonresident agent does not have an office in this state, in the office of nonresident agent's state of residence. Such records must be maintained for 5 years in the same manner required of resident agents.

**Section 13** amends s. 626.933, F.S., to allow the Department to authorize the Florida Surplus Lines Service Office to file suit on its behalf against a surplus lines agent or the surety insurer that issued the surety bond to the agent, if the agent has not timely paid the surplus lines tax or service fee to the Service Office. All costs and expenses incurred in the suit, which are not recoverable from the agent or surety must be borne by the Service Office.

**Section 14** amends s. 926.935, F.S., to conform disciplinary provisions relating to maintenance of surplus lines insurance records to recognize that a nonresident surplus lines agent may have an office in his or her state of residence and to conform to Section 11 that allows nonresident surplus lines agents to maintain records their state of residence.

**Section 15** provides an effective date of July 1, 2004. According to the Department, the federal court granted the motion of the Department to delay licensing of surplus lines agents until legislation was enacted providing qualifications and procedures.

**IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

The bill deletes the provisions of current law held to be unconstitutional in *Council of Insurance Agents & Brokers v. Gallagher*, as violating the Privileges and Immunities Clause and Equal Protection Clause of the U.S. Constitution to the extent that they deny to Florida-licensed nonresident insurance agents the same rights and privileges that they afford to Florida-licensed resident agents.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Nonresident general lines agents licensed in Florida will enjoy the economic benefit of no longer being required to share commissions with a resident agent and being allowed to have an office in Florida. Resident agents licensed in Florida will lose the economic benefit of receiving a share of the commission earned by non-resident agents and the benefit of provisions that restrict the activities of non-resident agents. However, this impact is derived primarily from the Court ruling in *Council of Insurance Agents & Brokers v. Gallagher*, rather than from this bill.

C. Government Sector Impact:

Unknown. The Department of Financial Services (Department) has not provided a fiscal note for this bill. It is likely that there will be increased licensure activity by allowing nonresidents to obtain surplus lines agent licenses and due to the elimination of restrictions on activities of nonresidents who hold a general lines license. This is likely to



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increase revenue from additional application and licensure fees, as well as increase the workload to the Department.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Amendments:**

None.

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

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