



## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Provide Limited Government**—The bill strengthens state regulation of unauthorized insurers by providing more power to OIR relative to fraud prevention. The bill authorizes OIR to issue an immediate cease and desist order to prevent further unauthorized transactions by an entity that is not licensed to transact insurance in the state.

#### B. EFFECT OF PROPOSED CHANGES:

##### Unauthorized Insurers

Insurance companies transacting insurance in Florida or from offices located in the state are required to obtain a certificate of authority (COA) issued by OIR pursuant to s. 624.401, F.S.<sup>1</sup> An unauthorized insurer is an insuring entity that does not have a COA to transact insurance business in Florida, and is not an eligible surplus lines insurer.<sup>2</sup> Specifically, s. 626.901, F.S., prohibits a person from representing or otherwise offering aid to any insurer not authorized to transact insurance in this state. Sections 626.901-626.912, F.S., govern unauthorized entities and their insurance transactions.

Acting as an agent or representing an unauthorized insurer involves a broad range of activities including soliciting or negotiating insurance or annuity contracts; forwarding applications; inspecting risks; fixing rates; and collecting premiums, among other activities. If an unauthorized insurer fails to pay a claim within the provisions of a contract entered into in violation of the unauthorized insurer law, any person who knew or reasonably should have known that the contract was entered into in violation of that law, and who solicited or negotiated such contract, is liable to the insured for the full amount of the claim or loss not paid.

Any insurance agent or other person who knowingly represents an unauthorized insurer, commits a third degree felony and a person who commits subsequent violations of the law, commits a felony of the second degree.<sup>3</sup> Also, any person who acts as an insurer, transacts insurance, or otherwise engages in insurance activities without a COA commits insurance fraud which constitutes a felony, the degree of which depends on the amount of premium collected.<sup>4</sup> If the amount of insurance premium collected is less than \$20,000, it is a third-degree felony with a minimum term of imprisonment of 1 year. If the amount is \$20,000 or more, but less than \$100,000, it is a second-degree felony with a minimum term of imprisonment of 18 months, and if the amount is \$100,000 or more, it is a first-degree felony with a minimum term of imprisonment of 2 years.

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<sup>1</sup> Under current law, there are several exceptions to the requirement to obtain a COA which apply to insurers with respect to specified transactions ranging from surplus lines coverages and reinsurance to captive insurers. Specifically, these exemptions pertain to transactions involving surplus lines coverages; specified reinsurance; captive insurance companies; investments by foreign insurers; servicing life or health insurance policies or annuity contracts pertaining to insurers that have withdrawn from Florida; policies covering only subjects of insurance not resident or expressly performed in this state at the time of issuance and lawfully solicited or delivered outside this state; and, investigation or litigation of specified claims under policies written in this state, or liquidation of assets and liabilities of the insurer, all as resulting from its former authorized operations in Florida. "Captive insurers" are created and owned by one or more non-insurers, for the primary purpose of providing their owners with coverage, usually at rates lower than those of other insurers.

<sup>2</sup> Surplus lines insurance is regulated under part VIII, chapter 626, F.S.

<sup>3</sup> Section 626.902, F.S.

<sup>4</sup> Section 626.401, F.S.

The law provides four exceptions to the definition of unauthorized insurance for the following:

- Activities authorized or accomplished on behalf of OIR under the Unauthorized Insurers Process law, ss. 626.904-626.912, F.S.;
- Surplus lines insurance when written pursuant to the Surplus Lines Law, ss. 626.913-626.937, F.S.;
- Transactions for which a COA is not required of an insurer under s. 624.402, F.S.; and
- Independently procured coverage written pursuant to s. 626.938, F.S.

According to staff of OIR, the typical unauthorized insurance company is often a criminal enterprise disguised as an insurance company.<sup>5</sup> Their operations are usually national and sometimes international in scope, and they may claim to be licensed in a foreign country. These companies write policies and collect premiums, but do not pay claims. Instead, such enterprises typically take the premiums and other assets of the company and move them offshore where they are difficult to find and even more difficult to retrieve, and ultimately prosecute. These unauthorized insurers defraud thousands of insurance consumers in Florida.

The Office of Insurance Regulation reports that over the past few years (as of September, 2003)<sup>6</sup> more than 4,423 Floridians have reported being left with \$17.8 million in unpaid claims from unauthorized insurers. Cases of fraud involving unauthorized entities operating in Florida have involved health care claims as well as property damage, workers' compensation, watercraft damage, and liability claims.

When OIR receives complaints alleging unauthorized activity, the complaint is turned over to the Market Investigations Unit to investigate potential administrative violations, while the same complaint is referred to both the Division of Agent and Agency Services within DFS if the case involves a licensed insurance agent, and to the Division of Insurance Fraud within the DFS for determination as to criminal violations. The Division of Insurance Fraud employs sworn law enforcement officers who investigate allegations of unauthorized insurance activities, fraudulent insurance acts, unfair methods of insurance competition or unfair or deceptive insurance acts or practices.<sup>7</sup> These officers may make warrantless arrests upon probable cause for criminal violations established as a result of an investigation.<sup>8</sup> The general laws applicable to arrests by state law enforcement officers apply to investigators of the division.

During the period from January 1, 2002 to the present, the Market Investigations Unit opened 389 cases of which 214 have resulted in the issuance of orders to cease and desist unauthorized activities. Cases referred to the Division of Insurance Fraud are confidential since the division is a law enforcement agency.

Representatives with OIR and DFS assert that while the sanctions for unauthorized entities have been strengthened in past years, subsequent compliance and enforcement actions have exposed certain weaknesses in the authority both of OIR and DFS to protect consumers. As a result, OIR is seeking legislative authority to strengthen laws governing unauthorized entities.

### **Changes Proposed by the Bill**

The bill authorizes OIR and DFS to issue an immediate final order under s. 120.569, F.S., (the Administrative Procedure Act) in its discretion and without advanced notice or hearing, requiring an unauthorized entity to cease and desist in any action that violates the law. The bill makes legislative

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<sup>5</sup> The DFS licenses insurance agents and investigates criminal activities of unauthorized insurers and agents representing unauthorized insurers. The OIR issues certificates of authority (COA) to insurers. Both the OIR and DFS exercise powers relating to unauthorized entities within their respective jurisdictions.

<sup>6</sup> This is the most recent information available according to OIR representatives.

<sup>7</sup> Section 626.989(2), F.S.

<sup>8</sup> Section 626.989(7), F.S.

findings that the unauthorized transaction of insurance constitutes an imminent and immediate threat to the health, safety, and welfare of the residents of this state. This provision allows OIR or DFS to issue an immediate final order against a person or entity conducting insurance business in the state without a valid COA or other authority, without the express recitation of specific incidents of irreparable harm because such harm will now be presumed for violating the unauthorized entities sanctions under s. 626.901, F.S.

This bill authorizes OIR to investigate the accounts, records, documents, and transactions pertaining to the activities of any unauthorized insurer or person as defined in s. 624.04, F.S.,<sup>9</sup> which is or may be aiding or representing an unauthorized insurer.

### **Unauthorized Insurers Process Law**

Under ss. 626.904-626.912, F.S., unauthorized insurers and persons representing or aiding such insurers are subject to the jurisdiction of the Florida courts in suits by or on behalf of insureds or beneficiaries under such insurance contracts. Also, service of process upon unauthorized insurers or their representatives must be made by delivering such process upon the Chief Financial Officer (CFO) who must mail copies of such process to the defendant at the defendant's last known primary place of business. This provision is due to the fact that prior to this law, Florida residents who had purchased an insurance policy from an unauthorized entity were required to assert their legal rights in forums in other states. Therefore, legislation was enacted creating a method of substituted service of process upon unauthorized insurers which is made by serving such process upon the CFO. Such unauthorized insurers are subject to the jurisdiction of OIR and DFS.<sup>10</sup>

Before an unauthorized insurer or person representing or aiding such an insurer files any pleading instituted against it in Florida, such insurer or person must obtain a COA to transact insurance in Florida or deposit with the clerk of the court in which such action is pending, cash, securities or a bond in an amount fixed by the court which is sufficient to secure the payment of any final judgment.<sup>11</sup>

This bill adds a reference to s. 626.909, F.S., (jurisdiction of OIR and DFS relating to unauthorized insurers), and a reference to suits instituted by OIR or DFS in enforcing agency actions against unauthorized insurers under s. 120.69, F.S. (administrative actions pertaining to enforcement of agency actions). The bill requires an unauthorized insurer or its representative first to obtain a COA or a bond when such insurers or representatives seek to defend against an enforcement action filed in circuit court by OIR or DFS. The bill also limits to 30 days after service of process the time during which an unauthorized insurer or its representatives may file a motion to challenge service of process.

The bill also provides penalties for representing an unauthorized insurer and clarifies that the bill does *not* apply to matters authorized by OIR under the Unauthorized Insurers Process Law, ss. 626.904-626.912, F.S. This means OIR may contract for help in investigating alleged unauthorized transactions without the contractor being charged with conducting unauthorized transactions.

### **Surplus Lines Requirements**

The Florida Insurance Code contains specific financial and other requirements that unauthorized insurers must comply with in order to become eligible surplus lines insurers.<sup>12</sup> Generally, surplus lines insurance is insurance coverage provided by a company that is not licensed in Florida, but that is allowed to do business in the state, as an "eligible" insurer, because the particular coverage offered is not available from insurers authorized to sell insurance in Florida.

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<sup>9</sup> This section defines "person" to include an individual, insurer, company, association, organization, Lloyds society, reciprocal insurer, partnership, etc.

<sup>10</sup> Section 626.909, F.S.

<sup>11</sup> Section 626.908, F.S.

<sup>12</sup> Section 626.918, F.S.

The law establishes requirements for approval of eligible surplus lines insurers and licensure of surplus lines agents by OIR, including the requirement that a surplus lines insurer maintain a surplus as to policyholders of not less than \$15 million, have been licensed in its state or country of domicile for a least 3 years, and furnish annual and quarterly financial statements to OIR.<sup>13</sup> The law also specifies the conditions that must be met before insurance coverage may be exported to an eligible surplus lines insurer, also referred to as a nonadmitted insurer. Surplus lines insurance is not subject to Florida regulation of rates or forms and there is no insurance guaranty fund protection if the insurer becomes insolvent.

### Independently Procured Insurance Coverage

Independently procured coverage (IPC) is insurance coverage that an insured in Florida, typically a business, obtains by directly contacting an unauthorized foreign or alien<sup>14</sup> insurer, or self insurer.<sup>15</sup> The insured must file specific information about the policy with the Florida Surplus Lines Service Office (Office) and must pay 5 percent of the gross amount of the premium and a 0.3 percent service fee to the Office.

Currently, subsection (4) of s. 626.901, F.S., exempts *independently procured coverage* (IPC) from being included within the definition of unauthorized insurance. The bill clarifies that IPC coverage is *not coverage which is solicited, marketed, negotiated, or sold* in Florida. This clarification is necessary, according to OIR officials, because some unauthorized insurers have asserted the defense that they are soliciting or selling IPC and therefore are not in violation of the unauthorized entities provisions.

#### C. SECTION DIRECTORY:

**Section 1** Amends s. 626.901, F.S., relating to the prohibition to aid or represent an unauthorized insurer.

**Section 2** Amends s. 626.902, F.S., relating to the penalties that may be imposed for representing an unauthorized insurer.

**Section 3** Amends s. 626.908, F.S., relating to the defense of an unauthorized insurer against a legal action filed against the unauthorized insurer or a person representing the unauthorized insurer.

**Section 4** Provides an effective date of July 1, 2005.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

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<sup>13</sup> Section 626.918, F.S.

<sup>14</sup> Insurers are divided into three categories under the Insurance Code: *domestic insurers* are formed under the laws of Florida; *foreign insurers* are formed under the laws of any state, district, or territory or commonwealth of the United States, other than Florida; and *alien insurers* are defined as insurers other than domestic or foreign insurers. Foreign and alien insurers must meet certain capital, surplus, and operational requirements.

<sup>15</sup> Section 626.938, F.S.

**B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

1. Revenues:

None.

2. Expenditures:

None.

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

Under the bill, OIR may audit the accounts, records, documents, and other materials related to the unauthorized transaction of insurance. Violators can be subject to an immediate cease and desist order at the discretion of OIR or DFS.

**D. FISCAL COMMENTS:**

The Office of Insurance Regulation reports that as of September 2003, an estimated 4,400 Florida citizens had been adversely affected by the fraudulent activities of unauthorized entities. The citizens who filed complaints with OIR reported losses of an estimated \$17.8 million due to claims that were unpaid and other similar activities.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

None.

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

**IV. AMENDMENTS/COMMITTEE SUBSTITUTE & COMBINED BILL CHANGES**

At its March 17, 2005 meeting, the Insurance Committee adopted an amendment to clarify that a person who assists OIR in the investigation of an unauthorized entity is not subject to the penalties authorized by law for an entity unauthorized to transact insurance.