

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

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

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: CS/CS/SB 714

INTRODUCER: Judiciary Committee; Banking and Insurance Committee; and Senators Brandes and Bracy

SUBJECT: Insurance

DATE: April 3, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Matiyow</u>	<u>Knudson</u>	<u>BI</u>	<u>Fav/CS</u>
2.	<u>Stallard</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 714 amends several insurance-related statutes. More particularly, the bill:

- Requires the Florida Hurricane Catastrophe Fund (FHCF) to reimburse a covered insurer's loss adjustment expenses at 10 percent of the insurer's loss reimbursement, instead of 5 percent as under current law.
- Authorizes insurers to transfer title of totaled motor vehicles or mobile homes to the Department of Highway Safety and Motor Vehicles electronically, as well as through regular mail or other "commercially available delivery service."
- Provides that workers compensation insurance applicants and their agents are no longer required to have their sworn statements notarized as currently required by rule of the Office of Insurance Regulation (OIR).
- Reduces the penalty for filing an application for workers compensation insurance that contains false, misleading, or incomplete information provided for the purpose of avoiding or reducing premiums from a second degree felony to a third degree felony.
- Gives a liability insurer who defends an insured the right to compel the sharing of defense costs by another insurer who also owes a duty to defend the insured on the same claim.
- Prohibits a pre-suit notice for an action brought under s. 624.155, F.S., which relates to bad faith claims and other causes of action against an insurer, from being filed within 60 days after the appraisal process outlined in an insurance contract is invoked.

- Deletes a provision allowing the Department of Financial Services (DFS) to return a pre-suit notice for a bad faith action under s. 624.155, F.S., if the notice lacks specific, required information.
- Provides that a foreign or alien insurer does not need to meet one of the requirements for operating in this state if the OIR is satisfied that its operation in this state is in the best interest of the state and its policyholders.
- Exempts health maintenance organizations and prepaid limited health service organizations (HMO) from having their risk-based capital determined in accordance with the formula set forth in the risk-based capital instructions, unless they also operate in another state.
- Authorizes a surplus lines agent or a retail agent who is servicing a surplus lines policy to charge a reasonable per-policy fee.
- Allows an insurer to offer and give insureds goods or services of any value for the purposes of loss control or loss mitigation related to covered risks. Currently it is an unfair insurance trade practice to provide items or services to an insured valued at more than \$100 per year.
- Allows a property, casualty, or surety insurer to offer a premium discount for a policy if another policy has been purchased from a different insurer that:
 - Has a joint marketing arrangement with the insurer offering the discount;
 - Issued the policy pursuant to the Citizens clearinghouse program if the same agent is servicing both policies; or
 - Has its policy serviced the same agent who is servicing the discounted policy.
- Requires a premium discount offered by a property, casualty, or surety insurer to be actuarially sound.
- Provides an insurer that is asserting a coverage defense more mailing options for sending the required notices.
- Requires a life insurer to provide a notice of lapse to the agent servicing a life insurance policy 21 days prior to the effective date of the lapse unless the:
 - Insurer provides an online method for the agent to identify lapsing policies;
 - Insurer has no record of the agent servicing the policy;
 - Agent is employed by the insurer or its affiliate; or
 - Insurer maintains a procedure that allows an agent to independently determine whether the notice of lapse has been sent to the insured.
- Requires a property insurer to notify a policyholder of its right to participate in mediation at the time of issuance and renewal or when the policyholder files a claim.
- Requires an insurer to collect an amount equal to at least one month's premium, instead 2 month's premium, before issuing a private passenger motor vehicle policy.

The effective date of the bill is July 1, 2019, except as otherwise noted in the bill.

II. Present Situation:

The Florida Hurricane Catastrophe Fund (FHCF)

The FHCF is a tax-exempt¹ fund created in 1993² after Hurricane Andrew³ as a form of mandatory reinsurance for residential property insurers. The FHCF is administered by the State Board of Administration (SBA)⁴ and is a tax-exempt source of reimbursement to property insurers for a selected percentage (45, 75, or 90 percent)⁵ of hurricane losses above the insurer's retention (deductible). The FHCF provides insurers an additional source of reinsurance that is less expensive than what is available in the private market, enabling insurers to generally write more residential property insurance in the state than would otherwise be written. Because of the low cost of coverage from the FHCF, the fund acts to lower residential property insurance premiums for consumers.

FHCF Mandatory Coverage

All insurers admitted to do business in this state writing residential property insurance that includes wind coverage must buy reimbursement coverage (reinsurance) on their residential property exposure through the FHCF.⁶ The FHCF is authorized by statute to sell \$17 billion of mandatory layer coverage.⁷ Each insurer that purchases coverage may receive up to its proportional share of the \$17 billion mandatory layer of coverage based upon the insurer's share of the actual premium paid for the contract year, multiplied by the claims paying capacity of the fund. Each insurer may select a reimbursement contract wherein the FHCF promises to reimburse the insurer for 45 percent, 75 percent, or 90 percent of covered losses, plus 5 percent⁸ of the reimbursed losses for loss adjustment expenses.⁹

FHCF Premiums

The FHCF must charge insurers the actuarially indicated premium¹⁰ for the coverage provided, based on hurricane loss projection models found acceptable by the Florida Commission on Hurricane Loss Projection Methodology.¹¹ The actuarially indicated premium is an amount that is adequate to pay current and future obligations and expenses of the fund. In practice, each insurer pays the FHCF annual reimbursement premiums that are proportionate to each insurer's share of the FHCF's risk exposure. The cost of FHCF coverage is generally lower than the cost of private reinsurance because the fund is a tax-exempt non-profit corporation and does not

¹ Section 215.555(1)(f), F.S.

² Ch. 93-409, Laws of Fla.

³ Ed Rappaport, *Preliminary Report, Hurricane Andrew* (updated Dec. 10, 1993; addendum Feb. 7, 2005), <https://www.nhc.noaa.gov/1992andrew.html>.

⁴ State Board of Administration of Florida, *About the SBA*, <https://www.sbafla.com/fsb/> (last visited March 27, 2019).

⁵ Section. 215.555(2)(e), F.S.

⁶ *See* s. 215.555(4)(a), F.S.

⁷ Section 215.555(4)(c)1., F.S.

⁸ Section 215.555(4)(b), F.S.

⁹ Loss adjustment expenses are costs incurred by insurers when investigating, adjusting, and processing a claim.

¹⁰ Section 215.555(2)(a), F.S.

¹¹ *See, Florida Commission on Hurricane Loss Methodology*, <https://www.sbafla.com/method/> (last visited March 29, 2019).

charge a risk load as it relates to overhead and operating expenses incurred by other private insurers.¹²

FHCF Bonding and Assessment Authority

When the moneys in the FHCF are or will be insufficient to cover losses, the law¹³ authorizes the FHCF to issue revenue bonds funded by emergency assessments on all lines of insurance except medical malpractice and workers compensation.¹⁴ Emergency assessments may be levied up to 6 percent of premium for losses attributable to any one contract year, and up to 10 percent of premium for aggregate losses from multiple years. The FHCF's broad-based assessment authority is one of the reasons the FHCF was able to obtain an exemption from federal taxation from the Internal Revenue Service as an integral part of state government.¹⁵

Transfer of Title of Totaled Motor Vehicle or Mobile Home by Insurer to the Department of Highway Safety and Motor Vehicles (DHSMV)

When an insurance company pays money as compensation for the total loss of a motor vehicle or mobile home must obtain the certificate of title and forward it to the DHSMV for processing.¹⁶

Effective July 1, 2023, if the insurance company is unable to obtain a properly assigned certificate of title for the owner or lienholder, then the company may receive a salvage certificate of title or certificate of destruction from the DHSMV.¹⁷ However, the company may only receive this if the motor vehicle or mobile home does not carry an electronic lien on the title and the insurance company has:

- Obtained the release of all liens on the motor vehicle or mobile home;
- Provided proof of payment of the total loss claim; and
- Provided an affidavit on letterhead signed by the insurance company or its authorized agent stating the attempts made to obtain the title from the owner or lienholder and stating that all attempts are to no avail.¹⁸

Right of Contribution

A person or entity often has two or more insurance policies covering the same type of claims. For example, a person may have automobile insurance that covers him or her for liability arising from an accident in which he or she was at fault. This person may also have an “umbrella policy,” which could be issued by a different insurer, and that would apply above the policy

¹² State Board of Administration of Florida, Florida Hurricane Catastrophe Fund, *2016 Annual Report*, https://www.sbafla.com/fhcf/Portals/FHCF/Content/Reports/Annual/20170606_FHCF_2016_AnnualReport_A.pdf?ver=2017-07-06-085215-943 (last visited March 29, 2019).

¹³ Section 215.555(6), F.S.

¹⁴ Section 215.555(6)(b), F.S.

¹⁵ The U.S. Internal Revenue Service has, by a Private Letter Ruling, authorized the FHCF to issue tax-exempt bonds. The initial ruling was granted on March 27, 1998, for 5 years until June 30, 2003. On May 28, 2008, the Internal Revenue Service issued a private letter ruling holding that the prior exemption, which was to expire on June 30, 2008, could continue to be relied upon on a permanent basis (on file with the Committee on Banking and Insurance).

¹⁶ Section 319.30(3)(b), F.S.

¹⁷ Section 319.30(3)(b)1., F.S.

¹⁸ *Id.*

limits of the automobile policy.¹⁹ If the person is at fault in an automobile accident and is sued, and only one insurer pays to defend the insured in the lawsuit, the insurer has no right to force the other insurer to cover the costs of defense; in other words, the insurer has no “right of contribution” from the other insurer.²⁰

Motorist Modernization

According to the DHSMV, the Motorist Modernization initiative

is a multi-year phased plan for re-engineering the Department of Highway Safety and Motor Vehicles’ driver license and motor vehicle systems to create efficiencies in the department’s work processes, enhance safety features for law enforcement agencies and streamline interactivity for customers now and into the future. When complete, the initiative will modernize driver license and vehicle registration systems to serve Florida’s growing population, without growing government. Customers may experience shorter wait times at local driver license and motor vehicle service centers and will gain access to additional online options.²¹

Workers Compensation Insurance Sworn Statements

Employers who apply for workers compensation insurance coverage are required to file applications in a form prescribed by the Financial Services Commission. Submission of an application that contains false, misleading, or incomplete information provided with the purpose of avoiding or reducing the amount of premiums for workers’ compensation coverage is a felony of the second degree.²²

The Financial Services Commission is allowed to adopt rules regarding the submission of such applications. The rules require applications to include information on the employer, the type of business, past and prospective payroll, estimated revenue, previous workers’ compensation experience, employee classification, employee names, and any other information necessary to enable a carrier to accurately underwrite the applicant. The application must contain a sworn statement by the employer attesting to the accuracy of the information submitted. The application must also contain a sworn statement by the agent attesting that the agent explained to the employer or officer the classification codes that are used for premium calculations. Rule 69O-189.003, F.A.C., promulgated by the Financial Services Commission, requires that the sworn statements be notarized.

¹⁹ Investopedia, *Umbrella Insurance Policy*, <https://www.investopedia.com/terms/u/umbrella-insurance-policy.asp> (last visited April 2, 2019).

²⁰ See, e.g., *Continental Cas. Co. v. United Pacific Ins. Co.*, 637 So. 2d 270 (Fla. 4th DCA 1994).

²¹ Florida Department of Highway Safety and Motor Vehicles, *Motorist Modernization*, <https://www.flhsmv.gov/motorist-modernization/> (last visited April 1, 2019). The Motorist Modernization initiative is funded by a nonrecurring appropriation provided in ch. 2018-9, Laws of Fla.

²² Such a felony is punishable as provided in s. 775.082, s. 775.083, or s. 775.084, F.S.

Civil Remedies Against Insurers

Insurance and Insurer Obligations

Insurance is a contract, commonly referred to as a “policy,” under which, for stipulated consideration called a “premium,” one party, the insurer, undertakes to compensate the other, the insured, for loss on a specified subject from specified perils. Florida residents often obtain property insurance and liability insurance. Property insurance protects individuals from the loss of or damage to property and, in some instances, personal liability pertaining to the property. One of the common lines of insurance in this category is homeowner’s insurance. Automobile liability insurance²³ covers suits against the insured for damages such as injury or death to another driver or passenger, as well as property damage. It is insurance for those damages for which the driver can be held liable due to the operation of the automobile.

A liability insurer generally owes two major contractual duties to its insured in exchange for premium payments—the duty to indemnify and the duty to defend.²⁴ The duty to indemnify refers to the insurer’s obligation to issue payment to the insured or a beneficiary on a valid claim.²⁵ The duty to defend refers to the insurer’s duty to provide a defense for the insured in court against a third party with respect to a claim within the scope of the insurance contract.²⁶

Statutory and Common Law Bad Faith

Common Law Bad Faith – “Third Party Claims”

As early as 1938, Florida courts recognized an additional duty that does not arise directly from the contract, the common law duty of good faith on the part of an insurer to the insured in negotiating settlements with third-party claimants.²⁷ Under a liability policy, the insured’s role is essentially limited to selecting the type and desired level of coverage and paying the corresponding premium.²⁸ As part of the contract, the insured surrenders to the insurer all control over the negotiations and decision making as to third-party claims.²⁹ The insured’s role is relegated to the obligation to cooperate with the insurer’s efforts to adjust the loss.³⁰ The insurer makes all the decisions with regard to third-party claims handling and thereby has the power to settle and foreclose an insured’s exposure to liability, or to refuse to settle and leave the insured exposed to liability in excess of the policy limits.³¹ As a result, “the relationship between the parties arising from the bodily injury liability provisions of the policy is fiduciary in nature, much akin to that of attorney and client,” because the insurer owes a duty to refrain from acting

²³ In Florida, every owner or operator of an automobile is required to maintain liability insurance to cover a minimum of \$10,000 in coverage for damage to another’s property in a crash. Additionally, every owner or registrant of an automobile is required to maintain personal injury protection, which covers medical expenses related to a car accident regardless of fault up to \$10,000. Sections 324.022 and 627.733, F.S.

²⁴ 16 Williston on Contracts s. 49:105 (4th ed.).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Auto. Mut. Indemnity Co. v. Shaw*, 184 So. 852 (Fla. 1938).

²⁸ Rutledge R. Liles, *Florida Insurance Bad Faith Law: Protecting Businesses and You*, 85 Fla. Bar. J. No. 3, p. 8 (March 2011).

²⁹ *Id.*

³⁰ *Id.*

³¹ *State Farm v. Laforet*, 658 So.2d 55, 58 (Fla. 1995).

solely on the basis of its own interests in the settlement of third-party claims.³² Accordingly, and because of this relationship, the insurer owes a duty to the insured to “exercise the utmost good faith and reasonable discretion in evaluating the claim” and negotiating for a settlement within the policy limits.³³ When the insurer fails to act in the best interests of the insured in settling a third-party claim, an injured insured is entitled to hold the insurer accountable for its “bad faith”³⁴ if a third party obtains a judgment against the insured in excess of his or her insurance coverage.³⁵ A third-party claim can be brought by the insured, having been held liable for judgment in excess of policy limits by the third-party claimant,³⁶ or it can be brought by the third party directly or through an assignment of the insured’s rights.³⁷

Statutory Bad Faith -- First- and Third-Party Claims

In 1982 the Legislature enacted s. 624.155, F.S., which provides that *any person* may bring a claim for “bad faith” against an insurer for “not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured with due regard for her or his interests,”³⁸ the same as the common law standard.³⁹ Section 624.155, F.S., codifies third-party claims for “bad faith,” but does not preempt the common law remedy.⁴⁰ Additionally, s. 624.155, F.S., recognizes first-party bad faith actions.

“There are three prerequisites to filing a statutory bad-faith claim: (1) determination of the insurer’s liability for coverage; (2) determination of the extent of the insured’s damages; and (3) the required notice must be filed under section 624.155(3)(a).”⁴¹

In order to bring a bad faith claim under the statute, a plaintiff must first give the insurer 60 days’ written notice of the alleged violation.⁴² The insurer has 60 days after the required notice is filed to pay the damages or correct the circumstances giving rise to the violation.⁴³ Because first-party claims are only statutory, that cause of action does not exist until the 60-day cure period provided in the statute expires without payment by the insurer.⁴⁴ However, because third-party claims exist both in statute and at common law, the insurer cannot guarantee avoidance of a third-party bad faith claim by curing within the statutory period.⁴⁵

³² *Baxter v. Royal Indem. Co.*, 285 So.2d 652, 655 (Fla. 1st DCA 1973), *cert. discharged*, 317 So.2d 725 (Fla. 1975).

³³ *Id.*

³⁴ Liles, *supra* note 6.

³⁵ *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So.2d 263, 265 (Fla. 5th DCA 1987).

³⁶ See *Powell v. Prudential Prop. and Cas. Ins. Co.*, 584 So.2d 12 (Fla. 3d DCA 1991).

³⁷ See *Thompson v. Commercial Union Ins. Co.* 250 So.2d 259 (Fla. 1971)(recognizing a direct third-party claim under the common law before the enactment of s. 624.155, F.S.); *State Farm Fire and Cas. Co. v. Zebrowski*, 706 So.2d 275 (Fla. 1997).

³⁸ Section 624.155(1)(b), F.S.

³⁹ Fla. Standard Jury Instr. 404.4 (Civil).

⁴⁰ Section 624.155(8), F.S.

⁴¹ *Landers v. State Farm Florida Ins. Co.*, 234 So. 3d 856, 859 (Fla. 5th DCA 2018) (*citing Cammarata v. State Farm Florida Ins. Co.*, 152 So.3d 606 (Fla. 4th DCA 2014)).

⁴² Section 624.155(3)(a), F.S.

⁴³ Section 624.155(3)(d), F.S.

⁴⁴ *Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.*, 753 So.2d 1278, 1284 (Fla. 2000).

⁴⁵ *Macola v. Gov. Employees Ins. Co.*, 953 So.2d 451, 458 (Fla. 2007) (holding that an insurer’s tender of the policy limits to an insured in response to the filing of a civil remedy notice, after the initiation of a lawsuit against the insured but before entry of an excess judgment, does not preclude a common law cause of action against the insurer for third-party bad faith).

“Acting Fairly” to Settle Third-Party Claims

In interpreting what it means for an insurer to act fairly toward its insured, Florida courts have held that when the insured’s liability is clear and an excess judgment is likely due to the extent of the resulting damage, the insurer has an affirmative duty to initiate settlement negotiations.⁴⁶ If a settlement is not reached, the insurer has the burden of showing that there was no realistic possibility of settlement within policy limits.⁴⁷ Failure to settle on its own does not mean that an insurer acts in bad faith.

The question of whether an insurer has acted in bad faith in handling claims against the insured is determined under the totality of the circumstances standard.⁴⁸ Each case is determined on its own facts and ordinarily the question of failure to act in good faith with due regard for the interests of the insured is for the jury.⁴⁹

In light of the heightened duty on the part of the insurer as a fiduciary, Florida courts focus on the actions of the insurer during the time when it was acting under a duty to the insured, not the actions of the claimant.⁵⁰

Property Insurance Appraisers and Umpires

Insurance companies often include an appraisal clause in property insurance policies.⁵¹ The appraisal clause provides a procedure to resolve disputes between the policyholder and the insurer concerning the value of a covered loss. The appraisal clause is used only to determine disputed values. An appraisal cannot be used to determine what is covered under an insurance policy. Coverage issues are litigated and determined by the courts.

The appraisal process *generally* works as follows:

- The insurance company and the policyholder each appoint an independent, disinterested appraiser.
- Each appraiser evaluates the loss independently.
- The appraisers negotiate and attempt to reach an agreed amount of the damages.
- If the appraisers agree as to the amount of the claim, the insurer pays the claim.
- If the appraisers cannot agree on the amount, they together choose a mutually acceptable umpire.
- Once the umpire has been chosen, the appraisers each present their loss assessment to the umpire.
- The umpire will subsequently provide a written decision to both appraisers. A decision agreed to by any two of the three will set the amount of the loss.

⁴⁶ See *Powell v. Prudential Property and Casualty Insurance Company*, 584 So.2d 12, 14 (Fla. 3d DCA 1991).

⁴⁷ *Id.*

⁴⁸ See *Berges v. Infinity Ins. Co.*, 896 So.2d 665, 680 (Fla. 2004).

⁴⁹ *Id.*

⁵⁰ *Id.* at 677.

⁵¹ *Citizens Property Insurance Corporation v. Mango Hill Condominium Association 12 Inc.*, 54 So.3d 578 (Fla. 3d DCA 2011) and *Intracoastal Ventures Corp. v. Safeco Ins. Co. of America*, 540 So.2d 162 (Fla. 3d DCA 1989), contain examples of appraisal clauses.

- The insurance company or the policyholder may challenge the umpire’s impartiality and disqualify a proposed umpire based on criteria set forth in statute.⁵²

Eligibility of a Foreign or Alien Insurer to Transact Insurance in Florida

“Foreign” and “alien” insurers, which are those that are not formed under the laws of this state,⁵³ may nonetheless transact insurance in Florida if they meet statutory criteria. Particularly, the insurer must meet the general requirements to transact insurance under the insurance code, and it must have operated satisfactorily for at least 3 years in its state or country of domicile. However, the Office of Insurance Regulation may waive the 3-year requirement if it:

- Has operated successfully and has capital and surplus of \$5 million;
- Is the wholly owned subsidiary of an insurer which is an authorized insurer in this state;
- Is the successor in interest through merger or consolidation of an authorized insurer; or
- Provides a product or service not readily available to the consumers of this state.

Risk-Based Capital for Insurers & Health Organizations

Risk-based capital (RBC) is a capital adequacy standard that represents the amount of required capital an insurer must maintain, based on the inherent risks in the insurer’s operations. It is determined by a formula that considers certain material risks depending on the type of insurer, and generates the regulatory minimum amount of capital that a company is required to maintain to avoid regulatory action. RBC raises a safety net for insurers, is uniform among states, and operates as a tripwire system to give state insurance regulators authority for timely corrective action.

In March 2006, the National Association of Insurance Commissioners (NAIC)⁵⁴ adopted revisions to the Risk-Based Capital for Insurers Model Act (#312), which provides that states must require both life and health and property and casualty insurers to submit RBC filings with their regulators. In 2010, the NAIC adopted a recommendation to make the Risk-Based Capital for Health Organizations (#315) Model Act an accreditation standard. This model act defines “health organization” to include Health Maintenance Organizations (HMO) and prepaid limited health service organizations (PLHSO). However, the model act permits insurance commissioners to exempt single-state HMOs and PLHSOs who meet specified criteria from the RBC requirements. Accordingly, effective January 1, 2015, it was mandatory for member states to require multi-state and non-exempt single-state HMOs and PLHSOs to submit risk-based capital filings in order to maintain accreditation.

In 2014, Florida adopted the RBC standard for multi-state⁵⁵ HMOs and PLHSOs.⁵⁶ However, Florida has neither extended the RBC requirements to single-state HMOs and PLHSO, nor adopted the exemption criteria permitted by the model act. Thus, life and health insurers,

⁵² See s. 627.70151, F.S.

⁵³ See s. 624.06(2)-(3), F.S.

⁵⁴ The NAIC is a voluntary association of insurance regulators from all 50 states. The NAIC coordinates regulation and examination of multistate insurers, provides a forum for addressing major insurance issues, and promotes uniform model laws among the states. The NAIC accreditation is a certification that legal, financial and organizational standards are being fulfilled by the OIR.

⁵⁵ Defined to include those authorized in Florida and one or more other states or countries. Section 636.4085(1)(g), F.S.

⁵⁶ Ch. 2014-101, Laws of Fla.

property and casualty insurers, including property and casualty insurers that write accident and health insurance, only, and multi-state HMOs and PLHSOs are subject to the RBC requirements. Single-state HMOs and PLHSOs are not.

Surplus Lines Agents

Surplus lines agents are authorized to handle the placement of insurance coverages with surplus lines insurers.⁵⁷ Licensed resident general lines agents who meet the statutory criteria for licensure are eligible for licensure as a surplus lines agent.⁵⁸ Florida law requires a surplus lines agent to file a quarterly affidavit with the Florida Surplus Lines Service Office (FSLSO) to document all surplus lines insurance transacted in the quarter.⁵⁹ The affidavit also documents the efforts the agent made to place coverage with authorized insurers and the results of the efforts. To account for the administrative costs surplus lines agents incur to comply with reporting requirements, the agent may charge a reasonable per-policy fee, not to exceed \$35, for each policy exported.⁶⁰ This fee has not been adjusted since it was raised from \$25 to \$35 in 2001.⁶¹ Retail agents involved in the export of policies to surplus lines do not get to charge a fee.

Risk-Based Capital Requirements for Insurers

Health maintenance organizations and prepaid limited health service organizations must have their risk-based capital determined in accordance with the formula set forth in the risk-based capital instructions.⁶²

Unfair Insurance Trade Practices

The Unfair Insurance Trade Practices Act,⁶³ among other things, defines unfair methods of competition and unfair or deceptive acts in the business of insurance.⁶⁴ It provides an extensive list of prohibited methods and acts. Among these are prohibitions on certain inducements to the purchase of insurance, including rebates, dividends, stock, and contracts that promise to return profits to the prospective insurance purchaser. The law also describes prohibited discrimination. There are also many exceptions to the prohibitions defined by law.

Among the exceptions is authorization for insurers and their agents to offer and make gifts of charitable contributions, merchandise, goods, wares, store gift cards, gift certificates, event tickets, anti-fraud or loss mitigation services, and other items up to \$100 per calendar year to an

⁵⁷ Section 626.914(1), F.S.

⁵⁸ Section 626.927, F.S. Generally, to be licensed as a surplus lines agent, an individual must be: (1) deemed by the Department of Financial Services to have sufficient experience in the insurance business (2) have 1-year experience working for a licensed surplus lines agent or have completed 60 class hours in an approved surplus lines course, and (3) pass a written examination.

⁵⁹ FLORIDA SURPLUS LINES SERVICE OFFICE, *Quarterly Report Affidavit as Required by the Surplus Lines Law*, <https://www.fslso.com/docs/default-source/default-document-library/BusinessForms/QuarterlyAffidavit.pdf?sfvrsn=24> (last visited April 2, 2019).

⁶⁰ Section 626.916(4), F.S.

⁶¹ Ch. 2001-213, Laws of Fla.

⁶² Section 624.408(1)(g), (2)(d), F.S.

⁶³ Chapter 626, F.S., part IX.

⁶⁴ Section 626.9541, F.S.

insured, prospective insured, or any person for the purpose of advertising.⁶⁵ There are several similar limitations on advertising gifts under the Florida Insurance Code related to the advertising practices of title insurance agents, agencies and insurers, public adjusters, group and individual health benefit plans, and motor vehicle service agreement companies.⁶⁶

Coverage Defense Notices

A liability insurer may not assert a “coverage defense” unless it sends a notice, and in some cases two notices, to its insured by registered or certified mail.⁶⁷ A “coverage defense” means “a defense to coverage that otherwise exists,” that is, coverage that would exist if an insured had not failed to meet the terms of the policy.⁶⁸ Accordingly, a coverage defense is not a denial of coverage based, for example, on the fact that the policy expressly excludes coverage of the type demanded by the insured.

The first notice that an insurer must send is the “written notice of reservation of rights to assert coverage defense,” which must be sent within 30 days after the liability insurer knew or should have known of the coverage defense. Within 60 days of compliance with the first notice requirement or receipt of a summons and complaint naming the insured as a defendant, but not later than 30 days before trial, the insurer must do one of three things if it desires to assert coverage defense.⁶⁹ One of these options is sending the insured a written notice by certified or registered mail of the insured’s refusal to defend the insured.⁷⁰

Discounts for Purchase of Multiple Insurance Policies

Florida law allows an insurer to include a discount in the premium charged for any policy, contract, or certificate of insurance, because another policy, contract, or certificate of any type has been purchased by the insured from the same insurer or insurer group.⁷¹ Additionally, the discount is allowed when an agent is servicing both an open-market policy for the insured and one issued by Citizens or an insurer that removed the policy from Citizens through the takeout process.⁷²

⁶⁵ Rule 69B-186.010, F.A.C., Unlawful Inducements Related to Title Insurance Transactions, governs inducements related to title insurance, but exempts gifts within the value limitation of s. 626.9541(1)(m), F.S. However, federal law prohibits any fee, kickback or thing of value given for referral of real estate settlement services on mortgage loans related to federal programs. 12 U.S.C. s. 2607 (2017).

⁶⁶ Public adjusters, their apprentices, and anyone acting on behalf of the public adjuster are prohibited from giving gifts of merchandise valued in excess of \$25 as an inducement to contract. Section 626.854(10), F.S. A group or individual health benefit plan may provide merchandise without limitation in value as part of an advertisement for voluntary wellness or health improvement programs. Section 626.9541(4)(a), F.S. Motor vehicle service agreement companies are prohibited from giving gifts of merchandise in excess of \$25 to agreement holders, prospective agreement holders, or others for the purpose of advertising. Section 634.282(17), F.S.

⁶⁷ See s. 627.426(2), F.S.

⁶⁸ See *AIU Ins. Co. v. Block Marina Inv., Inc.*, 544 So. 2d 998 (Fla. 1989).

⁶⁹ Section 627.426(2)(b), F.S.

⁷⁰ *Id.*

⁷¹ Section 627.0655, F.S.

⁷² Florida law provides two methods to depopulate Citizens policies: 1) insurers may “takeout” policies currently issued by Citizens through offers of coverage, and 2) insurance applicants may be prevented from being issued a Citizens policy if an insurer offers the applicant coverage for no more than 15 percent more than the Citizens’ premium through a clearinghouse listing process prior to being issued a Citizens policy. Sections 627.351(6) and 627.3518, F.S.

Secondary Notice Prior to Life Insurance Policy Lapse

Though insurance coverage of various types may lapse for non-payment of premium, in the case of life insurance, the insured is entitled to a minimum 30-day grace period for non-payment.⁷³ A notice of lapse must be issued after expiration of the grace period and at least 21 days prior to the effective date of the lapse. If the policy provides a grace period greater than 51 days (the standard minimum 30-day grace period, plus the 21-day pre-lapse notice period), then the insurer must issue the notice of lapse at least 21 days prior to the expiration of the grace period.⁷⁴ In addition, the insured is entitled to name a second person to receive the notice of lapse on their behalf.

Property Insurance Claim Mediation

The Department of Financial Services (DFS) administers alternative dispute resolution programs for various types of insurance. DFS has mediation programs for property insurance⁷⁵ and automobile insurance⁷⁶ claims. DFS has a neutral evaluation program, similar to mediation, for sinkhole insurance claims.⁷⁷ DFS approves mediators used in the two mediation programs and certifies the neutral evaluators used in neutral evaluations for sinkhole insurance claims.⁷⁸

For property insurance claims⁷⁹ involving personal lines and commercial residential claims, only the policyholder, as a first-party claimant, or the insurer may request mediation under DFS' program.⁸⁰ This means that third parties cannot utilize the program; however, an insurer may elect to mediate with the third party. This is true even if the policyholder assigns their policy benefit rights to the third party.⁸¹ The insurer must notify the policyholder of the right to mediation under the program upon receipt of the claim.⁸² The mediation costs are generally the responsibility of the insurer.

Initial Payment Requirements for Motor Vehicle Insurance

An insurer or agent may issue a private passenger motor vehicle insurance policy or binder for the policy only after collecting an amount of money that is equal to 2 months' premiums.

⁷³ Section 627.453, F.S.

⁷⁴ Section 627.4555, F.S.

⁷⁵ Section 627.7015, F.S.

⁷⁶ Section 626.745, F.S.

⁷⁷ Section 627.7074, F.S.

⁷⁸ Sections 627.7015, 627.7074, and 627.745, F.S.

⁷⁹ An eligible claim is one that does not involve: suspected fraud; there is no coverage under the policy; one where the insurer reasonably believes the policyholder has made material misrepresentations relevant to the claim and request for payment has been denied for that reason; one for less than \$500 (unless agreed to by the parties); or, windstorm or hurricane loss if the required notice of claim was not issued in compliance with law. Section 627.7015(9), F.S.

⁸⁰ Policyholders may have the assistance of legal counsel during the mediation process. Litigants in the county and circuit court may be referred to the program. Commercial coverages, private passenger motor vehicle coverages, and liability coverages of property insurance policies are not eligible for the property insurance mediation program. Section 627.7015(1), F.S.

⁸¹ Section 627.7015(1), F.S.

⁸² Section 627.7015(2), F.S.

III. Effect of Proposed Changes:

Section 1. Names the act “Omnibus Prime.”

The Florida Hurricane Catastrophe Fund

Section 2. Amends s. 215.555, F.S., to provide that for contracts and rates effective on or after June 1, 2019, the loss adjustment expenses paid by the Florida Hurricane Catastrophe Fund are to increase to 10 percent of an insurer’s reimbursed losses. The current reimbursement rate for loss adjustment expenses is 5 percent of the reimbursed losses.

This section is effective upon becoming a law.

Transfer of Title of a Totaled Motor Vehicles or Mobile Home

Section 3. Amends s. 390.30, F.S. to allow insurers to electronically transfer title of totaled motor vehicles or mobile homes to the DHSMV. Insurers may also send them in the mail or through “another commercially available delivery service.”

The bill also provides a new effective date for a provision of current law that allows insurers who cannot obtain the title from the insured to receive a salvage certificate of title or certificate of destruction from the DHSMV. Under current law, the effective date of this provision is July 1, 2023. Under the bill, the effective date is July 1, 2020.

Finally, this section of the bill allows any signature required under these provisions to be electronic. However, the electronic signature must be in accordance with ch. 668, F.S., which states that an “electronic signature”

means any letters, characters, or symbols, manifested by electronic or similar means, executed or adopted by a party with an intent to authenticate a writing. A writing is electronically signed if an electronic signature is logically associated with such writing.⁸³

Workers Compensation Sworn Statements

Section 4. Amends s. 440.381, F.S., to provide that workers’ compensation insurance applicants and their agents are no longer required to have their sworn statements notarized as currently required by rule 69O-189.003, F.A.C.

Right of Contribution

Section 5. Creates 624.1055, F.S. to require insurers who cover and have a duty to defend the same insured to share the costs of defending an action against the insured. An insurer’s duty to cover costs includes only the costs incurred after the insurer gets notice of the action. The court shall allocate the costs using appropriate equitable principles, and a liability insurer entitled to contribution may file an action for contribution in a court of competent jurisdiction.

⁸³ Section 668.003(4), F.S.

Civil Remedies Against Insurers

Section 6. Amends s. 624.155, F.S., to prohibit the filing of a civil remedy notice for a bad faith action under s. 624.155, F.S., during the first 60 days of the appraisal process outlined in the insurance contract. The bill also repeals current law that allows the Department of Financial Services to return a civil remedy notice for lack of specificity.

Certificate of Authority

Section 7. Amends s. 624.404, F.S., to provide another exception to the prohibition on a foreign or alien insurer or exchange operating in this state if that insurer or exchange has not operated satisfactorily for 3 years in its state or country of domicile. Under the bill, this 3-year requirement is waived if the insurer or exchange:

Demonstrates to the satisfaction of the [Office of Insurance Regulation] that its authorization to transact insurance in this state is in the best interest of this state and its policyholders.

Risk-Based Capital Requirements for Insurers

Section 8. Amends s. 624.4085, F.S., to exempt health maintenance organizations and prepaid limited health service organizations (HMO) from having their risk-based capital determined in accordance with the formula set forth in the risk-based capital instructions. However, an HMO or prepaid limited health services organization must have its risk-based capital determined in accordance with the formula if it also operates in another state.

Reasonable Per-Policy Fees for Placement or Export of Surplus Lines Policy

Section 9. Amends s. 626.916, F.S., to remove the \$35 limit on the reasonable per-policy fee that a filing surplus lines agent may charge for each policy certified for export. The bill also requires the per-policy fee to be itemized separately to the customer before purchase and enumerated in the policy. The bill also authorizes a retail agent to charge a reasonable per-policy fee for placement of a surplus lines policy, and requires the fee to be itemized to the customer.

Unfair Insurance Trade Practices

Section 10. Amends s. 626.9541(5), F.S., to allow insurers to offer and give insureds goods or services of any value for the purposes of loss control or loss mitigation related to covered risks. Currently it is an unfair insurance trade practice to provide items or services to an insured valued at more than \$100 per year.

Discounts for Purchase of Multiple Insurance Policies

Section 11. Amends s. 627.0655, F.S., to allow a property, casualty, or surety insurer to offer an actuarially sound premium discount for a policy if another policy has been purchased from a different insurer that:

- Has a joint marketing arrangement with the insurer offering the discount; or

- Issued the policy pursuant to the Citizens clearinghouse program if the same agent is servicing both policies.

A property, casualty, or surety insurer may also offer an actuarially sound premium discount based on the fact that another insurer's policy, contract, or certificate of any type is serviced by an insurance agent who is servicing both policies.

Currently, s. 627.0655, F.S., does not expressly require these discounts to be actuarially sound.

Coverage Defense Letter

Section 12. Amends s. 627.426, F.S., to add new options for an insurer's sending of the required coverage-defense notices. In addition to sending these notices via certified or registered mail, as under current law, an insurer may instead send them by "United States postal proof of mailing" or other mailing using the Intelligent Mail barcode or other similar tracking method used or approved by the United States Postal Service.

Secondary Notice Prior to Life Insurance Policy Lapse

Section 13. Amends s. 627.4555, F.S., to require a life insurer to provide a notice of lapse to the agent servicing a life insurance policy 21 days prior to the effective date of the lapse. However, the insurer is not required to issue the notice to the agent servicing the life insurance policy if the:

- Insurer provides an online method for the agent to identify lapsing policies;
- Insurer maintains a procedure that allows an agent to independently determine whether the notice of lapse has been sent to the insured;
- Insurer has no record of the agent servicing the policy; or
- Agent is employed by the insurer or its affiliate. Receipt of the notice does not make the agent responsible for any lapse.

Property Insurance Claim Mediation

Section 14. Amends s. 627.7015, F.S., to provide property insurers an additional option for giving a policyholder notice that the policyholder may elect to participate in mediation of a disputed claim. Under current law, this notice must be given at the time a first-party claim is filed. Under the bill, an insurer may instead provide the notice "at the time of issuance and renewal of a policy."

Motor Vehicle Insurance Initial Payments

Section 15. Amends s. 627.7295, F.S., to permit an insurer to issue a private passenger motor vehicle policy after receiving an amount equal to at least 1 month's premium instead of an amount equal to 2 months' premiums, as under current law.

Effective Date

Section 17. States that except as otherwise expressly provided in the bill, the effective date of the bill is July 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

This bill does not require counties or municipalities to spend funds or limit their authority to raise revenue or receive state-shared revenues as specified in Article VII, s. 18 of the Florida Constitution.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

The bill creates another exception to the requirement that a foreign insurer have operated satisfactorily for at least 3 years in its state or country of domicile in order to receive a certificate of authority to operate in this state. Under the exception, a foreign insurer may receive a certificate of authority if it: “Demonstrates to the satisfaction of the [Office of Insurance Regulation] that its authorization to transact insurance in this state is in the best interest of this state and its policyholders.”

This broad grant of discretion to OIR raises the issue of the nondelegation doctrine of the Florida Constitution. Under this doctrine, the Legislature “may not delegate the power to enact a law or the right to exercise unrestricted discretion in applying the law.”⁸⁴ Instead, “statutes granting power to the executive branch ‘must clearly announce adequate standards to guide ... in the execution of the powers delegated. The statute must so clearly define the power delegated that the [executive] is precluded from acting through whim, showing favoritism, or exercising unbridled discretion.’”⁸⁵

Accordingly, to avoid the potential for violating the nondelegation doctrine, the Legislature may wish to amend the bill to give OIR additional guidance or standards for

⁸⁴ *Sloban v. Florida Bd. of Pharmacy*, 892 So. 2d 26, 30 (Fla. 1st DCA 2008) (quoting *Sims v. State*, 754 So.2d 657, 668 (2000)).

⁸⁵ *Id.* at 30 (quoting *Fla. Dep’t of State, Div. of Elections v. Martin*, 916 So.2d 763, 770 (Fla. 2005) (quoting *Lewis v. Bank of Pasco County*, 346 So.2d 53, 55–56 (Fla.1976)).

use in determining whether a foreign insurer should be excepted from requirements to have prior satisfactory operations in its state or country of domicile.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Increasing the amount of reimbursement for loss adjustment expense from the Florida Hurricane Catastrophe Fund should have a positive impact for insurers as some insurers obtain private market reinsurance to cover loss adjustment expenses that often cost more than FHCF premiums. Increasing the amount of loss adjustment expenses covered by the FHCF, however, could result in drawing down the fund quicker, and increasing the risk of assessments being needed. If assessments are needed they would be levied to all lines of insurance excluding medical malpractice and workers compensation.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

Section 14 regarding notice for mediation does not appear to require the notice to be sent when a claim is denied. Mediation is available for most reasons for denial; some of the exceptions are suspected fraud, no coverage under the policy, or material misrepresentation by the policyholder.⁸⁶

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 215.555, 319.30, 440.381, 624.1055, 624.155, 624.404, 624.4085, 626.916, 626.9541, 627.0655, 627.426, 627.4555, 627.7015, 627.7295, and 921.0022.

IX. Additional Information:

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

CS/CS by Judiciary on April 1, 2019:

The committee substitute:

⁸⁶ Section 627.7015(9), F.S.

- Provides that the Florida Hurricane Catastrophe Fund must reimburse the loss adjustment expenses of an insurer at 10 percent of the insurer's reimbursed losses. In the underlying bill, the loss adjustment reimbursement percentage was 15 percent of reimbursed losses or the percentage created by the Financial Services Commission, whichever is less.
- Allows insurers to transfer title of totaled motor vehicles or mobile homes to the DHSMV electronically, as well as through regular mail or "another commercially available delivery service."
- Reduces the penalty for filing an application for workers compensation insurance that contains false, misleading, or incomplete information provided for the purpose of avoiding or reducing premiums from a second degree felony to a third degree felony.
- Gives a liability insurer who defends an insured the right to compel the sharing of defense costs by another insurer who also owes a duty to defend the insured on the same claim.
- Requires a premium discount offered by a property, casualty, or surety insurer to be actuarially sound.
- Provides that a foreign or alien insurer or exchange does not need to meet one of the requirements for operating in this state if the OIR is satisfied that its operation in this state is in the best interest of the state and its policyholders.
- Exempts health maintenance organizations and prepaid limited health service organizations (HMO) from having their risk-based capital determined in accordance with the formula set forth in the risk-based capital instructions, unless they also operate in another state.
- Authorizes a surplus lines agent or a retail agent who is servicing a surplus lines policy to charge a reasonable per-policy fee.
- Authorizes a property, casualty, or surety insurer to offer an actuarially sound premium discount based on the fact that a different insurer's policy, contract, or certificate of any type is serviced by an insurance agent who is servicing both policies.
- Provides more mailing options for an insurer that is asserting a coverage defense to send the required notices.
- Provides that a life insurer is not required to issue notice that a life insurance policy will lapse in 21 days to the agent servicing the life insurance policy if the insurer maintains a procedure that allows an agent to independently determine whether the notice of lapse has been sent to the insured.
- Requires a property insurer to notify a policyholder of its right to participate in mediation at the time of issuance and renewal or when the policyholder files a claim. In the underlying bill, the insurers could provide the notice when the policyholder filed a claim or when coverage is applied and payment is determined.
- Requires an insurer to collect an amount equal to at least one month's premium, instead 2 month's premium, before issuing a private passenger motor vehicle policy.

CS by Banking and Insurance on March 11, 2019:

The CS:

- Revises the reimbursement that insurers receive from the FHCF for loss adjustment expenses from 5 percent of losses to the lesser of 15 percent of losses or the uniform loss adjustment percentage established by rule.
- Deletes a requirement that workers compensation insurance applicants and their agents must have their sworn statements notarized.
- Prohibits filing during the first 60 days of the appraisal process outlined in the insurance contract a civil remedy notice for a bad faith action under s. 624.155, F.S.
- Repeals current law that allows the Department of Financial Services to return for lack of specificity a civil remedy notice.

B. Amendments:

None.