HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 853 Surplus Lines Insurers
SPONSOR(S): Patterson
TIED BILLS: **IDEN./SIM. BILLS:** SB 1894

	REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1)	Insurance, Business & Financial Affairs Policy Committee	19 Y, 0 N	Callaway	Cooper
2)	General Government Policy Council		Callaway	Hamby
3)				
4)				
5)				

SUMMARY ANALYSIS

Surplus lines insurance refers to a category of insurance for which there is no market available through standard insurance carriers in the admitted market. When insurance coverage is not available from licensed admitted insurers, persons seeking coverage may obtain coverage in the surplus lines market. Surplus lines insurers are regulated by the state, but to a lesser degree than admitted insurers.

Historically, surplus lines insurance companies have not abided by the same insurance regulatory requirements in chapter 627, F.S. as admitted market insurance companies due to s. 627.021(2), F.S. which states: "This chapter does not apply to: . . . (e) surplus lines insurance placed under the provisions of ss. 626.913-626.937." Additionally, the Office of Insurance Regulation (OIR) has not regulated surplus lines insurers to the same extent as admitted market insurers due to this exemption.

In two recent court decisions the Florida Supreme Court and the U.S. Court of Appeals for the Eleventh Circuit addressed the applicability of the surplus lines insurance exclusion in s. 627.021(2), F.S. Generally, these cases held that the exclusion in s. 627.021(2), F.S. for surplus lines insurance only excludes this insurance from the statutory provisions in Part I of chapter 627, F.S. which is the part of chapter 627, F.S. governing insurance rates. Thus, surplus lines insurers must comply with all the insurance regulatory requirements in chapter 627, F.S. except for the provisions relating to rates.

The bill addresses the surplus lines insurance exemption from chapter 627, F.S. by providing the provisions of chapter 627, F.S. do not apply to surplus lines insurance unless a statutory section in chapter 627, F.S. specifically states it applies to such insurers. The bill also contains a severability clause making effective any provision of the bill not held to be invalid if the provision can be implemented without use of the invalid provision. The bill applies retroactively to October 1, 1988, the effective date of the bill enacted in 1988 adding the surplus lines exemption to the statute. Thus, the bill would exempt surplus lines insurance from chapter 627, F.S. if such insurance was transacted from October 1, 1988 and forward.

The OIR will have increased expenditures associated with review and approval of all forms used by surplus lines insurers if the two court decisions are not addressed by the Legislature. This may require additional funding and FTEs for the OIR. The OIR did not quantify in the agency bill analysis the fiscal impact of having to regulate insurance forms of surplus lines insurers.

See the bill analysis for comments relating to potential constitutional issues presented by the bill relating to retroactive application of statutes.

The bill is effective upon becoming a law but applies retroactively to October 1, 1988.

HOUSE PRINCIPLES

Members are encouraged to evaluate proposed legislation in light of the following guiding principles of the House of Representatives

- Balance the state budget.
- Create a legal and regulatory environment that fosters economic growth and job creation.
- Lower the tax burden on families and businesses.
- Reverse or restrain the growth of government.
- Promote public safety.
- Promote educational accountability, excellence, and choice.
- Foster respect for the family and for innocent human life.
- Protect Florida's natural beauty.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Surplus Lines Insurance - Background

Surplus lines insurance refers to a category of insurance for which there is no market available through standard insurance carriers in the admitted market.[1] There are three basic categories of surplus lines risks: (1) specialty risks that have unusual underwriting characteristics or underwriting characteristics that admitted insurers view as undesirable; (2) niche risks for which admitted carriers do not have a filed policy form or rate; and (3) capacity risks, i.e., risks where an insured needs higher coverage limits than those that are available in the admitted market. [2]

There are 166 surplus lines insurance companies currently writing insurance in Florida.[3] Surplus lines insurers wrote over 700,000 policies in Florida in 2008.[4] 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).[5] In 2008, surplus lines insurers wrote 58,438 homeowners policies (HO-3 policies), 23,006 condo unit owners property policies, and 4,479 mobile homeowners policies.[6]

Under current law, surplus lines insurance is governed by ss. 626.913 through 626.937, F.S., the surplus lines law. When insurance coverage is not available from licensed admitted insurers, persons seeking coverage may obtain coverage in the surplus lines market. Surplus lines insurers are not authorized insurers as defined in the Florida Insurance Code.[7] Rather, surplus lines insurers are considered to be unauthorized insurers, but are eligible to transact surplus lines insurance under the surplus lines law as "eligible surplus insurers".

Surplus lines insurers are regulated by the state, but to a lesser degree than admitted insurers. For example, surplus lines insurers do not have to obtain a certificate of authority to transact insurance from the Office of Insurance Regulation (OIR), a requirement for insurers in the admitted market, but must

[1] Admitted market means insurance companies licensed to transact insurance in Florida.
[2] Brief of the Office of Insurance Regulation in the case of CNL Hotels & Resorts, Inc. v. Twin City Fire Ins. Co., 2008 WL 3823898 (C.A. 11 (Fla.)) on file with the Insurance, Business & Financial Affairs Policy Committee.
[3] http://www.fslso.com/tools/insurer.aspx (last viewed March 4, 2009).
[4] http://www.fslso.com/market/marketdata/CoveragesTopPolicySearch.aspx (last viewed March 4, 2009).
[5] Id.
[6] Id. In addition, 10,182 HO-8 homeowners' policies and 20,127 dwelling policies were written in the surplus lines market in 2008. A small number of HO-1, HO-2, HO-4, and HO-5 policies were also written.
[7] The Florida Insurance Code consists of Chapters 624-632, 634-636, 641-642, 648, and 651. See s. 624.01, F.S. (2008). Authorized insurers are insurers that have a certificate of authority to transact insurance in Florida from the Florida Office of Insurance Regulation.

obtain approval from the OIR to be an eligible surplus lines insurer. In addition, surplus lines insurers do not have to meet the other conditions of licensure imposed by the Florida Insurance Code for insurers in the admitted market, although the surplus lines law imposes eligibility qualifications for surplus lines insurers.[8] Section 626.919, F.S. allows the OIR to withdraw eligibility of surplus lines insurers under certain circumstances.

Before an insurance agent can place insurance in the surplus lines market, the law requires the insurance agent to make a diligent effort to procure the desired coverage from admitted insurers.[9] A diligent effort is defined by law to mean seeking and being denied coverage from at least three authorized insurers in the admitted market.[10]

The Florida Surplus Lines Service Office (FSLSO) is created by s. 626.921, F.S., as a nonprofit association overseen by a Board of Governors comprised of nine members. Seven of the nine board members must be affiliated with the surplus lines industry. The FSLSO is directed to oversee the surplus lines industry in Florida and to protect of the general public with respect to the placement of surplus lines policies. The FSLSO is authorized by law to collect fees from licensed surplus lines agents, based upon the premiums collected, in order to pay the administrative and other costs associated with the office.

Surplus Lines Insurance – Applicability of chapter 627 of the Florida Insurance Code

Most of the statutory provisions relating to insurance regulation are contained in chapter 627, F.S. For example, provisions in chapter 627, F.S. govern insurance rates and the OIR approval of rates, contents of an insurance policy, cancellation or nonrenewal of an insurance policy, the OIR approval of insurance forms, attorney's fees in insurance disputes, and construction of insurance policies. Moreover, chapter 627, F.S. contains additional requirements for specific types of insurance policies, such as health insurance policies, property insurance policies, and title insurance policies.

Historically, surplus lines insurance companies have not abided by the same insurance regulatory requirements in chapter 627, F.S. as admitted market insurance companies due to s. 627.021(2), F.S. which states: "This chapter does not apply to: . . . (e) surplus lines insurance placed under the provisions of ss. 626.913-626.937." Additionally, the OIR has not regulated surplus lines insurers to the same extent as admitted market insurers due to this exemption. Florida's exclusion of surplus lines insurance from the insurance regulatory laws that apply to insurers in the admitted market is consistent with surplus lines laws throughout the country that have traditionally not subjected surplus lines insurers to the same regulation as admitted insurers.[11]

In two recent court decisions the Florida Supreme Court and the U.S. Court of Appeals for the Eleventh Circuit addressed the applicability of the surplus lines insurance exclusion in s. 627.021(2), F.S.

The Florida Supreme Court in Essex Insurance Co. v. Zota ruled on a certified question from the United States Court of Appeal for the Eleventh Circuit.[12] The primary issue in the case involved an interpretation of Florida insurance law requiring the delivery of a copy of an insurance policy to the policyholder. Under the facts of the case, the Supreme Court held that delivery of a surplus lines insurance policy to the policyholder's insurance broker was sufficient under Florida law and thus, the surplus lines insurance company did not have to deliver a copy of the insurance policy directly to the policyholder. The court's holding was consistent with prior case law on this issue and on the broker-agency presumption found in common law. The court found that both s. 627.421, F.S. (requiring

[8] Eligibility qualifications include submission of a financial statement, requirements relating to set amounts for surplus, requirements relating to authorization of the surplus lines insurer in the state or country the insurer is domiciled in, and requirements relating to how long a surplus lines insure must be authorized in its domiciled state or country. See s. 626.918, F.S. for all eligibility requirements for surplus lines insurers.

[9] s. 626.916, F.S. (2008).

[10] s . 626.914, F.S. (2008). If the replacement cost of a residential property is $1 million or more, diligent effort means being denied coverage by at least one authorized insurer, rather than three.

[11] Edwards Angell Palmer & Dodge, LLP, Excess and Surplus Lines Laws In the United States, (John P. Dearie, Jr. ed., January 2008) on file with the Insurance, Business Regulation & Financial Affairs Policy Committee.

[12] Essex Ins. Co. v. Zota, 985 So.2d 1036 (Fla. 2008). The Zota case is still in litigation in the U.S. District Court, Southern District of Florida.

licensed insurers to deliver insurance policies to insureds within a specified timeframe) and s. 627.428, F.S. (allowing for the award of attorney's fees) were applicable to surplus lines insurance, despite s. 627.021(2), F.S. excluding surplus lines insurance from the insurance requirements found in chapter 627, F.S.

In reaching its decision, the Florida Supreme Court analyzed the statutory provision excluding surplus lines insurance from chapter 627, F.S. The court, in Zota, held the exclusion in s. 627.021(2), F.S. for surplus lines insurance only excludes this insurance from the statutory provisions in Part I of chapter 627, F.S. which is the part of chapter 627, F.S. governing insurance rates.[13] Accordingly, the court held surplus lines insurers do not have to file their rates with or obtain approval of the rates from the OIR but must comply with all of the other insurance regulatory provisions in chapter 627, F.S.

In making its decision, the court opined the word "chapter" in s. 627.021(2), F.S. was "clearly intended" by the Legislature to mean "part."[14] It based its reasoning on the National Corporacion Venezolana v. M/V Manaure V case decided by the Florida Supreme Court in 1987.[15] The court in Manaure V analyzed the legislative history of s. 627.021(2), F.S. in its decision interpreting the applicability of the exclusion in s. 627.021(2), F.S. for marine insurance.

According to the Manaure V court's analysis, legislation enacted in 1959 revising and consolidating the law regulating insurance was divided into 33 chapters with numerous numbered sections of the bill within each chapter.[16] When the legislative Statutory Revision Department (now known as the Division of Statutory Revision) codified the enrolled bill into the Florida Statutes, the Department divided the bill into nine statutory chapters (chapters 624-632, F.S.) and redesignated the original 33 chapters in the bill as parts in chapters 624-632, F.S. The chapter of the enrolled bill containing the exclusionary provisions, chapter 16, was designated part I of chapter 627, F.S. and titled "Rates and Rating Organizations," the identical title of chapter 16 in the enrolled bill.

The section of the enrolled bill containing the exclusionary provision, section 413, was numbered s. 627.021, F.S. by the Statutory Revision Department, and was placed in the "Rates and Rating Organizations" part of chapter 627 (part I). Moreover, when the Statutory Revision Department codified the enacted legislation into the Florida Statutes, the word "chapter" in ss. 627.011 and 627.021(1), F.S. was changed to "part I;" however the word "chapter" in s. 627.021(2), F.S. was not changed.

Because the chapter of the enrolled bill containing the exclusionary provisions changed to "part I" when the 1959 legislation was codified in the Florida Statutes and because other references to "chapter" in the codified legislation were changed to "part I," the court in Manaure V held the clear language of s. 627.021, F.S. meant the word "chapter" found in s. 627.021(2), F.S. referred only to part I of chapter 627 (the insurance rates part) rather than to chapter 627, F.S. in toto. Thus, the court applied the marine insurance exclusion (the exclusion in question in Manaure V) to only the ratings part (part I) of chapter 627, F.S. despite the statutory language stating the "chapter" (meaning chapter 627, F.S.) did not apply to marine insurance.

The exclusion in s. 627.021(2), F.S. for surplus lines insurance was enacted by the legislature in 1988, the year after the Manaure V decision.[17] The court in Zota determined when the Legislative Statutory Revision Department codified the 1959 legislation into the statute, the Department made a "scrivener's error" when it failed to change the word "chapter" referring to chapter 16 in the enrolled bill that related to insurance rates to "part" because the statutory provisions relating to insurance rates changed from a chapter in the enrolled bill to a part when the enrolled bill was codified into statute.

[13] Part I encompasses ss. 627.011-627.381, F.S.
[14] Zota at 1043.
[15] National Corporacion Venezolana v. M/V Manaure V, 511 So.2d 968 (Fla. 1987).
[16] The legislation did not specify where in the Florida Statutes the bill's provisions should be placed. Rather, the bill created unnumbered sections of law. In the bill, the insurance statutes were grouped by subject matter into chapters. These chapters did not correspond to statutory chapters and were not the statutory chapters used by the Statutory Revision Department to codify the bill into the Florida Statutes. Rather, the chapters in the bill divided the bill into various insurance subjects. See ch. 59-205, L.O.F.
[17] s. 2, Ch. 88-166, L.O.F.

In making its decision, the court in Zota adopted the Manaure V court's analysis of the legislative history of the insurance bill enacted in 1959. It also applied the principles of law that the legislature is presumed to know the judicial constructions of a law when enacting a new version of that law and the legislature is presumed to have adopted prior judicial constructions of a law unless a contrary intention is expressed in the new version.[18] To further support its holding, the court looked at other provisions in chapter 627, F.S. and determined that applying the exclusionary provision to all of chapter 627, F.S. would render some "scope of this part" provisions found in chapter 627, F.S. superfluous and would also directly conflict with the title of s. 627.021, F.S. which reads "[s]cope of this part." Accordingly, in Zota, the court determined the Legislature's "true intent" when the surplus lines exclusion was enacted in 1988 was to exclude surplus lines insurance from only the "part" of chapter 627 governing insurance rates, Part I of chapter 627, F.S.[19] In sum, the Zota case altered the applicability of the surplus lines insurance exclusionary provision held from 1988 to 2008 by the surplus lines industry and by the OIR by making surplus lines insurance subject to parts II – XXI of chapter 627 and excluding surplus lines insurance from only part I of chapter 627.

In the recent case of CNL Hotels & Resorts, Inc. v. Twin City Fire Insurance Co. the U.S. Court of Appeals for the Eleventh Circuit used the Zota holding that the exemptions in s. 627.021(2), F.S. only apply to part I of chapter 627 to remand a case involving the validity of an insurance policy endorsement back to the U.S. District Court.[20] The CNL Hotels case involved a claim by a policyholder, CNL Hotels, for payment of an insurance claim on the company's corporate directors' and officers' liability insurance policy. Twin City Fire Insurance provided the first layer of insurance coverage for this liability; two other insurance companies provided coverage for the liability after Twin City paid its policy limits on the claim. Although not specified in the facts of the case, the court's holding and reasoning lead to the presumption that Twin City Fire Insurance is a surplus lines insurance company which insured CNL Hotels in Florida. The federal appellate court was asked to rule on whether CNL's insurance policy with Twin City covered certain payments the corporation made to CNL shareholders and to their counsel. On the insurance claim relating to the payment to the CNL shareholder's counsel, the court stated an endorsement on the policy would remove the payment from being a covered loss under the policy. However, the court opined the endorsement may be void and unenforceable because it was not filed with and approved by the OIR before use by the surplus lines insurance company, Twin City Fire Insurance Company. The court relied on the Florida Supreme Court's decision in Zota that surplus lines insurers must comply with chapter 627 except for part I of chapter 627 (and s. 627.410, F.S. located in part II of chapter 627 requires all policy forms to be filed with and approved by the OIR before use) and remanded the case back to the federal district court for a decision as to whether the policy endorsement was void because it was not filed with and approved by the OIR in accordance with s. 627.410, F.S.

Since the Zota and CNL Hotels decisions, there have been numerous cases filed in state and federal court relating to the surplus lines exemption provision in s. 627.021(2), F.S.[21] Some of the cases have settled, others are currently in litigation. At issue in some of the cases is the applicability of the form filing requirements of s. 627.410, F.S. to surplus lines insurance, the issue in the CNL Hotels case.[22] 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 arguing the provision or endorsement is void and unenforceable because the surplus lines insurer did not file the policy or endorsement form with nor receive approval of the form from the OIR. In at least one of the pending cases, a representative from the OIR has filed an affidavit stating the statutory section in part II of chapter 627 (s. 627.410, F.S.) requiring insurance policy forms to be filed and approved by the OIR before use does not apply to surplus lines insurers. The affidavit further states the OIR is not and has not ever required surplus lines insurers to comply with the form filing requirements of s. 627.410, F.S. An affidavit from the Executive

[18] Zota at 1043.
[19] Zota at 1043.
[20] CNL Hotels & Resorts, Inc. v. Twin City Fire Ins. Co, 2008 WL 3823898 (C.A. 11 (Fla.)).
[21] The cases include: Howard v. Choice Hotels International, Inc., Case No. CA06-680-55 filed in the 7th Circuit, St. Johns County, Florida; GB, L.L.C. v. Underwriters at Lloyd's, London, Case No. 08-013299 CACE 13, filed in the 17th Circuit, Broward County, Florida (filed as a class action suit); Summers v. Scottsdale Insurance Company, Case No. 2007 CA 5232 WS/H filed in the 6th Circuit, Pasco County, Florida.
[22] S. 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.

Director of the FSLSO has also been filed in at least one of the pending cases. That affidavit states neither the FSLSO nor the OIR has ever required surplus lines insurers to comply with the form filing statute in part II of chapter 627 (s. 627.410, F.S.).

Effect of Proposed Changes

The bill addresses the holdings in the Zota and CNL Hotels decisions by providing the provisions of chapter 627, F.S. do not apply to surplus lines insurance unless a statutory section in chapter 627, F.S. specifically states it applies to such insurers. The bill also contains a severability clause making effective any provision of the bill not held to be invalid if the provision can be implemented without use of the invalid provision.

The bill applies retroactively to October 1, 1988, the effective date of the bill enacted in 1988 adding the surplus lines exemption to the statute.[23] Thus, the bill would exempt surplus lines insurance from chapter 627, F.S. if such insurance was transacted from October 1, 1988 and forward.

B. SECTION DIRECTORY:

Section1: Amends s. 626.913, F.S. relating to the surplus lines law.

Section 2: Provides a severability clause.

Section 3: Provides an effective date of "upon becoming a law;" provides the bill shall operate retroactively to October 1, 1988.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   The OIR will have increased expenditures associated with review and approval of all forms used by surplus lines insurers if the Zota and CNL Hotels decisions are not addressed by the Legislature. This may require additional funding and FTEs for the OIR. The OIR did not quantify in the agency bill analysis the fiscal impact of having to regulate insurance forms of surplus lines insurers.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Exempting surplus lines insurance companies from the insurance regulations found in chapter 627, F.S. will save such insurers any monies associated with complying with the regulatory provisions.

[23] Ch. 88-166, L.O.F.

To the extent the bill's retroactive application prevents much of the current and future litigation involving surplus lines insurance companies over the applicability of the exemption in s. 627.021(2), F.S. to surplus lines insurance, litigation costs spent by surplus lines insurers should be reduced.

Surplus lines policyholders successful in obtaining insurance coverage for claims because the surplus lines insurer or insurance contract did not comply with certain provisions in chapter 627 may lose coverage.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

Retroactive Application of Statutes

The general rule in insurance is that the statute in effect at the time an insurance contract is executed governs the substantive issues arising in connection with that contract.[24] Thus, if the Legislature amends an insurance law, the amendment typically will not apply to an insurance contract entered into before the amendment. However, if the amendment is procedural, the court may apply it retroactively to an insurance contract entered into before the amendment.

If the Legislature clearly expresses an intent that a statute apply retroactively, the court then determines whether retroactive application is constitutionally permissible.[25] Courts make this determination by looking to the effect of a statute. Stated legislative intent that a statute apply retroactively is not necessarily dispositive as to the retroactive application.

Statutes which do not alter contractual or vested rights but relate only to remedies or procedure can be applied retroactively.[26] Procedural law concerns the means and methods to apply and enforce substantive duties and rights.[27]

Statutes affecting substantive rights, liabilities, and duties cannot apply retroactively.[28] Statutes impairing vested rights, creating new obligations, or imposing new penalties cannot apply retroactively.[29]

When determining the retroactive application of an amendment to a statute, the courts may look at how soon an amendment is enacted after controversy as to the interpretation of the original act. If the amendment is enacted soon, then the court may consider the amendment as legislative interpretation of the original law and not a substantive change.[30] However, subsequent legislatures, in the guise of "clarification," cannot nullify retroactively what a prior legislature clearly intended.[31]

[24] Hassen v. State Farm Mutual Automobile Ins. Co., 674 So.2d 106, 107 (Fla. 1996); Progressive Express Ins. Co. v. Menendez, 979 So.2d 324, 330 (Fla 3rd DCA 2008).
[25] Romine v. Florida Birth Related Neurological Injury Compensation Ass'n, 842 So.2d 148, 153 (Fla. 5th DCA 2003).
[26] Menendez, 979 So.2d at 330.
[27] Romine 842 So.2d at 154 .
[28] Menendez, 979 at 330.
[29] Romine 842 So.2d at 153.
[30] Romine 842 So.2d at 154.
[31] Kaisner v. Kolb, 543 So.2d 732, 738 (Fla. 1989).

B. RULE-MAKING AUTHORITY:

None provided in the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES

None.