The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Judiciary Committee

BILL:	CS/SB 1894
INTRODUCER:	Judiciary Committee and Senator Bennett
SUBJECT:	Surplus Lines Insurance
DATE:	April 2, 2009 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Emrich	Burgess	BI	**Fav/1 amendment**
2.	Treadwell	Maclure	JU	**Fav/CS**
3.			FT	
4.			GA	
5.			WPSC	
6.				

Please see Section VIII. for Additional Information:

A. COMMITTEE SUBSTITUTE.....	X	Statement of Substantial Changes
B. AMENDMENTS.....		Technical amendments were recommended
		Amendments were recommended
		Significant amendments were recommended

I. Summary:

Surplus lines insurance is the market of last resort for difficult to place commercial and personal lines risks in Florida.[1] Typically, surplus lines insurers write policies for unusual, high-risk situations that include hazardous materials transporters, commercial trucking enterprises, day care centers, older homes located in coastal areas, professional athletes, hospitals, expensive boats and cars, and medical malpractice. In order to place business with a surplus lines insurer, the surplus lines agent must make a "diligent effort" to place the policy with a Florida-authorized insurer, which is shown by having three written rejections of coverage from authorized insurers currently writing the type of insurance being sought.[2]

Historically, surplus lines insurers have not been subject to the insurance regulatory requirements in ch. 627, F.S.,[3] as authorized insurers due to a specific exemption provision for surplus lines

[1] Surplus lines insurance is insurance coverage provided by an insurer that is not licensed in Florida, but is allowed to do business in the state because the particular coverage offered is not available from Florida-licensed or authorized carriers. Surplus lines insurers are governed under the Surplus Lines Law (ss. 626.913-626.937, F.S.).

[2] Sections 626.914(4) and 626.916(1)(a), F.S.

[3] Chapter 627, F.S., provides the regulatory requirements for authorized carriers under the Office of Insurance Regulation as to rates, forms, contracts, and other provisions. There are only a few provisions under ch. 627, F.S., that explicitly state that

under the chapter.[4] Furthermore, the Office of Insurance Regulation (OIR) has never regulated surplus lines insurers as to rate, form, or other requirements under ch. 627, F.S.[5] However, two recent rulings by the Florida Supreme Court and a federal appellate court have altered the manner in which surplus lines insurers have historically been regulated.[6] Essentially, these rulings require that surplus lines policy forms must now be filed, reviewed, and approved by the OIR under part II of ch. 627, F.S.,[7] which has never before been a requirement for these carriers.

The bill responds to these court decisions by clarifying that the form filing and other provisions of ch. 627, F.S., except where specifically stated, do not apply to surplus lines insurance. However, the bill imposes certain requirements on surplus lines insurers, beginning October 1, 2009, which are similar to some of the provisions governing admitted insurers in ch. 627, F.S. The bill:

- Requires surplus lines insurers to include on the face of the policy a statement that surplus lines insurers' policy rates and forms are not approved by any Florida regulatory agency;
- Specifies the payment types for surplus lines insurance contract premium and claims;
- Establishes procedures and time frames for certain disclosures by the surplus lines insurers to claimants regarding liability claims;
- Provides for an award of attorney's fees upon a judgment or decree by any Florida court in favor of any named or omnibus insured or named beneficiary; and
- Requires surplus lines insurers to print on the face of a policy a notice that the policy contains a separate deductible or a co-pay provision for hurricane or wind losses, which may result in high out-of-pocket expenses to the insured.

Excluding the new requirements under the bill which apply to policies issued on or after October 1, 2009, the legislation provides that the provisions of the bill will operate retroactively to October 1, 1988, the effective date of a law enacted in 1988 adding the surplus lines exemption to the statute.[8] Thus, the bill exempts surplus lines insurance from the provisions of ch. 627, F.S., from October 1, 1988, to present.

This bill amends sections 624.913 and 626.924, Florida Statutes. This bill creates the following sections of the Florida Statutes: 626.9371, 626.9372, 626.9373, and 626.9374.

---

they are to be applied to surplus lines carriers, which include assessments, reporting requirements, and activities related to risk retention and purchasing groups.

[4] Section 627.021(2), F.S.

[5] *See* Amicus Curiae Brief by the Office of Insurance Regulation in *CNL Hotels & Resorts, Inc.*, filed September 12, 2008.

[6] *Essex Insurance Company v. Zota,* 985 So. 2d 1036 (Fla. 2008) and *CNL Hotels & Resorts, Inc. v. Twin City Fire Insurance Company,* 291 F.Appx. 220, 2008 WL 3823898 (11th Cir. 2008).

[7] The court decisions affect the applicability of the entire chapter to surplus lines insurance.

[8] Chapter 88-166, Laws of Fla.

II. Present Situation:

Surplus Lines Insurance Coverage – Background

Insurance companies that transact insurance in Florida or that have offices located in the state are required to obtain a certificate of authority (COA) issued by the Office of Insurance Regulation (OIR) pursuant to s. 624.401, F.S. These companies, referred to as authorized or admitted insurers,[9] are broadly regulated by the OIR under the Insurance Code as to reserves, surplus as to policyholders, solvency, rates and forms, market conduct, permissible investments, and affiliate relationships.[10] Authorized insurers are also required to participate in a variety of government mandated insurance programs and pay assessments levied by state guaranty funds in the event of insurer insolvencies.[11]

Surplus lines insurers are regulated by the state, but do not have to obtain a COA and are not required to adhere to the other requirements mentioned above. Surplus lines insurance is an alternative type of insurance coverage for consumers to buy property-liability insurance from unauthorized (non-admitted) insurers when consumers are unable to purchase the coverage they need from admitted insurers. Surplus lines insurance is coverage provided by a company that is not licensed in Florida, but is allowed to transact insurance in the state as an "eligible" insurer[12] under the surplus lines law (ss. 626.913-626.937, F.S.). Under this law, insurance may only be purchased from a surplus lines carrier if the necessary amount of coverage cannot be procured after a diligent effort to buy the coverage from authorized insurers.[13] Rates charged by a surplus lines carrier must not be lower than the rate applicable and in use by the majority of the authorized insurers writing similar coverages on similar risks in Florida.[14] Likewise, a surplus lines policy contract form must not be more favorable to the insured as to the coverage or rate offered by the majority of authorized carriers.[15]

The surplus lines law contains specific financial and other requirements that unauthorized insurers must comply with in order to become eligible surplus lines insurers and obtain approval by the OIR. For example, a surplus lines insurer must maintain a surplus as to policyholders of not less than $15 million and have been licensed in its state or country of domicile for at least three years.[16] These entities must also pay annual premium receipts tax of 5 percent, which is more than double the percentage for admitted carriers.[17]

[9] An "authorized" or "admitted" insurer is one duly authorized by a COA to transact insurance in this state.
[10] The Insurance Code consists of chs. 624-632, 634, 635, 636, 641, 642, 648, and 651, F.S.
[11] For example, Florida licensed direct writers of property and casualty insurance must be members of the Florida Insurance Guaranty Association, which handles the claims of insolvent insurers under part II of ch. 631, F.S., and insurers offering workers' compensation coverage in Florida must be members of the Florida Workers' Compensation Insurance Guaranty Association, which provides payment of covered claims for insurers that are declared insolvent under part V of ch. 631, F.S.
[12] An "eligible surplus lines insurer" as defined in s. 626.914(2), F.S., is an "unauthorized insurer" which has been made eligible by the Office of Insurance Regulation to issue insurance coverage under the surplus lines law.
[13] See s. 626.914(4), F.S. A "diligent effort" is defined as seeking coverage from and being rejected by at least three authorized insurers that write the type of coverage being sought. The rejections must be documented.
[14] Section 626.916(1)(b), F.S.
[15] Section 626.916(1)(c), F.S.
[16] Section 626.918, F.S.
[17] Section 626.932, F.S.

Historically, surplus lines insurers have never been held subject to Florida's regulation of rates, forms, or other requirements under ch. 627, F.S., as are admitted insurers.[18] This is true of the regulatory treatment of surplus lines insurers in other states across the country. The different regulatory treatment is due to the unique nature of surplus lines insurance because it covers consumer needs arising from emerging technologies, new business practices, or changing legal environments which require a quick response that is often difficult for admitted insurers to provide, according to representatives with the Florida Surplus Lines Office.

Florida ranks as the fourth largest state in terms of surplus lines business, behind only California, Texas, and New York. There are 165 surplus lines insurers writing insurance in Florida with over $4 billion in written premiums during 2008.[19] These insurers wrote over 700,000 Florida policies last year. The majority of surplus lines insurance written in Florida in 2008 was inland marine coverage (197,334 policies), commercial general liability (138,618 policies), and commercial property (104,343 policies). Surplus lines insurers wrote only a small fraction of homeowners policies (58,438) in 2008 as compared to the number of policies written by admitted carriers (6,034,918).[20] That same year, surplus lines carriers wrote 23,006 condominium unit owners policies, and 4,479 mobile homeowners policies.

Florida Surplus Lines Service Office and Surplus Lines Agents

In 1997, the Legislature created the Florida Surplus Lines Service Office (FSLSO), a non-profit association designed to act as a "self-regulating organization" to permit better access by consumers to approved surplus lines insurers.[21] The FSLSO is governed by a nine-person board of governors and is required to perform its functions under a plan of operation approved by the OIR. The FSLSO:

- Receives, records, and reviews all surplus lines insurance policies;
- Maintains records of policies;
- Prepares and delivers to each surplus lines agent quarterly reports of each agent's business;
- Collects and remits the surplus lines tax; and
- Performs other activities as specified by statute.

There are 1,059 licensed surplus lines agents in Florida which are authorized to handle the placement of insurance coverages with surplus lines insurers and are deemed to be members of the FSLSO. These agents are required to report and file with the FSLSO a copy of, or information on, each surplus lines insurance policy, including the name of the insured and insurer, the policy number and its effective date, the policy's expiration date, the type of coverage, the premium, and other information.

[18] *See Affidavits In Support of Intervenor-Plaintiff Essex Insurance Company's Amended Motion for Summary Judgment* by Steve Parton, Office of Insurance Regulation, General Counsel, and Belinda Miller, Office of Insurance Regulation, Deputy Commissioner for Property and Casualty Insurance, filed in *Howard v. Choice Hotels International, Inc.*, Case No. CA06-680-55 (Fla. 7th Cir. Tr. Ct. 2008).
[19] Florida Surplus Lines Service Office.
[20] These are HO-3 policies.
[21] Chapter 97-196, Laws of Fla. Section 626.921, F.S.

Surplus Lines Litigation Relating to the Applicability of Chapter 627, F.S.

The insurance regulatory requirements under ch. 627, F.S., cover a broad range of subjects which include: filing and approval of rates and forms by the OIR, insurance contract coverage provisions, reporting requirements, application of attorney's fees, licensure of rating and other organizations, and specific requirements for different lines or types of insurance.[22] Specifically, part I of the chapter governs the filing and approval of insurer rates by the OIR and part II governs, in part, the filing and approval by the OIR of insurer policy forms.[23]

Authorized carriers must comply with the rate, form, and other requirements outlined above in ch. 627, F.S. However, surplus lines insurers historically have never been required by the OIR to comply with rate, form, or other provisions under ch. 627, F.S., because these insurers are governed by the surplus lines law[24] and because the OIR considered the surplus lines insurers to be specifically exempt under ch. 627, F.S., as explained below. Representatives with the OIR assert that the specific rate and form filing requirements under parts I and II of ch. 627, F.S., which apply to authorized insurers holding certificates of authority issued by the OIR, do not apply to surplus lines insurers.[25] These representatives state that one of the purposes of the Surplus Lines law (s. 626.913(2), F.S.), is:

> to protect such authorized insurers, who under the laws of this state must meet certain standards as to policy forms and rates, from unwarranted competition by unauthorized insurers who, in the absence of *this* law, would not be subject to similar requirements.

The OIR representatives state that the agency has not regulated surplus lines insurers to the same extent as the admitted market due to the exemption specified under s. 627.021(2), F.S., which states: "This chapter [ch. 627, F.S.] does *not apply* to: . . . (e) Surplus lines insurance placed under the provisions of ss. 626.913-626.937."[26] The OIR's exclusion of surplus lines insurance from insurance regulatory laws that apply to authorized insurers is consistent with surplus lines laws throughout the country, which have traditionally not subjected surplus lines insurers to the same regulations as authorized insurers.[27] However, the historical regulatory status of surplus lines insurance has been brought into question by two recent court decisions interpreting the surplus lines exclusion provision.[28]

---

[22] The lines or types of insurance include but are not limited to: life and health insurance, Medicare supplement insurance, property and motor vehicle insurance and title insurance.

[23] Under s. 627.410, F.S., every insurance policy form must be filed 30 days in advance of use, and after the expiration of the 30 days, the form is deemed approved unless, prior to that time, the form has been approved or disapproved by the OIR.

[24] *See* ss. 626.913-626.937, F.S.

[25] *See* affidavits by Steve Parton, OIR General Counsel, and Belinda Miller, OIR Deputy Commissioner for Property and Casualty Insurance.

[26] This provision was enacted by the Legislature in 1988 (Ch. 88-166, Laws of Fla.), with an effective date of October 1, 1988.

[27] Edwards Angell Palmer & Dodge, LLP, *Excess and Surplus Lines Laws in the United States,* John P. Dearie, Jr. – Editor, January 2008.

[28] *Essex Insurance Co. v. Zota*, 985 So. 2d 1036 (Fla. 2008) and *CNL Hotels & Resorts, Inc. v. Twin City Fire Insurance Co.*, 2008 WL 3823898 (11th Cir. 2008). The *Essex* court ruled on a certified question from the U.S. 11th Circuit Court of Appeals. In *Essex*, the court found that two sections in part II of ch. 627, F.S., were applicable to surplus lines insurers (ss. 627.421 and 627.428, F.S.) because neither of these sections appears in part I of ch. 627, F.S. The primary issue in the case involved an interpretation of Florida insurance law requiring the delivery of a copy of a surplus lines insurance policy to

In *Essex Insurance Co.,* the Florida Supreme Court ruled that the surplus lines exclusion provision in s. 627.021(2), F.S., only exempted this type of insurance from the rate filing regulations under part I of ch. 627, F.S., and not the remaining insurance regulations in ch. 627, F.S. In its opinion, the Court stated that the word "chapter" in s. 627.021(2), F.S., was intended by the Legislature to mean "part" as in part I of ch. 627, F.S., with the result that sections of ch. 627, F.S., that were argued as inapplicable to surplus lines carriers separately regulated by ch. 626, F.S., were found applicable to such carriers.[29] The *Essex* court basically altered the applicability of the surplus lines insurance exclusionary provision under s. 627.021, F.S., by making surplus lines insurance subject to parts II - XXI of ch. 627, F.S. The Court based its reasoning on a prior Florida Supreme Court case, *National Corp. Veneqolana v. Manaure,*[30] which, in analyzing s. 627.021(2), F.S., held that the statutory exclusion applied exclusively to part I of ch. 627, F.S., rather than ch. 627, F.S., in whole, and therefore the rest of that chapter should apply to surplus lines insurers.

In *CNL Hotels & Resorts, Inc. v. Twin City Fire Insurance Co.*, the U.S. Court of Appeals for the Eleventh Circuit was faced with an argument that the surplus lines insurance carrier (Twin City) was subject to the forms filing and approval provision of s. 627.410, F.S.,[31] since that provision was contained in that "part" of ch. 627, F.S., that *Essex* found applicable to surplus lines carriers. The court relied upon the *Essex* decision in ruling that s. 627.410, F.S., which is in part II of ch. 627, F.S., applies to surplus lines insurers.[32] The Eleventh Circuit held that "if a form is not filed with the Office, the form is void." Consequently, it remanded the case to the trial court to determine whether the policy endorsement was void because it was not filed and approved by the OIR in accordance with s. 627.410, F.S.

There have been a number of cases filed in state and federal courts relating to the surplus lines exemption provision in s. 627.021(2), F.S., in the aftermath of the *Essex* and *CNL* rulings.[33] At

---

the policyholder (s. 627.421, F.S.). The Court held that delivery of the policy to the policyholder's insurance broker was sufficient under Florida law and, thus, the surplus lines insurance company was not required to deliver a copy of the insurance policy directly to the policyholder. The Court also found that s. 627.428, F.S., (award of attorney's fees statute) would apply to Essex Insurance Co. even though it was a surplus lines carrier, should its insureds prevail on coverage issues that were remanded for fact development to the lower court.

[29] Chapter 627, F.S., is entitled "Insurance Rates and Contracts" and consists of 21 parts. Part I covers rates and rating organizations. The operative statutory language considered by the *Essex* court reads:

> 627.021 **Scope of this part.-**
> (1) This part of this chapter applies only to property, casualty, and surety insurances on subjects of insurance resident, located, or to be performed in this state.
> (2) This chapter does not apply to:
> …
> (e) Surplus lines insurance placed under the provisions of ss. 626.913-626.937.

[30] *National Corp. Veneqolana v. Manaure*, 511 So. 2d 970 (Fla. 1987). In *Manaure*, the Court addressed the question of whether s. 627.021(2)(c), F.S., excluded marine insurance from s. 627.7262, F.S., (part XI of ch. 627, F.S.) and held that the exclusionary provisions of s. 627.021(2), F.S., apply exclusively to part I of ch. 627, F.S.

[31] Section 627.410, F.S., requires insurance companies to file insurance forms with the OIR and obtain approval of the forms from the OIR before the forms can be used by the insurer.

[32] The Court held that the exemptions contained in s. 627.021, F.S., only apply to part I of ch. 627, F.S.

[33] The cases include: *Choice Hotels v. Howard*, Case No. CA06-680-55, filed in the 7th Circuit, St. Johns County, Florida; *GB, L.L.C.d/b/a Mamma Nunza v. Lloyds,*, Case No. 08-013299 CACE 13, filed in the 17th Circuit, Broward County, Florida

issue in some of the cases is the applicability of the form filing requirements of s. 627.410, F.S., to surplus lines insurance. In many of these cases, plaintiffs, who are policyholders of the surplus lines insurance company defendant, are attempting to obtain insurance coverage by voiding either a provision in the insurance contract or an endorsement to the contract. The plaintiffs argue that the provision or endorsement was void and unenforceable because the surplus lines insurer did not file the policy or endorsement form with, or receive approval of the form from, the OIR. If these arguments prevail, coverage will be afforded where it was otherwise excluded under the terms of the insurance contract and where it was not anticipated in the pricing. Some surplus lines insurers argue that they face the prospect of voidance of policy forms as these issues are litigated. As a result, there is little chance they will continue to provide coverage to Florida insureds.

Representatives from the OIR and the Florida Surplus Lines Service Office have filed amicus papers and affidavits in some pending cases, arguing that the OIR has never required surplus lines insurers to comply with the form filing requirements in part II of ch. 627, F.S., as required of admitted insurers. Further, the OIR has asserted that the agency cannot handle the volume of filings if thousands of surplus lines policies had to be filed for pre-approval.

Some attorneys with the trial bar assert that the provisions in ch. 627, F.S., are designed to protect the public and that there should be ramifications to the surplus lines insurer for noncompliance with these statutory requirements. They point out that the court decisions are correct in that surplus lines carriers are similar to admitted carriers and that consumers deserve the protections and agency scrutiny afforded under ch. 627, F.S.

III. Effect of Proposed Changes:

The bill includes a provision declaring that surplus lines insurers are exempt from any provision in ch. 627, F.S., unless expressly provided otherwise in that chapter. In addition, the bill includes several provisions that impose requirements on surplus line insurers, which are similar to laws governing admitted insurers in ch. 627, F.S. Following is a section-by-section analysis of the bill:

Exclusion of Surplus Lines Insurers from Chapter 627, F.S.

Section 1. The bill amends s. 626.913, F.S., the provision under the surplus lines law relating to the "legislative purpose" of the law. The bill provides that, except as may be specifically stated to apply to surplus lines insurers, the provisions of ch. 627, F.S., do not apply to surplus lines insurance authorized under the surplus lines law.

This provision appears to be in response to the recent court decisions that surplus lines insurers must comply with the other provisions of ch. 627, which include filings with the Office of Insurance Regulation (OIR), as well as review and approval by OIR. In effect, under the bill, unless a provision in ch. 627, F.S., expressly provides that it applies to surplus lines insurance, this type of insurance is exempt from those provisions. Although the bill includes the exemption

(filed as a class action suit); *Summers v. Scottsdale Insurance Company*, Case No. 2007 CA 5232 WS/H, filed in Pinellas County, Florida.

language in ch. 626, F.S., the surplus lines exemption language subject of the court decisions regarding the applicability of ch. 627, F.S., to surplus lines insurers remains unaltered in ch. 627, F.S.

Policy Information

Section 2. This section amends s. 626.924, F.S., the statute governing what information is required to be printed on the face of the surplus lines policy and on any certificate, cover note, or other confirmation of the insurance. The bill provides that surplus lines policies issued on or after October 1, 2009, must have the following statement stamped or printed on the face of the policy in at least 14-point, boldface type:

> SURPLUS LINES INSURERS' POLICY RATES AND FORMS ARE NOT APPROVED BY ANY FLORIDA REGULATORY AGENCY.

Payment of Premiums and Claims

Section 3. This section creates s. 626.9371, F.S., which relates to payment of premiums and claims for surplus lines policies. The bill specifies that the premiums for surplus lines insurance contracts issued on or after October 1, 2009, must be paid in cash consisting of coins, currency, checks, or money orders or by using a debit card, credit card, automatic electronic funds transfer, or payroll deduction plan.

Similarly, all payments of claims made on or after October 1, 2009, in Florida must be made in cash consisting of coins, currency, checks, drafts, or money orders. However, the bill provides that if payment is made by check or draft, the payment must comply with the standards for cash items adopted by the Federal Reserve System to facilitate the sorting, routing, and mechanized processing of such items. Payment may also be made by debit card or any other form of electronic transfer if authorized by the recipient or the recipient's representative. If fees or costs are charged against the recipient or the recipient's representative, the insurer must disclose this to the recipient at the time of written authorization. However, the written authorization may be waived by the recipient if the insurer verifies the identity of the insured or the insured's recipient and does not charge a fee for the transaction. The bill provides that the insurer remains liable if funds are misdirected.

The provisions in section 3 of the bill are almost identical to the payment of premiums and claims provisions applicable to admitted insurers in ch. 627, F.S. However, the bill does not include similar provisions from s. 627.4035(1), F.S., that allow for the option of payment plans establishing quarterly and semiannual payment of premiums for certain policyholders or provisions exempting certain agreements and loans from these provisions.

Disclosure Requirements

Section 4. This section creates s. 626.9372, F.S, which relates to required disclosure statements of certain information in liability claims. The bill provides that each surplus lines insurer that provides or may provide liability insurance coverage to pay all or a portion of any claim under a policy issued on or after October 1, 2009, must provide, within 30 days after the written request

of the claimant, a statement of the corporate officer or the insurer's claims manager or superintendent the following information regarding each known policy of insurance, including excess or umbrella insurance:

- The name of the insurer;
- The name of each insured;
- The limits of the liability coverage;
- A statement of any policy or coverage defense that such insurer reasonably believes is available to the insurer at the time of filing the statement; and
- A copy of the policy.

In addition to this requirement, the insured or his or her insurance agent must disclose the name and coverage of each known insurer to the claimant upon request. In addition, the insured or agent must forward the request for information to all affected insurers. The insurer has 30 days from receipt of the request to comply with the request for information. If the insurer discovers facts requiring an amendment to the information provided, it must provide an amended statement within 30 days of discovery of those facts.

These provisions differ slightly from the disclosures required of admitted insurers under s. 627.4137(1), F.S. Under ch. 627, F.S., admitted insurers are required to submit the same information to a claimant. However, the statement must be made under oath. While surplus lines insurers are afforded 30 days to provide amended statements to claimants under the bill, admitted insurers must immediately provide an amended statement upon discovery of facts necessitating an amendment.

Attorney's Fees

Section 5. This section creates s. 626.9373, F.S., to provide for an award of attorney's fees against insurers in certain cases. Under the bill, if a state court or appellate court awards a judgment or decree against a surplus lines insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer on or after October 1, 2009, the trial or appellate court is authorized to award reasonable attorney's fees. If attorney's fees are awarded, the award must be included in the judgment or decree rendered in the case.

Although the attorney's fee provision governing admitted insurers in s. 627.428, F.S., includes an exclusion of attorney's fee awards in certain life insurance policies and annuity contracts, which are not applicable in the surplus lines context, the attorney's fee provision in the bill is virtually identical to the provision in ch. 627, F.S.

Deductibles and Coinsurance

Section 6. This section creates s. 626.9374, F.S., to provide for notices to insureds regarding certain liability assumed with deductibles and coinsurance. For instance, the bill provides that a surplus lines personal lines residential property insurance policy issued on or after October 1, 2009, that contains a separate hurricane or wind deductible must place the following language in 14-point font on the face of the policy:

> THIS POLICY CONTAINS A SEPARATE DEDUCTIBLE FOR HURRICANE OR WIND LOSSES, WHICH MAY RESULT IN HIGH OUT-OF-POCKET EXPENSES TO YOU.

Similarly, any surplus lines personal lines residential property insurance policy issued on or after October 1, 2009, containing a coinsurance provision applicable to hurricane or wind losses must include the following language on the face of the policy in 14-point font:

> THIS POLICY CONTAINS A CO-PAY PROVISION THAT MAY RESULT IN HIGH OUT-OF-POCKET EXPENSES TO YOU.

Although these provisions are almost identical[34] to the provisions included in s. 627.701(4), F.S., relating to admitted insurers, ch. 627, F.S., provides some additional requirements for insurers. For example, existing law requires admitted insurers to display the actual dollar value of the hurricane deductible on the declarations page of the policy and on the renewal declarations page for personal lines residential property insurance policies.[35] For any personal lines residential property insurance policy containing an inflation guard rider, the insurer must notify the policy holder of the possibility that the hurricane deductible may be higher than indicated when loss occurs due to application of the inflation guard rider.[36] Finally, other detailed provisions governing hurricane deductibles for policies covering a risk valued at less than $500,000 are included in ch. 627, F.S.[37]

Severability Clause

Section 7. This section provides that if any provision of the act or the application of the act to any person or circumstance is held invalid, the invalidity will not affect other provisions or applications of the act which can be given effect without the invalid provision or application, and that the provisions of the act are severable.

Effective Date

Section 8. This section provides that the act shall take effect upon becoming a law. The bill also provides that Section 1 of the act will operate retroactively to October 1, 1988. This is the operative date because it is the effective date of the law enacted in 1988 adding the surplus lines exemption to s. 627.021(2), F.S., to provide that that ch. 627, F.S., does not apply to surplus lines insurance.

[34] The bill provides that these provisions must appear on the face of the policy in 14-point font. Section 627.701(4)(a), F.S., provides that this notice must appear on the face of the policy in 18-point font. Additionally, ch. 627, F.S, references "hurricane losses," while the bill references "hurricane *or wind* losses."
[35] Section 627.701(4)(b), F.S.
[36] Section 627.701(4)(c), F.S.
[37] Section 627.701(4)(d), F.S.

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:

Severability Clause

The bill contains a severability clause. Generally, courts are under a duty to sever unconstitutional provisions from a law and allow the rest of the law to stand if that is possible. Courts must do so regardless of the lack of a severability clause in law. This duty springs from the doctrine of separation of powers.[38]

Retroactive Application

The bill provides that Section 1 will operate retroactively to October 1, 1988. This is the effective date of the law enacted in 1988 adding the surplus lines exemption to s. 627.021(2), F.S., to provide that that the ch. 627, F.S., does not apply to surplus lines insurance. In general, courts will refuse to apply a statute retroactively if it affects substantive rights, liabilities, and duties,[39] impairs vested rights, creates new obligations, or imposes new penalties.[40] However, statutes which do not alter contractual or vested rights, but relate only to remedies or procedure, can be applied retroactively.[41]

Florida courts have recognized that a statute may be retroactively applied if:

- There is clear evidence that the Legislature intended to apply the statute retroactively; and
- Retroactive application is constitutionally permissible.[42]

The bill clearly meets the first prong because section 3 of the bill states explicitly that it will operate retroactively to October 1, 1988.

---

[38] *Boyd v. Green*, 355 So. 2d 789 (Fla. 1978). *See* FLA. CONST. s. 3, art. II.
[39] *Progressive Express Ins. Co. v. Menendez*, 979 So. 2d 324 (Fla. 3d DCA 2008).
[40] *Romine v. Florida Birth Related Neurological Injury Compensation Ass'n,* 842 So. 2d 148, 153 (Fla. 5th DCA 2003).
[41] *Menendez*, 979 So. 2d at 330.
[42] *Metropolitan Dade County v. Chase Fed. Housing Corp.*, 737 So. 2d 494 (Fla. 1999); *Promontory Enterprises, Inc v. Southern Engineering & Contracting, Inc.*, 864 So. 2d 479 (Fla. 5th DCA. 2004).

In determining whether retroactive application is constitutional, courts have generally held that due process considerations prevent the retroactive abolition of vested rights.[43] This is not an absolute rule, however, because the courts have identified factors that may be considered in determining whether to allow retroactivity. In one case, the Supreme Court weighed three factors in considering the validity of retroactivity:

- The strength of the public interest served by the statute;
- The extent to which the right affected is abrogated; and
- The nature of the right affected.[44]

As a further consideration, the Court has ruled that when "an amendment to a statute is enacted soon after controversies as to the interpretation of the original act arise, a court may consider that amendment as a legislative interpretation of the original law and not as a substantive change thereof." [45] There are numerous examples wherein the Court has rejected retroactivity[46] and has approved retroactivity.[47]

A court may approve retroactive application of the bill to October 1, 1998, if it determines that the bill only augments current surplus lines insurance procedure. However, if the court were to determine that the bill does, in some way, alter substantive rights, it may approve the retroactive application if it determines that the bill is in response to the Florida Supreme Court's recent interpretations that surplus lines insurers are subject to most of the provisions of ch. 627, F.S.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Within the past year, courts have held that surplus lines insurers are subject to all of the provisions of ch. 627, F.S., except for part I, the rating law. Surplus lines insurers will benefit under the bill's provisions because they will not have to comply with the non-rating portions of ch. 627, F.S. (except where specifically stated), because the bill will restore the regulatory status of surplus lines insurance that was applied before the court decisions. To that extent, the bill represents a positive fiscal impact for these insurers by relieving them from costs they would face in the aftermath of the judicial rulings.

[43] *State Dept. of Transportation v. Knowles,* 402 So. 2d 1155 (Fla. 1981).
[44] *Id.*
[45] *Lowry v. Parole and Probation Comm.,* 473 So. 2d 1248 (Fla. 1985).
[46] *State Dept. of Transportation v. Knowles,* 402 So. 2d 1155 (Fla. 1981); *Rupp v. Bryant,* 417 So. 2d 658 (Fla. 1982); *State Farm Mut. Auto. Ins. Co. v. Laforet,* 658 So. 2d 55 (Fla. 1995); *Kaiser v. Kolb,* 543 So. 2d 732 (Fla. 1989).
[47] *Dept. of Agricultural Services v. Bonanno,* 568 So. 2d 24 (Fla. 1990); *Metropolitan Dade Co. v. Chase Federal Housing Corp.* 737 So. 2d 494 (Fla. 1999); *Orlando v. Desjardins,* 493 So. 2d 1027 (Fla. 1986); *Lakeland v. Catinella,* 129 So. 2d 133 (Fla. 1961).

However, costs will be incurred by surplus lines insurers to comply with some of the provisions of the bill, such as the requirement to include certain statements on the face of surplus lines policies. Additionally, surplus lines insurers that unlawfully deny claims may be subject to an award of attorney's fees if an insured is successful in a suit against the surplus lines insurer.

C. Government Sector Impact:

Under the bill, the Office of Insurance Regulation (OIR) will not be required to review and approve form filings and adhere to the other regulatory requirements under ch. 627, F.S., for surplus lines insurers. The bill represents a positive fiscal impact for the OIR by relieving them from costs associated with surplus lines form filing reviews and other requirements the agency would face in the aftermath of the judicial rulings.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Judiciary on April 1, 2009:
The committee substitute:

- Requires surplus lines insurers to include on the face of the policy a statement that surplus lines insurers' policy rates and forms are not approved by any Florida regulatory agency;
- Specifies the payment types for surplus lines insurance contract premiums and claims;
- Establishes procedures and time frames for certain disclosure statements to claimants by the surplus lines insurer regarding liability claims;
- Requires surplus lines insurers to provide amended statements to claimants within 30 days of the discovery of certain information necessitating an amended statement;
- Provides for an award of attorney's fees upon a judgment or decree by any Florida court or appellate court in favor of any named or omnibus insured or named beneficiary;
- Requires surplus lines insurers to print on the face of a policy a notice that the policy contains a separate deductible or a co-pay provision for hurricane or wind losses, which may result in high out-of-pocket expenses to the insured; and

- Clarifies that the bill only applies retroactively to Section 1 of the bill, which excludes surplus lines insurers from provisions of ch. 627, F.S., while the remaining sections will take effect upon becoming law.

B. Amendments:

None.