

**HOUSE OF REPRESENTATIVES STAFF ANALYSIS**

**BILL #:** HB 75 Title Insurance  
**SPONSOR(S):** Mahon and others  
**TIED BILLS:** **IDEN./SIM. BILLS:** SB 638

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) Civil Justice Committee	5 Y, 0 N	Lammers	Billmeier
2) Insurance Committee			
3) Justice Council			
4)			
5)			

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**SUMMARY ANALYSIS**

HB 75 expands the definition of title insurance to include personal property as well as real property. The bill is loosely modeled on the 2001 revisions to UCC Article 9, and the subsequent creation of Article 9 personal property insurance in many states. Article 9 insurance typically guarantees the attachment, perfection, and priority of the lender's security interest in personal property, although Article 9 insurance does not guarantee actual ownership of the personalty.

It is expected that this bill will generate an increase in insurance sales premiums, although it is unknown how many insurance companies will choose to enter this market. There should also be an increase in tax revenue from the sale of these insurance policies, although an exact amount is unknown.

This bill will take effect July 1, 2005.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

Safeguard individual liberty—This bill allows insurance companies in Florida to sell title insurance on personal property, creating a new market for such companies, and it also allows consumers to purchase this insurance without going out of state. The bill removes Florida's current prohibition on the sale of title insurance for the protection of personal property.

#### B. EFFECT OF PROPOSED CHANGES:

##### Title Insurance

Title insurance in Florida is available to lenders and purchasers of real property, to protect them against any future adverse claims of ownership of the property that might result in the loss of title.<sup>1</sup> Section 624.608, F.S., provides that title insurance is available for owners or other people who have an interest in real property or a lien or encumbrance on real property. Currently, Florida law does not authorize the sale of title insurance for personal property. Most lenders require title insurance when they underwrite loans for real property.<sup>2</sup> Title insurance provides two forms of protection to the policyholder. First, title insurance provides a "duty to defend," which covers legal expenses related to an adverse claim against the lender's interest.<sup>3</sup> Secondly, title insurance contains a "duty to indemnify," by which the title insurer promises to reimburse or indemnify the lender for any damage to the lender's security interest, should the condition of title turn out to be less than it was insured for.<sup>4</sup> Real property title insurance only requires one premium for the life of the policy, which lasts as long as the real property is owned, for an owner's policy, or the life of the loan, for a lender's policy.<sup>5</sup> Title insurance can protect against a variety of specified risks, usually set forth on the first page of the policy, although additional risks may be covered at the discretion of the insurer.

##### Uniform Commercial Code

Article 9 of the Uniform Commercial Code (UCC) pertains to secured transactions and governs transactions involving the granting of credit secured by personal property and the sale of accounts and chattel paper.<sup>6</sup> Florida was one of the last states to adopt the revised Article 9, adopting the revision effective January 1, 2002; the revised Article 9 has now been adopted by all fifty states.<sup>7</sup> Other benefits of revised Article 9 include clarification of the rights and duties of secured creditors in the event of a debtor's default and more predictable and certain processes for perfecting and enforcing security interests.<sup>8</sup> The revisions to Article 9 update and clarify rules governing the creation, maintenance, and

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<sup>1</sup> See, e.g., Campbell R. Harvey, Campbell R. Harvey's Hypertextual Finance Glossary, Fuqua School of Business, Duke University, at <http://www.duke.edu/~charvey/Classes/wpg/bfglost.htm> (last visited Feb. 4, 2005).

<sup>2</sup> Albert Rush, What Mortgage Bankers Should Know About Title Insurance, First American Title Insurance Company, at <http://www.firstam.com/faf/html/cust/jm3240.html> (last visited Feb. 4, 2005).

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> James Prendergast, The Case for Personal Property Lien Priority Insurance, 34:3 Uniform Commercial Code Law Journal 252 (Winter 2002).

<sup>6</sup> Federal Financial Institutions Examination Council, FFIEC Statement on Revised UCC Article 9 1 (Feb. 28, 2001), available at [http://www.ffiec.gov/pdf/pr022801\\_statement.pdf](http://www.ffiec.gov/pdf/pr022801_statement.pdf).

<sup>7</sup> Section 679.101-679.507, Florida Statutes; Cook, Schuhmann & Groseclose, Inc., UCC Article 9 Now Adopted in All States, at <http://www.alaskalaw.com/uccup.html> (last visited Feb. 4, 2005).

<sup>8</sup> Rush, What Mortgage Bankers Should Know About Title Insurance.

perfection of security interests in personal property, thereby streamlining certain commercial sales and financial transactions while also providing increased legal certainty in those business transactions.<sup>9</sup>

Under the revised Article 9, a financing statement is not rendered ineffective by minor errors or omissions in the debtor's name, or in the name of the collateral, unless the error would make the financing statement "seriously misleading."<sup>10</sup> A name error is seriously misleading unless a search under the correct naming, using the filing office's search logic, would disclose the defective financing statement, but most current search logic systems will not recognize even common misspellings or spelling variations of names.<sup>11</sup> Furthermore, an improperly rejected filing statement is deemed to have been correctly filed and is, therefore, effective, and "an improperly rejected filing statement is not effective against a later secured creditor who obtains a security interest for value in reasonable reliance on the absence of the financing statement from the records."<sup>12</sup>

### Article 9 Title Insurance

Traditionally, attorneys have provided legal opinions in the form of letters known as "priority legal opinions," explaining the condition of title for a loan or other non real estate interest.<sup>13</sup> However, due to the numerous changes and complications created by the revised Article 9, attorneys have been increasingly reluctant to provide these opinion letters, because an attorney will be held personally liable for negligence in issuing such an opinion.<sup>14</sup> Even when a priority legal opinion is given, the letters are often so filled with qualifying language that they offer virtually no real certainty to a lender contemplating a financial transaction.<sup>15</sup> Because of the increasing vagueness of these opinions, at least one large company has announced that it will no longer require legal opinions when considering a loan application.<sup>16</sup>

Although attorneys can be held responsible for issuing incorrect priority legal opinions, there is no recourse against the state or any division thereof for misindexed or misfiled financing statements that are undiscoverable yet still valid.<sup>17</sup> Courts have also upheld the right of UCC search companies to strictly limit their consequential damages for searches that contain errors or for filings that are not disclosed by a search.<sup>18</sup> The search companies generally limit their liability to the amount of the fee charged for the search.<sup>19</sup>

Because a lender making a loan secured by personal property collateral will often have no recourse against either the search company or the state, UCC insurance can be desirable to provide both defense coverage and payment on claims in the common situation where the search company has clearly limited its liability and the state has not waived its right of sovereign immunity.<sup>20</sup> In this way, UCC insurance mirrors traditional title insurance in that it defends the insured against adverse claims and also reimburses the insured party when a covered interest is lost. UCC insurance is now offered

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<sup>9</sup> The Bond Market Association, Letter to New York State Senators and Assembly Members Urging Adoption of Revised Article 9 of the UCC, published March 16, 2001, at <http://www.bondmarkets.com/story.asp?id=1288> (last visited Feb. 4, 2005).

<sup>10</sup> John C. Murray, Sufficiency of Debtor's Name for Valid UCC Filing: Can UCC Insurance Help?, First American Title Insurance Company (2004) at <http://www.firstam.com/faf/html/cust/jm-sufficiency.html> (last visited Feb. 4, 2005).

<sup>11</sup> Id.

<sup>12</sup> Id.

<sup>13</sup> James Prendergast, The Case for Personal Property Lien Priority Insurance, 34:3 Uniform Commercial Code Law Journal 252, 263-65 (Winter 2002).

<sup>14</sup> Id. at 265.

<sup>15</sup> Sandra Stern, An Analysis of the Secured Lender's UCC Article 9 Insurance Policy, 227 New York Law Journal 124, June 28, 2002, available at <http://www.uccplus.com/files/uccanalysis.pdf> (last visited Feb. 8, 2005).

<sup>16</sup> Id.

<sup>17</sup> John C. Murray, Limitation of Liability for UCC Searches: Can UCC Insurance Provide an Alternative?, First American Title Insurance Company (2003), at <http://www.firstam.com/faf/pdf/jmurray/uccsearch.pdf> (last visited Feb. 4, 2005).

<sup>18</sup> Id.

<sup>19</sup> Id.

<sup>20</sup> Id.

by several national land-title insurance companies that are regulated by each state where they conduct business.<sup>21</sup>

The Insurance Department of the State of New York has concluded that policies providing lenders with title insurance for loans on personal property, as allowed by the UCC, are substantially similar to title insurance and may only be written by title insurance companies.<sup>22</sup> The UCC Article 9 insurance policy available in New York covers all forms of Article 9 transactions.<sup>23</sup> These personal property insurance policies provide coverage for all four types of perfection of an interest recognized by Article 9: perfection by filing, control (i.e., entering into an agreement with a third party, whereby the third party recognizes the lender's interest), possession, or automatic perfection upon the occurrence of a stated event.<sup>24</sup>

In addition to the duty to defend and pay claims, an Article 9 policy provides that the insurer will not seek subrogation against any attorney of the insured under the policy, except in cases of fraud.<sup>25</sup> An Article 9 insurance policy offers greater certainty than the traditional legal opinion for lenders seeking assurance that their investments will be protected, including the significant benefit of providing bankruptcy coverage, albeit subject to several specific exclusions.<sup>26</sup> Unlike traditional real estate insurance, Article 9 insurance also expressly provides coverage for after-acquired collateral.<sup>27</sup>

### Personal Property Title Insurance

Except for specific types of personal property that are subject to civil registration laws, such as vessels and aircraft, there is no system in place for a buyer or lender to determine whether a person selling an item of personal property, such as a television, actually owns the television he is seeking to sell or use as collateral.<sup>28</sup> Thus, insurance on these types of purchases is not "title" insurance, as that term is widely understood, because this type of insurance policy is not intended to replace the buyer of personal property's obligation of due diligence.<sup>29</sup> Instead, an Article 9 insurance policy insures the attachment, perfection, and priority of security interest in personal property, rather than the ownership of the property.<sup>30</sup> Thus, Article 9 personal property title insurance differs significantly from standard real estate title insurance.<sup>31</sup> The benefit of providing Article 9 insurance for personal property is that it protects law firms from the greatest potential malpractice area with regards to representing a lender in a secured personal property transaction—the review of the borrower's existing financing statement filings and the preparation and filing of the lender's financing statements, since, as previously discussed, even a minor mistake in the spelling of a party's name can have a drastic effect on the results of a title search under the revised Article 9.<sup>32</sup>

### HB 75

This bill would extend the definition of traditional real estate title insurance to personal property. Although individuals in Florida may already purchase Article 9 title insurance on personal property, they must do so through out-of-state companies, as insurance companies regulated by Florida law cannot

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<sup>21</sup> Stern, An Analysis of the Secured Lender's UCC Article 9 Insurance Policy.

<sup>22</sup> UCC Title Insurance Policy, Office of General Counsel, State of New York Insurance Department, December 27, 2000, available at <http://www.ins.state.ny.us/rg012271.htm> (last visited Feb. 3, 2005).

<sup>23</sup> Stern, An Analysis of the Secured Lender's UCC Article 9 Insurance Policy.

<sup>24</sup> Id.

<sup>25</sup> Id.

<sup>26</sup> Id.

<sup>27</sup> Id.

<sup>28</sup> James Prendergast, The Case for Personal Property Lien Priority Insurance, 34:3 Uniform Commercial Code Law Journal 252, 256 (Winter 2002).

<sup>29</sup> Id. at 256-57.

<sup>30</sup> Id. at 257.

<sup>31</sup> Id.

<sup>32</sup> Id. at 261-62.

sell this insurance. This bill is modeled upon the 2001 revisions to Article 9 of the UCC, which expanded the scope of jurisdiction over personal property. As previously mentioned, all fifty states have adopted the 2001 revisions to Article 9.<sup>33</sup> This bill would allow lenders to secure their interest in loans for purchases of personal property within this state.

C. SECTION DIRECTORY:

**Section 1.** Amends s. 624.608, F.S., which defines title insurance, by extending the definition to include insurance of personal property.

**Section 2.** Amends s. 627.771, F.S., which defines "related title services," to include transactions involving personal property.

**Section 3.** Provides an effective date of July 1, 2005.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The state will collect some revenue from tax on insurance premiums. The amount of tax this bill will generate is not known.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

One company estimates that this bill will result in an additional \$500,000 in insurance premiums being sold in Florida annually.<sup>34</sup> It is unknown whether or not other insurance companies will choose to enter this market.

D. FISCAL COMMENTS:

None.

## III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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<sup>33</sup> UCC Article 9 Now Adopted in All States, *supra* note 7.

<sup>34</sup> Estimate provided by Fidelity National Title Insurance Company.

This bill does not require counties or municipalities to take an action requiring the expenditure of funds, does not reduce the authority that counties or municipalities have to raise revenue in the aggregate, and does not reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

This bill does not delegate rule-making authority to any administrative agency.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

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

N/A.