HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS

BILL #:	CS/HB 927	**FINAL HOUSE FLOOR ACTION:**	
SPONSOR(S):	Insurance & Banking Subcommittee; Hager	107 **Y's**	0 **N's**
COMPANION BILLS:	CS/SB 1136	**GOVERNOR'S ACTION:**	Approved

SUMMARY ANALYSIS

CS/HB 927 passed the House on April 16, 2015. The bill was amended by the Senate on April 24, 2015, and subsequently passed the House on April 24, 2015.

Title insurance insures owners of real property or others having an interest in real property, such as lenders, against loss by: encumbrance; defective title; invalidity; or adverse claim to title. The Office of Insurance Regulation (OIR) licenses title insurers and establishes their rates. The Department of Financial Services (DFS) manages insolvent title insurers, in its role as "receiver," usually through rehabilitation.

The insolvency claim costs and expenses are funded through assessments on active title and recovered through surcharges on title insurance policies issued in the state. A $3.28 surcharge per policy is currently in force. Surcharges are retained by the insurer until they recover their assessment payments. Excess surcharges are paid to the Insurance Regulatory Trust Fund (IRTF). Excess surcharge collections do not reduce future assessments or assist insurers that are slow to recover their payments. The surcharges cease once all insurers recover their assessment payment. There is uncertainty over when the surcharges end on account of how the assessment methodology assigns the amount due from each title insurer.

The bill changes the administration process regarding assessment recovery surcharges. Specifically, the bill:

- Removes language limiting the surcharge to one per insolvent company, permitting the receiver to adjust the surcharge amount related to a particular company;
- Requires transaction settlement statements to specify that the surcharge amount is a "surcharge" and provide that the surcharge is not premium;
- Requires any insurer that was not subject to a given assessment, regardless of their activity in the previous calendar year, to collect and remit the surcharge to the receiver as an excess surcharge;
- Establishes an excess surcharge account for use as specified in the bill and described below;
- Allows the OIR to end surcharges after all actively writing title insurers have recovered the assessment;
- Rolls unused excess surcharges held by the receiver into the IRTF, after certain conditions are met, rather than immediately upon receipt; and
- Grants specific rulemaking authority.

The bill has an indeterminate fiscal impact on state revenues and a potential positive fiscal impact on state expenditures. The bill would reduce expected revenue to the IRTF by redirecting the funds into an excess surcharge account retained by the DFS, as receiver, to exclusively service the needs of insolvent title insurer estates, potential estates, and title insurers that have yet to recover their assessment payments. This excess surcharge account will maintain the funds until there are either no active title insurer receiverships for twelve consecutive months, or there are no payable claims for 60 consecutive months, at which time the excess surcharge funds will be deposited into the IRTF.

The bill was approved by the Governor on June 11, 2015, ch. 2015-154, L.O.F., and will become effective on July 1, 2015.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

Background

Title Insurance

Title insurance insures owners of real property or others having an interest in real property, such as lenders, against loss by: encumbrance; defective title; invalidity; or adverse claim to title.[1] Title insurance is a policy issued by a title insurer that, after evaluating a search of title, insures against certain covered risks including: forgery; fraud; liens; and encumbrances on a title. It is usually taken out by the purchaser of property or an entity that is loaning money on a mortgage.

Purchasers of real property and lenders utilize title insurance to protect themselves against claims by others that claim to be the rightful owner of the property. Most lenders require title insurance when they underwrite loans for real property. Title insurance provides a duty to defend against adverse claims on the subject property's title, and also promises to indemnify the policyholder for damage to the lender's security interest created by a cloud on title, unmarketable title, or adverse title that was not discovered by the insurer.[2]

Regulation in Florida

Two entities provide regulatory oversight of the title insurance industry in Florida: the Department of Financial Services (DFS or receiver), which regulates title insurance agents and acts as receiver of insolvent title insurer estates; and the Office of Insurance Regulation (OIR), which licenses title insurers. Title insurance forms must be filed and approved by the OIR prior to usage[3] and premium rates charged by title insurers are specified by rule by the Financial Services Commission (FSC).[4] Title insurers may petition the OIR for an order authorizing a specific deviation from the premium established by rule.[5]

In Florida, title insurers operate on a monoline basis, meaning that the insurer can only transact title insurance and cannot transact any other type of insurance.[6] Eighteen title insurers are authorized and actively writing title insurance in the state.[7]

Pursuant to s. 627.782, F.S., the FSC is mandated to adopt a rule specifying the premium to be charged by title insurers for the respective types of title insurance contracts and, for policies issued through agents or agencies, the percentage of such premium required to be retained by the title insurer.[8] The FSC must review the premium not less than once every three years.

Title insurers and title insurance agencies are required to submit to the OIR, on or before May 31 of each year, revenue, loss, and expense data for the most recently concluded year that are determined necessary to assist in the analysis of premium rates, title search costs, and the condition of the Florida title insurance industry.

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[1] Section 624.608, F.S. Title insurance is also insurance of owner's and secured parties' interests against the existence, attachment, perfection and priority of security interests in personal property under the Uniform Commercial Code.
[2] See, e.g., the website of the American Land Title Association (ALTA), http://www.alta.org (Last accessed: March 12, 2015). ALTA is the national trade association of the abstract and title insurance industry. There are currently six basic ALTA policies of title insurance: Lenders, Lenders Leasehold, Owners, Owners Leasehold, Residential, and Construction Loan Policies.
[3] Section 627.777, F.S.
[4] Section 627.782, F.S.
[5] Section 627.783, F.S.
[6] Section 627.786, F.S.
[7] Florida Office of Insurance Regulation, http://www.floir.com/CompanySearch/ (last accessed March 12, 2015). Search for "Title Insurance" under "Company Type."
[8] A minimum 30 percent of premium must be retained by the title insurer. Section 627.782, F.S.

Insurer Insolvency: Rehabilitation and Liquidation

Chapter 631, F.S., relates to insurer insolvency and guaranty payments. It governs the receivership process for insurance companies in Florida. Federal law specifies that insurance companies cannot file for bankruptcy.[9] Instead, they are either "rehabilitated" or "liquidated" by the state. In Florida, the Division of Rehabilitation and Liquidation of the DFS is responsible for rehabilitating or liquidating insurance companies as the "receiver."[10] This process involves the initiation of a delinquency proceeding and the placement of an insurer under the control of the receiver. Insolvencies are handled before the Circuit Court of Leon County, i.e., the 2nd Judicial Circuit.[11]

Foreign Title Insurers in Receivership[12]

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 (IRTF).

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.[13] If the insurer's board of directors either joins in the petition or consents, a liquidation order is issued appointing the 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. A notice 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 priorities set in statute.[14]

Liquidation of title insurers is disfavored because it results in the cancellation of the insurer's policies. This would eliminate the insurance covering the lender's interest in the title and require the owner to obtain new title insurance or refinance the mortgage at unexpected additional cost. According to the DFS, they have never liquidated a title insurer in the state.

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[9] The Bankruptcy Code expressly provides that "a domestic insurance company" may not be the subject of a federal bankruptcy proceeding. 11 U.S.C. § 109(b)(2). The exclusion of insurers from the federal bankruptcy court process is consistent with federal policy generally allowing states to regulate the business of insurance. See 15 U.S.C. § 1012 (McCarran-Ferguson Act).

[10] Typically, insurers are put into liquidation when the company is insolvent whereas insurers are put into rehabilitation for numerous reasons, one of which is an unsound financial condition. The goal of rehabilitation is to return the insurer to a sound financial condition. The goal of liquidation, however, is to dissolve the insurer. *See* s. 631.051, F.S., for the grounds for rehabilitation and s. 631.061, F.S., for the grounds for liquidation.

[11] Section 631.021, F.S.

[12] "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.

[13] The grounds for liquidation are set forth in s. 631.061, F.S.

[14] Section 631.271, F.S.

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, for insurers generally, the receiver:

- Is authorized to conduct all business of the insurer;
- Directs, manages, hires, and discharges employees;
- Is authorized to manage the property and assets of the insurer as it deems necessary; and
- Files for release of the company from receivership if rehabilitation efforts are successful and grounds for receivership no longer exist.

By statute, for title insurers, the receiver reviews the insurer's condition and files a rehabilitation plan, subject to court approval, that provides for the following:[15]

- 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; and
- 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.

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. However, as noted above, liquidation of title insurance companies is disfavored.

Title Insurers in Rehabilitation

There are two title insurers in rehabilitation: National Title Insurance Company (National) and K.E.L. Title Insurance Group, Inc. (K.E.L.).[16] According to the DFS, these two are the only title insurers to go into receivership in the state. Both cases resulted in assessments[17] and the collection of surcharges.

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[15] Section 631.400, F.S.

[16] See State of Florida, ex rel., the Department of Financial Services of the State of Florida v. National Title Insurance Company, Case No. 2009-CA-2577 (Fla. Cir. Ct.), and State of Florida, ex rel., the Department of Financial Services of the State of Florida v. K.E.L. Title Insurance Group, Inc., Case No. 2012-CA-3514 (Fla. Cir. Ct.). Detailed information can be obtained from the Department of Financial Services at http://www.myfloridacfo.com/Division/Receiver/Companies/CompaniesinRehabilitation.htm#.VQGU1qPD_cv . (Last accessed on March 12, 2015.)

[17] See 2012 Title Insurance Assessment for National Title Insurance Company Rehabilitation, Office of Insurance Regulation Case No. 127302-12, 2014 Title Insurance Assessment for National Title Insurance Company Rehabilitation, Office of Insurance Regulation Case No. 162723-14, and 2014 Title Insurance Assessment for K.E.L. Title Insurance Group Rehabilitation, Office of Insurance Regulation Case No. 150289-14.

Assessments[18]

As a condition of doing business in the state, 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 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 three percent of an insurer's surplus to policyholders at the end of the previous calendar year or ten percent of an insurer's surplus to policyholders over any consecutive five-year period. The ten percent limitation is to be calculated as the sum of the percentages of surplus to policyholders assessed in each of those five 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. However, because an insurer may become inactive in the interim, it may be impossible to meet this condition.

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. The surcharge is to be paid by the party responsible for payment of the title insurance premium, unless otherwise agreed between the parties.

If additional title insurers become impaired, the OIR is required to order an increase in the surcharge amount to reflect the aggregate surcharge. However, the statute does not permit the OIR to alter the surcharge related to a particular insolvency. The OIR may authorize one surcharge per insolvency, but a particular surcharge cannot be adjusted as additional claim and expenses develop. Because of the nature of title insurance, it is very difficult to estimate the development of claims and expenses over the long term.

Title insurance agents and agencies are required to collect and remit the surcharges to the title insurer upon which a policy is written within 60 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,

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[18] Section 631.400, F.S.

by March 1st 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 payable to the IRTF.

The OIR may only order the collection of surcharges ceased after all title insurers that paid the assessment fully recover the amount that they paid on account of the assessment.[19] Because the assessment is set as a pro rata share of direct written premium, but the surcharge is collected on a per policy basis, title insurers with a high average premium but a low policy volume may require an exceptionally long period of time to fully recover their assessment payment. Additionally, title insurers that paid the assessment may become inactive prior to recovering their assessment payments. So, the condition precedent to ceasing the surcharge may be impossible to meet.

Current Assessments and Surcharges

To date, the OIR, at the request of the receiver, has ordered three assessments.[20] Two are related to National ($212,478 in 2012 and $300,000 in 2014) and one is related to K.E.L. ($2,023,870 in 2014). Seventeen title insurers were ordered to pay the 2012 assessment. Fifteen title insurers were ordered to pay the 2014 assessments. There is a difference between the number assessed because K.E.L. became insolvent and another company became inactive prior to the 2014 assessments. The OIR reports that the first two assessments have been fully paid and that compliance on the last is ongoing.

Together, the total authorized surcharge on all title insurance policies written in the state is $3.28 ($0.28 related to National and $3.00 related to K.E.L.). Title insurers began collecting surcharges in September 2014. Excess surcharge collections have not yet occurred.

Effect of the Bill

The bill removes language limiting the surcharge to one per insolvent company. This permits the receiver to adjust the surcharge amount related to a particular company as claims and expenses develop. Currently, the surcharge related to National is set at $0.28 per policy. To date, there has been only $512,478 in claims and expenses converted into assessments in the matter. If higher claim activity occurs, the surcharge related to National cannot be adjusted in response. When one considers that the assessment related to K.E.L., which only held 0.27 percent of the Florida market in 2011, was over $2,000,000, it becomes apparent that far higher claim activity could occur in the National case. The bill allows the flexibility to react to actual claim development, as it occurs.

Currently, the amount of the surcharge is required to be listed on title transaction settlement statements. The bill requires the settlement statement to specify that the amount is a "surcharge." Also, the surcharge is not subject to the insurance premium tax. The bill specifically states that the surcharge does not qualify as premium.

Title insurers who did not write title insurance policies in the previous calendar year are required to collect and remit surcharges if they begin writing policies. The bill clarifies this provision to require any insurer that was not subject to a given assessment, when issued, to collect and remit the surcharge for any policies it writes while the assessment is in effect. These surcharge collections are entirely excess surcharges (because these companies did not pay the assessment) and are remitted to the excess surcharge account maintained by the receiver, as established by the bill.

While no excess surcharges have been collected and remitted, statute requires excess surcharges to be paid into the IRTF. The bill establishes an excess surcharge account under the receiver (i.e., the Department of Financial Services). The receiver is allowed to use the excess surcharge funds only to:

[19] Section 627.401(6), F.S.
[20] See footnote 16, above.

- Reduce or eliminate the amount of a future assessment related to a title insurer in receivership at the time of the assessment or one that later enters receivership, or
- Reduce the amount of time that a surcharge for the recovery of assessment is in effect, by transferring excess surcharge collections to title insurers that have not yet recovered the amount of assessment the paid.

The OIR shall order the end of surcharge collections once all title insurers that paid the assessment have recovered their payment. The bill allows the OIR to order title insurers to stop collecting the surcharges once all title insurers that wrote policies in the previous year have fully recovered their assessment payment. This allows the collection of surcharges, including excess surcharges, to end at the earliest opportunity. If any title insurers are unable to recover their assessment payment, they will be able to claim recovery against the excess surcharge account provided for in the bill.

The bill rolls over excess surcharges held in the account to the IRTF if there are no active title insurer receiverships for twelve consecutive months or there are no payable claims for 60 consecutive months. This allows the receiver to continue to use the excess surcharge collections to fund the claims and expenses of title insurers in receivership as long as at least one title insurer is in receivership with ongoing payable claims activity. This avoids sending excess surcharges to the IRTF while those funds could be used for ongoing or developing title insurer insolvencies. This is expected to minimize the value of additional assessments and the value and term of the aggregate surcharges.

The Financial Services Commission, as the agency head for the OIR, is given specific rulemaking authority to adopt rules governing the collection, use, and transfer of surcharges, including excess surcharges. Specific rulemaking authority is also given to the DFS, on behalf of the Division of Rehabilitation and Liquidation, to oversee the claiming and distribution of funds from the excess surcharge account.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   The bill has an indeterminate fiscal impact on revenues that could be deposited into the Insurance Regulatory Trust Fund (IRTF) within the Department of Financial Services (DFS). Currently, no excess surcharges have been remitted for deposit into the IRTF. However, the OIR has stated that there are approximately 1,000,000 title insurance policies written each year.[21] Given the approximate amount of 1,000,000 title insurance policies written each year, and the current $3.28 surcharge which began in September of 2014, the surcharge will generate approximately $3,280,000 per year. Total assessments to date equal $2,536,348. These figures lead to an approximate amount of excess surcharges of $743,652 that could soon be deposited into the IRTF. The bill would reduce this expected revenue to the IRTF by redirecting the funds into an excess surcharge account retained by the DFS, as receiver, to exclusively service the needs of insolvent title insurer estates, potential estates, and title insurers that have yet to recover their assessment payments. This excess surcharge account will maintain the funds until there are either no active title insurer receiverships for twelve consecutive months, or there are no payable claims for 60 consecutive months, at which time the excess surcharge funds will be deposited into the IRTF within the DFS.

2. Expenditures:

[21] Email correspondence with the Office of Insurance Regulation (March 12, 2015) on file with the Government Operations Appropriations Subcommittee.

The bill potentially has a positive impact on state government expenditures to the extent that the state is a purchaser of title insurance and the value and term of surcharges will be minimized as a result of this legislation.

A. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   The bill potentially has a positive impact on local government expenditures to the extent that they are purchasers of title insurance and the value and term of surcharges will be minimized as a result of this legislation.

B. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill is expected to have an indeterminate but positive impact on the private sector. It will minimize the value of assessments and value and duration of surcharges to recover assessments that fund the claims and expenses of insolvent title insurers.

C. FISCAL COMMENTS:

1. The bill authorizes the receiver to expend excess surcharges remitted under the statute and bill for purposes specified by the bill. This includes distributing funds to title insurers that are not claimants to receivership estates. These expenditures are outside of and are not the asset of any insolvent estate. It is unclear if this activity is subject court order, or solely within the discretion of the receiver to expend.