

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 1229 Title Insurance  
**SPONSOR(S):** Insurance & Banking Subcommittee, Holder  
**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	13 Y, 0 N, As CS	Reilly	Cooper
2) Rulemaking & Regulation Subcommittee			
3) Government Operations Appropriations Subcommittee			
4) Economic Affairs Committee			

### SUMMARY ANALYSIS

Title insurance protects owners of real property or others having an interest in real property against loss by encumbrance, defective title, invalidity, or adverse claim to title. Currently, policies of an insurer in rehabilitation can only remain in force as long as the insurer has sufficient assets to avoid liquidation.

The bill requires the receiver of a title insurer in rehabilitation to file a rehabilitation plan that provides for the following:

- Title insurance policies on real property in Florida are to remain in force, unless assessments on other title insurers would be insufficient to pay the insurer's claims.
- Title insurance policies on real property in other states ("out-of-state policies") that do not statutorily provide for payment of future losses of title insurers in receivership may be cancelled as of a date approved by the court, with a claims filing deadline established.
- Separate allocations of remaining estate assets to fund claims made on out-of-state policies that, respectively, have been cancelled or remain in force, and a formula for determining funds to be allocated to these claims.

When a title insurer is ordered into rehabilitation, all remaining title insurers are liable for an assessment to pay outstanding claims on the insurer's policies covering real property in Florida and associated administrative expenses. Upon the receiver's request, the Office of Insurance Regulation (OIR) is required to order an annual assessment sufficient to pay such amounts, and an annual assessment in subsequent years until specified criteria are met. Assessments are to be based on each title insurer's pro-rata share of direct title insurance premiums written in Florida in the previous calendar year, and cannot exceed specified levels. When an assessment has been ordered, the insurer in rehabilitation cannot issue new policies and cannot be released from rehabilitation until all assessments have been repaid.

To reimburse insurers for assessments paid, the OIR is required to order a surcharge on all subsequently issued title insurance policies on Florida real property. The surcharge cannot exceed \$25 per transaction for each impaired title insurer and must be sufficient to repay all assessments within 7 years.

When a foreign title insurer with Florida policies is placed in receivership by its domiciliary state, the Department of Financial Services (DFS) is authorized to apply for a court order appointing it ancillary receiver for purposes of making assessments on the insurer's Florida policies.

The bill requires the DFS to review the regulatory structure of the title insurance industry in Florida and to submit its findings and recommendations to the Legislature.

To the extent that the bill continues in force title insurance policies on real property in Florida, it provides consumer protections to Florida policyholders.

The bill is effective upon becoming law.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h1229.INBS

DATE: 4/5/2011

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Overview of Title Insurance**

Title insurance insures owners of real property (owner's policy) or others having an interest in real property against loss by encumbrance, defective title, invalidity, or adverse claim to title.<sup>1</sup> Title insurance is a policy issued by a title insurer that, after performing a search of title, represents the state of that title and insures the accuracy of its search against claims of title defects. It is usually taken out by the purchaser of property or an entity that is loaning money on a mortgage. Most lenders require title insurance when they underwrite loans for real property.<sup>2</sup>

Two state agencies provide regulatory oversight of the title insurance industry in Florida: the Department of Financial Services (DFS), which regulates title agents and agencies, and the Office of Insurance Regulation (OIR), which regulates title insurers, including licensing and promulgation of rates. Title insurers in Florida operate on a monocline basis, meaning that the insurer can only transact title insurance and no other type of insurance.<sup>3</sup>

#### **Insurers in Receivership<sup>4</sup>**

Insurance companies are exempted from federal bankruptcy jurisdiction and are instead subject to state law regarding receivership. Under Florida law, the Second Judicial Circuit Court in Leon County (the court) has oversight jurisdiction over insurance company receivership matters. In accordance with Part I of chapter 631, F.S., the "Insurers Rehabilitation and Liquidation Act," the DFS serves as receiver of any Florida insurer placed into receivership. The Division of Rehabilitation and Liquidation within DFS is responsible for performing the DFS's duties as receiver. The DFS as receiver administers the affairs of insurers placed into receivership by the court's conservation order,<sup>5</sup> rehabilitation order, or liquidation order.

#### **Rehabilitation**

The receiver of an impaired insurer, as the rehabilitator, prepares a plan to assist an insurer to resolve its difficulties, and is responsible for taking actions necessary to correct the conditions that necessitated the receivership as the court may direct. Generally, the receiver suspends all powers of the company's directors, officers, and managers.

By statute and court order:

- The receiver is authorized to conduct all business of the insurer.
- The receiver may direct, manage, hire, and discharge employees.
- The receiver is authorized to manage the property and assets of the insurer as it deems necessary.
- The receiver may file for release of the company from receivership if rehabilitation efforts are successful and grounds for receivership no longer exist.

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<sup>1</sup> Section 624.608, F.S. Title insurance is also insurance of owners and secured parties of the existence, attachment, perfection and priority of security interests in personal property under the Uniform Commercial Code.

<sup>2</sup> See, e.g., the website of the American Land Title Association, <http://www.alta.org> (last accessed March 27, 2011). ALTA is the national trade association of the abstract and title insurance industry.

<sup>3</sup> Section 627.786, F.S.

<sup>4</sup> An overview of the receivership process, including rehabilitation and liquidation, is available from the Department of Financial Services' website at <http://www.myfloridacfo.com/Receiver/>. Additional information is provided in the "2010 Annual Report of the Division of Rehabilitation and Liquidation," also available at this website.

<sup>5</sup> Conservation is the regulatory process by which an insurance company's affairs are administered to preserve the company's assets.

If the receiver determines that further attempts to rehabilitate the insurer are futile or if continued rehabilitation would increase the risk of loss to policyholders, the receiver may file for liquidation of the insurer.

## **Liquidation**

When the DFS determines that a Florida-domiciled insurer is insolvent or is operating in a financially hazardous manner, it petitions the court for an order requiring the insurer to show cause why it should not be placed into liquidation.<sup>6</sup> If the insurer's board of directors either joins in the petition or consents, a liquidation order is issued appointing DFS as receiver to liquidate the insurer; otherwise, a hearing is held to determine whether the petition should be granted.

Under the court's supervision, the receiver as liquidator is charged with gathering (marshaling) the company's assets, converting them into cash, and distributing the cash to the insurer's claimants in accordance with the priority for claims payment established by statute.

After issuance of the liquidation order, the DFS takes possession of the insurer's offices, equipment, records and assets, and notice of the liquidation is sent to all potential claimants advising them of the liquidation and the process to follow to perfect their claim against the insurer's estate. All property and casualty insurance policies are cancelled within 30 days of the liquidation order.

After all assets have been converted to cash, claims prioritized and valued, and any objections to the valuation of claims resolved, the receiver will file a petition with the court asking for authority to distribute the cash according to the priority scheme in statute.

## **Effect of the Bill**

### **Title Insurers Ordered into Rehabilitation**

The bill requires the receiver of a title insurer in rehabilitation to review the insurer's condition, and file a rehabilitation plan, subject to court approval, that provides for the following:

- Title insurance policies covering real property in Florida are to remain in force, unless assessments on other title insurers would be insufficient to pay the insurer's claims in the ordinary course of business.
- Title insurance policies covering real property in other states ("out-of-state policies") that do not statutorily provide for payment of future losses of title insurers in receivership may be cancelled as of a date proposed by the receiver (if approved by the court); with a claims filing deadline proposed for out-of-state policies that are cancelled.
- A proposed percentage of the remaining estate assets to fund out-of-state claims where policies have been cancelled, with any unused funds returned to the general assets of the insurer's estate.
- A proposed percentage of the remaining estate assets to fund out-of-state claims where policies remain in force.
- That funds allocated to pay claims on out-of-state policies are to be based on the pro-rata share of premiums written in each state over each of the 5 calendar years preceding the date of the order of rehabilitation.

## **Assessments**

As a condition of doing business in the state, Florida title insurers are liable for an assessment to pay all unpaid title insurance claims on policies covering real property in Florida, and the expenses of administering and settling such claims, of a title insurer ordered into rehabilitation. The OIR, upon request of the receiver, is required to order an annual assessment in an amount the receiver considers sufficient to pay known claims, loss adjustment expenses, and the cost of administration of

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<sup>6</sup> The grounds for liquidation are set forth in s. 631.061, F.S.

rehabilitation expenses. In requesting an assessment, the receiver is required to consider the remaining assets of the insurer in receivership. Annual assessments may be made until the insurer in rehabilitation does not have any policies in force or the potential for future liability has been satisfied. Assessments are to be based on each title insurer's pro-rata share of direct title insurance premiums written in Florida in the previous calendar year as reported to the OIR.

The assessment levied against a title insurer cannot exceed 3 percent of an insurer's surplus to policyholders at the end of the previous calendar year or 10 percent of an insurer's surplus to policyholders over any consecutive 5-year period. The 10 percent limitation is to be calculated as the sum of the percentages of surplus to policyholders assessed in each of those 5 years. An emergency assessment may also be ordered, if requested by the receiver. However, the total of the emergency assessment and any annual assessment to be paid by a title insurer in a single calendar year cannot exceed the cap applicable to the annual assessment alone. The OIR may exempt a title insurer from, or limit payment of, the assessment when such payment would reduce the insurer's surplus to policyholders below the minimum required for the insurer to maintain its certificate of authority in another state. Assessments are payable within 90 days or under a quarterly installment plan approved by the receiver, accompanied by applicable finance charges.

Proceeds of assessments may be used by the receiver in an effort to keep in force title policies on Florida real property, including purchasing reinsurance or otherwise providing for the assumption of policy obligations by another insurer. When an assessment has been ordered, the insurer in rehabilitation is barred from issuing new title insurance policies until it is released from rehabilitation. An insurer may not be released from rehabilitation until all title insurers have received full reimbursement for assessments paid.

### **Surcharges**

To reimburse title insurers for assessments paid, the OIR is required to order a surcharge on all subsequently issued title insurance policies on Florida real property. The surcharge cannot exceed \$25 per transaction for each impaired title insurer and the surcharge must be in an amount estimated to be sufficient to recover all amounts assessed within 7 years. If additional title insurers become impaired, the OIR is required to order an increase in the surcharge amount to reflect the aggregate surcharge. The surcharge is to be paid by the party responsible for payment of the title insurance premium, unless otherwise agreed between the parties. Title insurance agents and agencies are required to collect and remit the surcharges to the title insurer upon which a policy is written within 30 days. No surcharge is due or owing as to any policy of insurance issued at the simultaneous issue rate. The surcharge is to be considered a separate governmental assessment to be separately stated on any settlement statement, and is not subject to premium tax or reserve requirements. Title insurers are required to provide the OIR with an accounting, by March 1<sup>st</sup> of each year, of assessments paid and surcharges collected during the previous calendar year. Any surcharges collected by an insurer in excess of the assessment paid are to be paid into the Insurance Regulatory Trust Fund.

### **Foreign Title Insurers in Receivership<sup>7</sup>**

When a foreign title insurer with policies in Florida is placed in receivership by its domiciliary state, the DFS may apply to the court for an order appointing it as ancillary receiver for the purpose of making assessments. The proceeds of such assessments may be used for the payment of claims, to acquire reinsurance, or otherwise provide for the assumption of Florida policy obligations by another insurer. If the assets in Florida are insufficient to pay the administrative costs of the ancillary receivership, the receiver may request additional funds from the Insurance Regulatory Trust Fund.

The bill is effective upon becoming law.

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<sup>7</sup> "Foreign insurer" is defined in s. 624.06, F.S., as an insurer formed under the laws of any state, district, territory, or commonwealth of the United States other than Florida.

**B. SECTION DIRECTORY:**

**Section 1:** Sets forth the Legislature's intent that the Department of Financial Services review the regulatory structure of the title insurance industry in Florida and submit findings and recommendations by December 31, 2011.

**Section 2:** Repeals s. 627.7865, F.S., which provides for assessments against title insurers when a title insurer is liquidated with unpaid outstanding claims.

**Section 3:** Creates s. 631.400, F.S., providing for assessments (and emergency assessments) against title insurers when a title insurer is ordered into liquidation.

**Section 4:** Creates s. 631.401, F.S., providing for surcharges on title insurance policies to reimburse insurers for assessments paid as a result of an insurer being ordered into rehabilitation.

**Section 5:** Creates s. 631.402, F.S., concerning receivership of foreign title insurers.

**Section 6:** Amends s. 627.782, F.S., making a conforming change.

**Section 7:** Amends s. 701.041, F.S., making a conforming change.

**Section 8:** Provides that the bill is effective upon becoming a law.

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

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

1. Revenues:

None.

2. Expenditures:

None.

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

1. Revenues:

None.

2. Expenditures:

None.

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

Florida title insurers will be liable for assessments to pay all outstanding title insurance claims and expenses of administering and settling claims on real property in Florida when a title insurer is ordered into liquidation. Except as otherwise provided, title insurance policies on real property in Florida will remain in force when the insurer that issued the policy is ordered into rehabilitation.

**D. FISCAL COMMENTS:**

To the extent that a surcharge will be placed on title insurance policies after a title insurer has been ordered into rehabilitation and assessments have been paid by insurers, the cost of title insurance will increase for Florida consumers.

**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:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

On March 30, 2011, the Insurance & Banking Subcommittee heard a proposed committee substitute and reported the proposed committee substitute favorably. The analysis was updated to reflect adoption of the proposed committee substitute