

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1181 Public Adjusters
SPONSOR(S): Insurance, Business & Financial Affairs Policy Committee, Long
TIED BILLS: IDEN./SIM. BILLS: CS/SB 2264

Table with 4 columns: REFERENCE, ACTION, ANALYST, STAFF DIRECTOR. Row 1: Insurance, Business & Financial Affairs Policy Committee, 13 Y, 1 N, As CS, Callaway, Cooper. Row 2: General Government Policy Council, Callaway, Hamby.

SUMMARY ANALYSIS

This bill makes significant changes to the regulation of public adjusters in residential property and condominium unit owner property insurance claims. The bill provides specific statements that are deceptive or misleading if the statements are contained in advertising or solicitation of public adjusters.

The bill adds a fee cap to reopened or supplemental claims involving public adjusters. The public adjuster fee on these types of claims cannot exceed 30 percent of the claim payment obtained on the reopened or supplemental claim.

Contractors are forbidden from adjusting property insurance claims but are allowed to submit bids to the policyholder to repair or replace damaged property.

The bill requires a notice of any claim, supplemental claim, or reopened claim resulting from windstorm or a hurricane event to be filed with the insurance company within three years after the event first made landfall or caused the damage which forms the basis of the claim.

The bill may violate the single subject doctrine because part of the bill addresses a claims filing deadline for certain types of property insurance claims which is not related to the activity of public adjusters addressed by the other provisions in the bill.

The bill has no fiscal impact on local government. The Department of Financial Services indicates an appropriation of \$30,000 is needed to modify the continuing education computer system to implement the continuing education requirement for public adjuster apprentices.

The bill is effective on June 1, 2010, unless otherwise provided.

## 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:

##### **Public Adjusters - Background**

Chapter 626, F.S., regulates insurance field representatives and operations. Part VI of the chapter governs insurance adjusters. The law recognizes various types of adjusters, including public adjusters, independent adjusters, company employee adjusters, and catastrophe or emergency adjusters.<sup>1</sup> Public adjusters, unlike company employee adjusters, operate independently and are not affiliated with any insurance company. Independent and company employee adjusters work for insurance companies.

Adjusters can be further classified as resident or nonresident.<sup>2</sup> Resident adjusters are those who reside in Florida and are licensed in Florida, whereas, nonresident adjusters reside outside of Florida and are licensed by their home state.

The Department of Financial Services (DFS) regulates all types of adjusters. The DFS reports that currently Florida licenses almost 34,000 resident adjusters and over 42,000 non-resident adjusters.<sup>3</sup> Of these, 2,310 are resident public adjusters and 389 are non-resident public adjusters.<sup>4</sup>

The law, in s. 626.854, F.S., defines a public adjuster as follows:

any person, except a duly licensed attorney . . . , who, for money, commission, or any other thing of value, prepares, completes, or files an insurance claim form for an insured or third-party claimant or who, for money, commission, or any other thing of value, acts or aids in any manner on behalf of an insured or third-party claimant in negotiating for or effecting the settlement of a claim or claims for loss or damage covered by an insurance contract or who advertises for employment as an adjuster of such claims, and also includes any person who, for money, commission, or any other thing of value, solicits, investigates, or adjusts such claims on behalf of any such public adjuster.

A public adjuster is hired and paid by the policyholder/insured to act on his or her behalf. The public adjuster fee is usually a percentage of the claim payment that the public adjuster is responsible for recovering. Under Florida law, the percentage of the fee on an initial claim payment is set by statute

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<sup>1</sup> s. 626.864, F.S.

<sup>2</sup> s. 626.858, F.S.; s. 626.8582, F.S.; s. 626.8584, F.S.

<sup>3</sup> DFS Bill Analysis and Fiscal Impact Statement dated 2/16/10.

<sup>4</sup> According to DFS, there are 16,031 licensed resident independent adjusters (12,697 non-resident independent adjusters); 15,433 licensed resident company employee adjusters (28,953) non-resident company employee adjusters).

and varies depending on if the claim is a result of a hurricane event or not.<sup>5</sup> Independent and company employee adjusters do not charge policyholders a fee for adjusting the claim.

Public adjusters are licensed by the DFS if they meet the statutory qualifications for licensure found in s. 626.865, F.S. Qualifications include age, residency, testing, experience, and trustworthiness.<sup>6</sup> Public adjusters must also present a \$50,000 bond to DFS in order to be licensed.<sup>7</sup> No bond is required of company employee or independent adjusters.

Administrative rules relating to public adjusters, in part, address public adjuster contract cancellation, a public adjuster's actions relating to business referrals, and a public adjuster's actions relating to engagement of services of other professionals to help with the claim.<sup>8</sup> Administrative rules also govern the solicitation of business and advertising by public adjusters and the contract used by public adjusters.<sup>9</sup> Public adjusters must also abide by the general ethical rules applicable to all types of adjusters.<sup>10</sup>

### **2008 Legislation Relating to Public Adjusters**

In 2008, the Legislature enacted legislation imposing restrictions and regulations on public adjusters in residential property and condominium unit owner property insurance cases.<sup>11</sup> The legislation restricted public adjuster fees to 20 percent on non-hurricane claims and 10 percent on hurricane claims and prohibited a public adjuster from basing a fee for work on a supplemental claim on the amount paid to the policyholder on the previous claim.

The legislation made numerous changes relating to public adjuster client solicitation and business practices. The legislation prohibited public adjusters from soliciting directly or indirectly between the hours of 8:00 pm and 8:00 am Monday through Saturday and all day on Sunday. Public adjusters were also prohibited from soliciting or entering into a contract until at least 48 hours after occurrence of the loss, unless contacted by the policyholder.<sup>12</sup> Public adjusters were prohibited from giving or offering to give a monetary loan or advance to a client or prospective client and were prohibited from giving or offering to give anything with a value in excess of \$25 for advertising or as an inducement to enter into a contract with a public adjuster. In addition, the 2008 legislation enacted time periods during which a policyholder can cancel a public adjuster contract without penalty. The legislation also made it an unfair and deceptive insurance trade practice for a public adjuster or any other person to circulate or disseminate untrue, deceptive, or misleading information relating to insurance.

The bill enacted in 2008 also made numerous changes relating to public adjuster licensure, created a public adjuster apprenticeship program and license, and amended continuing education requirements for public adjusters.

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<sup>5</sup> s. 626.854(11), F.S. Additional information about the public adjuster fee structure is discussed later in the analysis.

<sup>6</sup> Similar qualifications apply to independent and company adjusters.

<sup>7</sup> s. 626.865(2), F.S.

<sup>8</sup> Rule 69B-220.201(4) and (5), F.A.C.

<sup>9</sup> Rule 69B-220.051, F.A.C.

<sup>10</sup> s. 626.878, F.S.

<sup>11</sup> Ch. 2008-220, L.O.F. The 2008 legislation resulted from findings of the Task Force on Citizens Property Insurance Claims Handling and Resolution created in 2007 to make recommendations to the legislative and executive branches relating to the appropriate handling, service and resolution of the open 2004/2005 hurricane claims of Citizens Property Insurance Corporation (Citizens). During review of Citizens' hurricane claims, the Task Force became aware of the impact public adjusters have on the claims process. The Task Force found that while the services of public adjusters can be beneficial to policyholders who have suffered a loss, the laws in place in 2007 did not adequately protect consumers from unscrupulous public adjusters. The Task Force heard testimony that some public adjusters were not properly trained or qualified to represent insureds. Also, these adjusters charged exorbitant fees which oftentimes were not apparent to insureds because the fees were not prominently displayed in the public adjuster contract. Stakeholders also testified that there was a need for an apprentice type program for public adjusters so that individuals would be knowledgeable and experienced when they became public adjusters. In an effort to remedy concerns expressed about abuses by some public adjusters, the Task Force proposed legislation in 2008.

<sup>12</sup> The constitutionality of the 48-hour prohibition on solicitation by public adjusters is currently in litigation. See 37 2009 CA 003926 Frederick W. Kortum, Jr. vs. Alex Sink as Chief Financial Officer of the State.

## **2009 Legislation Relating to Public Adjusters**

In 2009, the Legislature enacted further changes related to the activity of public adjusters.<sup>13</sup> The 2009 legislation prohibited public adjusters or public adjuster apprentices from paying fees for referrals of business to the public adjuster. The legislation also required public adjuster apprentices to obtain a certain claims adjuster designation before applying for an apprentice license. Furthermore, the number of active apprentices employed by a public adjusting firm was limited to 12 and the number of apprentices supervised by a public adjuster limited to three.

The 2009 legislation also required the Office of Program Policy Analysis and Government Accountability (OPPAGA) to do a study on public adjusters and report the study's findings by February 1, 2010. The legislation required the report to include a review of relevant Citizens Property Insurance Corporation (Citizens) claims and statistics involving public adjusters, public adjuster claims submission practices, and a review of Florida law and rules governing public adjusters. The report was also to include a review of laws in other states governing public adjusters. OPPAGA was instructed to review both catastrophe and non-catastrophe related claims, with a specific focus on new and supplemental or reopened catastrophe claims originated in 2009 which relate to hurricanes that occurred in 2004 and 2005. The effects on consumers of Florida law relating to public adjusters was also required to be studied.

## **OPPAGA Study Relating to Public Adjusters**

The OPPAGA study relating to public adjuster required by the 2009 legislation was completed in January 2010 (Report 10-06). The primary findings of the report were:

- The number of licensed public adjuster in Florida has grown significantly in the last six years, and the incidence of complaints, regulatory actions, and allegations of fraud involving public adjusters is generally low.
- Florida's public adjuster laws are comparable to and in some cases more restrictive than those of other similar states.
- According to Citizens' claims data, cases took longer to reach a settlement but received higher payments when policyholders used public adjusters for claims file in 2008 and 2009.
- Public adjusters represented policyholders in 26 percent of non-catastrophe and 39 percent of catastrophe claims filed in 2008 and 2009 against Citizens.

## **Effect of the Bill**

The bill makes significant changes to the regulation of public adjusters in residential property and condominium unit owner property insurance claims to provide greater oversight of these adjusters.

### *Advertising or Solicitation by Public Adjusters*

Section 626.854(8), F.S., provides it is an unfair and deceptive trade practice for public adjusters to circulate or disseminate advertisements, statements, or announcements that contain untrue, deceptive, or misleading assertions, representations, or statements relating to insurance. The bill sets forth specific statements that are deceptive or misleading if the statements are contained in advertising or solicitation of public adjusters. Thus, if a public adjuster uses these statements in advertising or solicitation, the adjuster commits an unfair and deceptive trade practice. The penalty for commission of an unfair and deceptive trade practice is found in s. 626.9521, F.S., and is a fine no more than \$5,000 for each nonwillful violation and a fine no more than \$40,000 for each willful violation.<sup>14</sup>

The bill provides the following statements by a public adjuster are an unfair and deceptive trade practice:

- Statement inviting a policyholder to file a property insurance claim when the policyholder may not have property damage covered by an insurance policy.
- Statement inviting a policyholder to file a property insurance claim when a claim for the property damage has previously been submitted by the policyholder to the insurer and the claim fully adjusted and paid by the insurer.

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<sup>13</sup> Ch. 2009-87, L.O.F.

<sup>14</sup> The total amount of fines that can be assessed is \$50,000 for all nonwillful violations arising out of the same action or \$250,000 for all willful violations arising out of the same action (s. 626.9521(3)(c), F.S.).

- Statement inviting a policyholder to file a property insurance claim by offering monetary or other valuable inducement to a policyholder.
- Statement inviting a policyholder to file a property insurance claim by stating there is “no risk” to a policyholder to file a property insurance claim.
- Statement or use of a logo or shield that implies or could be construed to mean the adjuster’s solicitation was issued or distributed by a governmental agency or is sanctioned or endorsed by a governmental agency.

The bill also requires any written advertisements<sup>15</sup> by public adjusters to contain a specific disclaimer in bold print and capital letters in a specific typeface. The disclaimer identifies the advertisement as a solicitation for business.

#### *Public Adjuster Fees*

Starting June 1, 2010, the bill limits public adjuster fees on reopened or supplemental residential property and condominium unit owner property insurance claims. Under current law, public adjuster fees for these claims are generally limited to 20 percent of the claim payment on non-hurricane claims and ten percent of the claim payment on hurricane claims filed for one year after the Governor’s declaration of a state of emergency related to the hurricane. The bill makes the ten percent fee limit apply to hurricane related claims anytime after a hurricane, rather than those claims filed in the year following the hurricane. The ten percent/20 percent fee limits do not apply to reopened or supplemental claims with public adjuster involvement.

The only restriction in current law relating to public adjuster fees on reopened or supplemental claims is in s. 626.854(11)(a), F.S. This statute allows a public adjuster to be paid a fee only on the amount paid on the reopened or supplemental claim. Thus, the claim payment amount on the initial claim is not included in the public adjuster fee on a reopened or supplemental claim. There is no limit in current law, however, on the amount a public adjuster can be paid for obtaining claim payment on reopened or supplemental claims. The amount is negotiated between the public adjuster and the policyholder.

The bill adds a fee cap to reopened or supplemental claims involving public adjusters. The public adjuster fee on these types of claims cannot exceed 30 percent of the claim payment obtained on the reopened or supplemental claim. But, if this fee totals more than ten percent of the aggregate claim payment for hurricane claims or 20 percent of the aggregate claim payment for non-hurricane claims, the public adjuster’s fee for the reopened or supplemental claim is limited to 10 percent of the aggregate claim payment for hurricane claims or 20 percent of the aggregate claim payment for non-hurricane claims.

#### *Action Required of Public Adjusters and Insurance Companies*

When a public adjuster becomes involved in a property insurance claim, the bill requires the public adjuster to take all reasonable and necessary efforts to provide the insurance company prompt notice of the claim. The public adjuster must ensure notice of the claim is given to the insurance company, the public adjuster contract is timely given to the insurance company, the property insured is timely made available to the insurance company for inspection, and the policyholder is timely made available for interview by the insurance company about the claim. The public adjuster cannot restrict the insurance company, or anyone acting on the company’s behalf, from reasonable access to the policyholder or the damaged property.

The insurance company must be given a reasonable opportunity to investigate and respond to a claim. The insurance company is required to timely meet or communicate with the public adjuster in order to reach an agreement. The insurance company, or anyone acting on the company’s behalf, must give the policyholder or public adjuster 48 hours’ notice before meeting with the policyholder or inspecting the damaged property. If the required notice is not given, the policyholder can deny access to the property. Both parties can waive the 48 hour notice requirement.

<sup>15</sup> “Written advertisement” is defined in the bill as new papers, magazine, flyers, brochures, and mailers.

Public adjusters are forbidden from obstructing or preventing the insurance company or the company's adjuster from timely access to the damaged property for inspection purposes. Public adjusters are allowed to be present when an insurance company inspects a damaged property but must provide alternative means for access to the property if the lack of availability of the public adjuster for the inspection would delay the property inspection.

#### *Actions by Contractors and Subcontractors*

Contractors licensed by the Department of Business and Professional Regulation or subcontractors are not allowed to represent policyholders and adjust property insurance claims unless the contractor is also licensed as a public adjuster and is compliant with the licensing requirements. Contractors, however, are allowed to prepare or submit a bid to repair damaged property and to discuss the bid with the policyholder if the contractor is preparing or submitting a bid at the request of the insurance company or the policyholder and the contractor is doing the repair work for the contractor's usual and customary fee.

#### *Public Adjuster Apprentice Licensing*

Current law (s. 626.8651, F.S.) contains numerous requirements for a public adjuster apprentice license but does not contain any continuing education requirements for this license. The bill requires public adjuster apprentices to complete at least eight hours of continuing education on public adjusting, of which two hours relates to ethics, before a public adjuster apprentice can qualify for a license as a public adjuster.

#### *Public Adjuster Contracts*

The bill codifies most of the content requirements of public adjuster contracts contained in administrative rules.<sup>16</sup> The bill requires public adjuster contracts to contain the name and address of the adjuster and the policyholder. The contract must also contain the license number of the public adjuster, the name of the public adjusting firm, a brief description of the loss, the public adjuster fee percentage, and the type of claim. The contract must also contain dated signatures of the adjuster and the policyholder. The contract must be sent to the policyholder's insurance company within 30 days after the contract is executed by the public adjuster and the policyholder. Requirements in current law for the content of a public adjuster contract are: the contract must be in writing, disclose contract cancellation information, and contain a fraud statement.<sup>17</sup>

#### *Filing Time Frame for Windstorm or Hurricane Claims*

Although no time frame for filing property insurance claims is found in the Insurance Code,<sup>18</sup> s. 95.11, F.S., requires actions on contracts to be brought within five years. An insurance policy is a contract so the five year statute of limitations in s. 95.11, F.S., applies to insurance policies. Thus, when an insurance company breaches the insurance contract, the policyholder has five years from the breach to file suit.

Starting June 1, 2010, the bill requires notice of any claim, supplemental claim, or reopened claim resulting from windstorm or a hurricane event to be filed with the insurance company within three years after the event first made landfall or caused the damage which forms the basis of the claim. This claim filing deadline applies only to personal lines residential policies.<sup>19</sup> The bill specifies the three year claim filing time frame added by the bill does not affect the five year statute of limitations under s. 95.11, F.S. Thus, five years after the insurance company breaches the insurance contract will remain the time frame for filing suit for breach of the insurance contract which is typically denial of a property insurance claim.<sup>20</sup>

<sup>16</sup> Rule 69B-2051(6), F.A.C. Administrative rules promulgated by the DFS require public adjuster contracts to contain the adjuster's name, business address, phone number, and license number. The contract must also contain the policyholder's name, address, address of loss, description of the loss, insurer's name, insurer's policy number; the date the contract was signed by the policyholder, and the compensation amount to the adjuster. Rules also require the contract to be in writing and signed by the public adjuster.

<sup>17</sup> s. 626.854(7), F.S. (contract cancellation information); s. 626.8796, F.S. (contract must be in writing and contain a fraud statement).

<sup>18</sup> The Insurance Code is comprised of chapters 624-632, 634, 635, 636, 641, 642, 648, and 651.

<sup>19</sup> Personal lines residential policies include homeowner, mobile homeowner, dwelling, tenant's, condominium unit owner's, and cooperative unit owner's policies.

<sup>20</sup> See Saenz v. State Farm Fire and Casualty Company et al, 861 So.2d 64 (Fla. 3<sup>rd</sup> DCA 2003); Passman v. State Farm Fire and Casualty Company, 779 So.2d 323 (Fla. 2<sup>nd</sup> DCA 1999).

**B. SECTION DIRECTORY:**

**Section 1:** Amends s. 626.854, F.S., relating to compensation for public adjusters.

**Section 2:** Amends s. 626.854, F.S., relating to the definition of public adjuster and prohibitions relating to public adjusters.

**Section 3:** Amends s. 626.8651, F.S., relating to the public adjuster apprentice license.

**Section 4:** Amends s. 626.8796, F.S., relating to public adjuster contracts.

**Section 5:** Creates s. 626.70132, F.S., relating to the duty to file a windstorm or hurricane claim.

**Section 5:** Provides an effective date of June 1, 2010 except where otherwise provided.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

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

1. Revenues:

None.

2. Expenditures:

The DFS indicated in the agency analysis an appropriation of \$30,000 is needed to modify the agency's continuing education computer system to implement the continuing education requirement for public adjuster apprentices.

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

1. Revenues:

None.

2. Expenditures:

None.

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

The fee restrictions on reopened or supplemental claims contained in the bill could reduce the income of public adjusters.

The restrictions on public adjuster solicitation could deter policyholders from obtaining the claims adjusting services provided by public adjusters which could reduce the claim payment.

Public adjuster apprentices will have to pay for continuing education classes.

**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:

Article III, Section 6 of the Florida Constitution provides in relevant part: "Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title." The subject matter which should be considered when determining whether an act embraces a single subject is the subject expressed in the title. *Ex parte Knight*, 41 So. 786 (Fla. 1906). The test is whether the bill is designed to accomplish separate objectives which have no natural or logical connection to each other. *Board of Public Instruction v. Doran*, 224 So. 2d 693 (Fla. 1969). Where an act contains two subjects that "are designed to accomplish separate and dissociated objects of legislative effort," the act violates single subject. *State ex rel. Landis v. Thompson*, 163 So. 270, 283 (Fla. 1935). An act may contain various subtopics without violating the single-subject requirement. *Burch v. State*, 558 So. 2d 1 (Fla. 1990). The title of the bill is informative of the subject of the bill.

Where the courts find a single subject violation, the entire act fails. Once a law is readopted, however, it is no longer subject to single subject or adequate title requirements.

This bill is titled "An act relating to public adjusters." Sections one through four of the bill relate and apply only to activity of public adjusters. Section five of the bill, however, relates to and applies to a time frame for filing personal lines residential property insurance claims and applies to all personal lines residential property claims, not just those filed by policyholders using public adjusters. Thus, the sponsor may wish change the title of the bill because the bill addresses a claims filing deadline for certain types of property insurance claims which is not related to the activity of public adjusters addressed by the other provisions in the bill.

## B. RULE-MAKING AUTHORITY:

None provided in the bill.

## C. DRAFTING ISSUES OR OTHER COMMENTS:

See comments in Constitutional Issues section of the staff analysis for comments relating to a title change for the bill.

In the agency analysis, the DFS indicates requiring public adjuster apprentices to take continuing education on public adjusting is unnecessary for the following reasons:

- The apprentice must obtain an Accredited Claims Adjuster designation prior to being licensed which includes training and instruction in adjusting damages and losses under insurance contracts.
- The apprentice license is issued for 18 months. Individuals may apply for the permanent license after 12 months. During this time period, the apprentice is in the profession of public adjusting on a daily basis due to the fact that apprentices are required to be directly supervised by a permanent licensed public adjuster.
- The apprentice license is considered to be a "temporary" license and no other temporary license issued by the DFS requires continuing education.

The agency also recommends defining the terms "reasonable," "necessary," and "timely" used in the bill relating to actions required of public adjusters and of insurance companies.



#### **IV. AMENDMENTS/COUNCIL OR COMMITTEE SUBSTITUTE CHANGES**

On March 25, 2010, the Insurance, Business & Financial Affairs Policy Committee considered a proposed committee substitute (PCS), adopted two amendments, and reported the PCS favorably with a committee substitute. One amendment corrected a scrivener's error. The second amendment made the restrictions relating to public adjusters apply to public adjusters adjusting condominium unit owner claims, rather than condominium association claims. Current law applying the restrictions to public adjusters adjusting residential property claims is not changed and thus the restrictions would also apply to residential property claims. The staff analysis was updated to reflect the committee substitute.