

**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.)

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Prepared By: The Professional Staff of the Committee on Banking and Insurance

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BILL: SB 1492

INTRODUCER: Senator Wright

SUBJECT: Consumer Protection

DATE: February 3, 2020

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Harmsen</u>	<u>McKay</u>	<u>CM</u>	<b>Favorable</b>
2.	<u>Knudson</u>	<u>Knudson</u>	<u>BI</u>	<b>Pre-Meeting</b>
3.	_____	_____	<u>RC</u>	_____

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**I. Summary:**

SB 1492 modifies provisions in several areas that are regulated by the Department of Financial Services (DFS), including:

- Removing a fee for the replacement of PINs for credit freezes implemented under the Keeping I.D. Safe Act;
- Strengthening authority for the DFS to request documents from licensed entities;
- Establishing a required licensure scheme for adjusting firms;
- Classifying the aiding and abetting of unlicensed activity by certain licensees as a third-degree felony;
- Prohibiting the use of “Medicaid” or “Medicare” in new insurance agency names;
- Requiring licensees regulated under ch. 626, F.S., to maintain the privacy of consumers’ personal financial or medical information;
- Extending telemarketing solicitation protections to Florida’s insurance consumers by prohibiting phone solicitation by an insurance licensee after 9 p.m., or before 8 a.m.;
- Ending the sale of industrial life insurance products;
- Increasing the possible suspension period for title insurance agent licensees from a 1-year period to a 2-year suspension period, thereby conforming to the permissible suspension period applicable to other insurance licensees;
- Extending the cooling-off period during which a consumer who entered into a contract with a property adjuster may cancel the contract without cause;
- Requiring that a specific disclosure is signed by any consumer whose policy will be exported into the surplus lines market;
- Expanding the definition of an unfair or deceptive trade practice to include the acts of initiating an insurance policy without a consumer’s consent and effectuating an insurance policy by sending an invoice to a mortgagee or escrow agent without a consumer’s consent;

- Amending the disclosure required by insurers who will use a consumer’s credit score to calculate a premium to include references to the DFS resources for financial literacy and consumer assistance;
- Creating a hurricane season notice, which requires insurance companies to deliver a copy of the Homeowner Claims Bill of Rights and a summary of the consumer’s hurricane coverages and deductibles to their consumers in advance of each hurricane season;
- Requiring insurers to provide additional information to their consumers during the claims handling process, e.g., the contact information of any adjuster assigned to the claim and the adjuster’s report;
- Instituting a requirement that information communicated to the insurance consumer during the claims handling process also be sent to the consumer’s agent of record;
- Updating the Homeowner Claims Bill of Rights to reflect additional duties imposed on insurers during the claims handling process;
- Prohibiting insurance policies sold in Florida after July 1, 2020, from including a forum selection clause that requires the consumer to pursue litigation, arbitration, or mediation outside of Florida;
- Removing the statutory requirement that an insured pay a \$100 deductible to receive payment on their claim through the Florida Insurance Guaranty Association;
- Consolidating the forms used by the DFS’ Division of Unclaimed Property; and
- Conforming cross-references.

## II. Present Situation:

The Department of Financial Services (DFS or Department) has broad duties, including licensure and regulation of those who transact insurance; insurance consumer assistance and protection; and holding and attempting to return unclaimed property to its rightful owner.<sup>1</sup>

The present situation for each relevant provision of the bill is discussed in the Effect of Proposed Changes section of this bill analysis, below.

## III. Effect of Proposed Changes:

### Credit Reports

A credit report is a record of a consumer’s credit history and other information about the consumer, including his or her name, address, social security number, employment information, date of birth, and court judgments.<sup>2</sup> Three major credit bureaus—Equifax, Experian, and TransUnion—compile and sell consumer credit reports. Lenders, insurers, utility and cell phone companies, employers, and others may obtain a consumer’s credit report for their use in

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<sup>1</sup> See, e.g., Department of Financial Services, *What DFS Can Do For You*, <https://www.myfloridacfo.com/division/CFO/DFS.htm> (last visited Jan. 27, 2020).

<sup>2</sup> 15 U.S. Code s. 1681 defines a “credit report” as any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, ... general reputation, [or] personal characteristics... which is used...for the purpose of...establishing the consumer’s eligibility for credit or employment purposes.... The Florida KIDS Act adopts this definition of a “credit report” in s. 501.0051(1)(a), F.S.

determining, e.g., whether to extend credit, set insurance rates, or employ the consumer.<sup>3</sup> A consumer may also review his or her credit report at no charge once every 12 months from each of the credit bureaus.

### ***Security Freezes and the Keeping I.D. Safe (KIDS) Act***

The Keeping I.D. Safe (KIDS) Act<sup>4</sup> allows a third party, such as a parent or guardian, to place a security freeze on a minor child's credit report, or credit score to prevent the information from being released without express authorization to a third party, such as an insurer. After its receipt of a security freeze request, a credit reporting agency must provide a unique personal identification number (PIN) to the minor child's representative; this PIN is required to remove the security freeze. While credit reporting agencies are prohibited from charging any fee to place or remove a security freeze, they may charge up to \$10 to reissue a PIN.<sup>5</sup>

**Section 1** amends s. 501.0051, F.S., to prohibit a credit reporting agency from charging any fee to reissue a PIN or provide a new unique PIN to a consumer.

### ***Insurer's Use of Credit Score***

Section 626.9741, F.S., regulates and limits insurer's use of credit reports and scores for underwriting and rating personal lines motor vehicle insurance and personal lines residential insurance policies for Florida consumers. Specifically, an insurer must inform a consumer that it will access his or her credit report when the consumer submits an application for coverage. If the insurer denies the consumer's application based on the consumer's credit report, it must also give the consumer a copy of the credit report it relied on with an explanation of the reasons it denied coverage.

The DFS currently offers financial literacy courses to help consumers make informed financial and insurance-related decisions.<sup>6</sup>

**Section 13** amends s. 626.9741, F.S., to require an insurer to include the following language in its notice that a consumer's credit report or score is being requested:

The Department of Financial Services offers free financial literacy programs to assist you in understanding how credit scores are calculated, what factors are considered, and how credit works. The Department's toll-free Insurance Consumer Helpline is available to assist you with insurance-related questions and inquiries. To learn more about the free financial literacy programs or for help with insurance, call 1-877-693-5236 or visit [www.MyFloridaCFO.com](http://www.MyFloridaCFO.com).

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<sup>3</sup> Board of Governors of the Federal Reserve System, *Credit Reports and Credit Scores: Consumer's Guide*, available at [https://www.federalreserve.gov/creditreports/pdf/credit\\_reports\\_scores\\_2.pdf](https://www.federalreserve.gov/creditreports/pdf/credit_reports_scores_2.pdf) (last visited Jan. 27, 2020).

<sup>4</sup> Section 501.0051, F.S.

<sup>5</sup> Section 501.0051(9), F.S.

<sup>6</sup> Florida Department of Financial Services, *Financial Literacy-Empowering You to Make Informed Financial Decisions*, <https://www.myfloridacfo.com/Division/Consumers/FinancialLiteracy.htm> (last visited Jan. 27, 2020).

## Division of Consumer Services

The Division of Consumer Services (Division) provides education, information, and assistance to consumers for all products or services regulated by the DFS or the Financial Services Commission.<sup>7</sup> The Division of Consumer Services' duties specifically include:

- Receiving consumer questions and complaints;
- Educating the public about insurance-related topics;
- Providing mediation to resolve disputes between a consumer and insurance company; and
- Serving as a conduit for referrals for further legal action by the DFS.<sup>8</sup>

Section 624.307(10)(b), F.S., permits the Division to impose an administrative penalty on a person who holds a license or certificate of authority from the Department if he or she fails to respond to the Division's request for information within 20 days. This has been limited by the Fifth Amendment privilege against self-incrimination. A licensed individual must produce those records that are required to be kept by law, but is not required to produce those not within the purview of statutes.<sup>9</sup> Conversely, a corporation has no privilege against self-incrimination, nor does a custodian of corporate records, even if the contents tend to incriminate him or her.<sup>10</sup>

**Section 2** amends s. 624.307(10)(b), F.S., to remove the penalty on individuals for the failure to respond to a Department inquiry, and to create a duty for an entity that is licensed or issued a certificate of authority by the DFS to respond to its written requests for information. This section also updates the duty by requiring the entity to provide any requested documents to the DFS.

## Communications between a Consumer and Insurer

Section 627.71031, F.S., provides base requirements for communications between an insurer and consumer who has notified the insurer of a possible claim. Generally, the residential property insurance company must respond to the consumer within 14 days to acknowledge the claim and provide necessary claim forms, instructions, and telephone contact information. The insurer is then required to commence an investigation within 10 days after it received proof of loss statements from the consumer. Lastly, the insurer is required to pay or deny a claim within 90 days after notice of the claim was made; if the insurer fails to make such a payment until after 90 days have passed, the payment bears interest due to the consumer. These duties generally constitute the consumer rights outlined in the Homeowner Claims Bill of Rights.<sup>11</sup>

**Section 18** amends s. 627.70131, F.S., to expand residential property insurer's and surplus lines insurer's duties to a consumer after he or she notifies the insurer of a possible claim. This section clarifies that a consumer's initial communication with an insurance company representative, not

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<sup>7</sup> Department of Financial Services, *Department of Financial Services Long Range Program Plan: Fiscal Years 2020-21 through 2024-25*, 15 (Sept. 30, 2019), available at <http://floridafiscalportal.state.fl.us/Document.aspx?ID=19566&DocType=PDF> (last visited Jan. 27, 2020). See also, Department of Financial Services, *Consumer Guides*, <https://www.myfloridacfo.com/Division/Consumers/understandingCoverage/Guides/Default.htm> (last visited Jan. 27, 2020).

<sup>8</sup> Section 624.307(10)(a), F.S.

<sup>9</sup> *Saviak v. Gunter*, 379 So. 2d 450 (Fla. Dist. Ct. App. 3d Dist. 1980).

<sup>10</sup> *Eller Media Co. v. Serrano*, 761 So. 2d 464 (Fla. Dist. Ct. App. 3d Dist. 2000); *State v. Wellington Precious Metals, Inc.*, 487 So. 2d 326 (Fla. Dist. Ct. App. 3d Dist. 1986).

<sup>11</sup> See further discussion of the Homeowner Claims Bill of Rights, *infra*.

just an agent, regarding his or her claim initiates the duties outlined in this section of law. This section also expands the application of these duties to surplus lines insurers and surplus lines insurance authorized under ss. 626.913-626.937, F.S.

The additional duties implemented by the bill include the insurer's communication (via electronic communication or mailing) to a claimant of:

- An adjuster's name, license number, and contact information, if the insurer's claim investigation involves a physical inspection of the claimant's property;
- The name, license number, and contact information of any subsequent adjusters assigned to the consumer's claim, which must be provided within 7 days after the change;
- An unedited copy of any adjuster's report that the insurer received, which must be provided within 7 days after the insurer received the report; and
- Specific notices when an insurer provides a preliminary or partial estimate or payment on a claim that the estimate may be revised, or the payment may be supplemented, based on ongoing evaluations.

Additionally, an insurer must establish processes to provide a consumer's agent of record with access to the above information communicated to the consumer (specifically regarding the adjuster's report and adjuster's contact information).

Lastly, this section clarifies several timeframes applied to the insurer's communications by updating terms to either "calendar days" or "business days."

### **The Homeowner Claims Bill of Rights**

The Homeowner Claims Bill of Rights (Bill of Rights) outlines consumers' rights and responsibilities as a homeowner's insurance policyholder during the insurance claims process.<sup>12</sup> An insurance company must provide a consumer with a copy of the Bill of Rights within 14 days of receiving any communication about a claim.<sup>13</sup> Florida law provides form language that the insurer must include in the Bill of Rights, which gives notice of the consumer's right to:<sup>14</sup>

- Receive written confirmation of a claim's coverage, denial, or continued investigation within 30 days of specific communication;
- Obtain full settlement payment, or partial payment on the undisputed portion of a claim, within 90 days;
- Enter mediation of a disputed claim or neutral evaluation of a claim relating to sinkhole damage; and
- Contact the Department of Financial Services for assistance.

The Bill of Rights also includes consumer advice for best practices after a loss has been incurred.

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<sup>12</sup> Florida Department of Financial Services, *Know Your Rights- Homeowner Claims Bill of Rights* (Dec. 2018), available at <https://www.myfloridacfo.com/Division/Consumers/understandingCoverage/Guides/documents/HOABillRights.pdf> (last visited Jan. 27, 2020).

<sup>13</sup> Section 627.70131, F.S.

<sup>14</sup> Section 627.7142, F.S. These consumer rights are partially based on the insurer's duties as outlined in s. 627.70131, F.S.

**Section 20** updates the Bill of Rights to better reflect the insurer's duties outlined in s. 627.70131, F.S. The Bill of Rights must now include notice that the consumer has the right to:

- Be notified of the name and contact information of any subsequent company adjuster assigned to his or her claim;<sup>15</sup> and
- Receive interest payments, which begin accruing when a consumer files a claim, at the time of payment of the full settlement amount or undisputed claim portion. A consumer is also due interest payments if the insurer fails to deny the claim within 90 calendar days after a claim is made.<sup>16</sup>

This section also clarifies that references to days are *calendar* days.

**Section 15** amends s. 627.421, F.S., to require insurers to deliver a copy of the Bill of Rights to all of their homeowners' insurance policyholders by either mail or e-mail between March 3 and April 2 of each year. This notice must also include a statement of the policyholder's hurricane coverage, including the applicable hurricane deductible, the coverages, and any exclusions.

### **Insurance Adjusters**

A public adjuster is hired and paid by the policyholder to act on his or her behalf in a claim the files against an insurance company. Public adjusters can represent a policyholder in any type of insurance claim, not just property insurance claims.<sup>17</sup>

### ***Adjusting Firms***

Current law authorizes, but does not require, licensure of adjusting firms.<sup>18</sup> According to a representative of the DFS, there are currently no licensed adjusting firms. An adjusting firm license must be renewed every three years and requires a \$60 application fee.<sup>19</sup> An adjusting firm license application must include:<sup>20</sup>

- The name and address of each of the firm's majority owners, partners, officers, and directors;
- The firm's name and principal business address; and
- Any branch office locations and the names under which they will operate.

Each adjusting firm location must have a designated primary adjuster who acts as a supervising manager and is accountable for misconduct that occurs at the firm location.<sup>21</sup>

Chapter 626 provides grounds for mandatory and discretionary denial, suspension, or revocation of an adjusting firm license.<sup>22</sup>

**Section 3** amends s. 626.112, F.S., to require all adjusting firms to obtain a license from the DFS to transact adjusting in the state. However, an individual who owns and operates an adjusting

<sup>15</sup> This duty is created by section 18 of this bill, which amends s. 627.70131, F.S. Section 18 of this bill also requires the initial adjuster to give the consumer his or her name, license number, and contact information.

<sup>16</sup> See s. 627.70131(5)(a), F.S.

<sup>17</sup> Section 626.854(1), F.S.

<sup>18</sup> Section 626.8696, F.S.

<sup>19</sup> Section 624.501(20), F.S.

<sup>20</sup> Section 626.8696, F.S.

<sup>21</sup> Section 626.8695, F.S.

<sup>22</sup> Section 626.8697, F.S.

firm, has a Florida adjuster license, and does not employ, appoint, or otherwise use the services of any other licensee, is not required to obtain an adjusting firm license. The adjusting firm licensure requirements instituted by this section are consistent with the requirements applicable to insurance agencies.

This section further specifies that a branch location is not required to be licensed provided that it:

- Operates under the same name and federal tax identification number of the licensed firm;
- Has a licensed primary adjuster who has been designated with the DFS; and
- Submits its address and telephone number to the DFS within 30 days after beginning to transact insurance.

This section also imposes a \$10,000 administrative penalty on adjusting firms that fail to be licensed as required by this section.

### ***Public Adjuster Contracts***

Current law and administrative rules provide numerous restrictions and parameters on activities of public adjusters, especially relating to solicitation of contracts and inducement to contract.<sup>23, 24</sup> As an additional consumer protection, Florida law grants a policyholder a short timeframe during which he or she may cancel a contract with an adjuster without cause, penalty, or obligation. This cooling-off period permits the policy holder to cancel the contract within 3 business days of execution of the contract with an adjuster, or when the insured or claimant notifies the insurer of the claim, whichever is later. However, the cooling-off period is extended to 5 business days from the date the contract was executed, if it was entered into during a state of emergency or during the 1-year period after the date of loss.

The adjuster must disclose in all of his or her contracts the consumer's right to cancel the contract, and the methods by which the consumer may send a cancellation.

**Section 10** amends s. 626.854, F.S., to increase the duration of the cooling-off period during which a consumer may cancel his or her contract with an adjuster. Generally, the bill increases the cooling-off period from 3 business days to 7 calendar days. However, for contracts signed during a state of emergency or during the 1-year period after the date of loss, the bill increases the cooling-off period to 30 calendar days.

### **Misleading Insurance Agency Names**

The DFS may withhold permission to operate under an agency name if the name is too similar to another already in use by a different agency; the name may mislead the public; or the name states or implies that the agency is an entity other than an insurance agency, such as an insurer, state or federal agency, or charitable organization.<sup>25</sup>

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<sup>23</sup> Section 626.854, F.S. Laws enacted in 2008 (ch. 2008-220, Laws of Fla.), in 2009 (ch. 2009-87, Laws of Fla.), 2011 (ch. 2011-39, Laws of Fla.), and 2017 (ch. 2017-147, Laws of Fla.), provided significant changes relating to public adjusters.

<sup>24</sup> Rule 69B-220.201(4) and (5), F.A.C.

<sup>25</sup> Section 626.602(1)-(3), F.S.

The Social Security Act prohibits any person from using the terms “Medicare” or “Medicaid” in an advertisement or other communication in a manner which the person knows, or should know, would convey the false impression that the communication is approved by the Centers for Medicare & Medicaid Services.<sup>26</sup>

There are currently 85 insurance agencies licensed in Florida whose agency names contain the words “Medicare,” or “Medicaid.”<sup>27</sup>

**Section 4** amends s. 626.602, F.S., to permit the DFS to disapprove an insurance agency’s proposed use of a name that includes the words “Medicare” or “Medicaid.” Insurance agencies that currently operate under such a name may continue to use the names, but if the license expires or is suspended or revoked, the agency may not be relicensed under that name.<sup>28</sup>

### **Administrative Penalties and Grounds to Refuse a License**

The Health Insurance Portability and Accountability Act of 1996 (HIPAA) is a federal law that protects individual’s health information from certain disclosures when it is held by health care providers and health insurance companies.<sup>29</sup> Additionally, s. 456.057, F.S., provides that patient records, when held by a healthcare professional, must not be disclosed without the consent of the patient or his or her legal representative. Neither HIPAA nor the state provision apply to insurance licensees.

The Florida Telemarketer Act, ss. 501.601-501.626, F.S., prohibits commercial telephone solicitations before 8 a.m. or after 9 p.m. However, insurers and their subsidiaries and affiliates are exempt from this law.<sup>30</sup> Similarly, the Federal Trade Commission’s Telemarketing Sales Rule prohibits telemarketing calls before 8 a.m., or after 9 p.m.<sup>31</sup>

Currently, Florida law prohibits public adjusters from soliciting an insured before 8 a.m. and after 8 p.m. on Monday through Saturday, and completely prohibits any solicitations on Sunday.<sup>32</sup>

**Section 5** amends s. 626.621, F.S., to add two bases for which the DFS may suspend or revoke the license of an insurance agent, adjuster, customer representative, service representative, or managing general agent, or refuse to issue a license to an applicant:

- Making a consumer’s or customer’s personal financial or medical information available or accessible to the public; and

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<sup>26</sup> 42 U.S. Code s.1320b-10(a)(1). Upheld by *United Seniors Ass’n Inc. v. SSA*, 423 F. 3d 397, 399 (4<sup>th</sup> Cir. 2005).

<sup>27</sup> Department of Financial Services, *Licensee Search*, <https://licenseesearch.fldfs.com/> (enter “Medicare” or “Medicaid” in “Agency/Firm Name field, then click “search”) (last visited Jan. 27, 2020).

<sup>28</sup> Insurance agency licenses are indefinite. Section 626.382, F.S.

<sup>29</sup> U.S. Department of Health and Human Services, *Your Health Information Privacy Rights*, available at [https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/consumers/consumer\\_rights.pdf](https://www.hhs.gov/sites/default/files/ocr/privacy/hipaa/understanding/consumers/consumer_rights.pdf) (last visited Jan. 27, 2020).

<sup>30</sup> Section 501.604(7), F.S.

<sup>31</sup> Federal Trade Commission, *The Telemarketing Sales Rule*, <https://www.consumer.ftc.gov/articles/0198-telemarketing-sales-rule> (last visited Jan. 27, 2020).

<sup>32</sup> Section 626.854(5), F.S.



- Initiating in-person or telephone solicitation with a prospective customer after 9 p.m. or before 8 a.m., unless the customer requests otherwise.

### **License Suspension for Title Agents and Title Agencies**

**Section 9** amends s. 626.8443, F.S., to increase a title agent or title agency's permitted suspension period from 1 year to 2 years. This conforms the suspension period to those applicable to insurance agents,<sup>33</sup> and bail bond agents.<sup>34</sup>

A suspended licensee may not engage in the transaction of business that requires a license. After the duration of the suspension, an individual or entity with a suspended license may request to have the license reinstated by the Department, rather than undergo the licensing process in the same manner as a first-time applicant, as is required after a license revocation.<sup>35</sup>

### **Unfair Insurance Trade Practices**

The Unfair Insurance Trade Practices Act<sup>36</sup> prohibits unfair methods of competition and unfair or deceptive acts in the business of insurance,<sup>37</sup> including:

- Misrepresenting the benefits, advantages, or terms of any insurance policy;
- Inducing the lapse or exchange of any insurance policy, generally so the agent can earn a commission on a replacement policy; and
- Providing more insurance coverage than a consumer requests or consents to, while also failing to inform the consumer that the additional coverage was optional ("sliding").<sup>38</sup>

A person who commits acts prohibited by the Unfair Insurance Trade Practices Act is generally subject to a fine of up to \$20,000 for nonwillful violations, and up to \$200,000 total for willful violations.<sup>39</sup> However, specific violations are subject to greater administrative penalties and are also punishable as criminal misdemeanors.<sup>40</sup>

Additionally, a person who willfully submits fraudulent signatures on an application or policy-related document commits a third-degree felony, which is also punishable by the assessment of administrative fines of no more than \$75,000 per violation.<sup>41</sup>

**Section 12** amends s. 626.9541, F.S., to expand the definition of sliding, a practice that violates the Unfair Insurance Trade Practices, to include:

- Initiating, effectuating, binding, or otherwise issuing an insurance policy without the prior informed consent of the person who owns the property that will be insured; and

<sup>33</sup> Section 626.641, F.S. *See also*, Rule 69B-231, Laws of Fla.

<sup>34</sup> Section 648.45, F.S. *See also*, Rule 69B-241, Laws of Fla.

<sup>35</sup> Section 626.641(2), F.S.

<sup>36</sup> Chapter 626, F.S., part IX, ss. 626.951-626.99, F.S.

<sup>37</sup> Section 626.9541, F.S.

<sup>38</sup> Section 626.9541(1)(z), F.S. *See also*, *Beckett v. Department of Financial Services*, 982 So. 2d 94 (Fla. 1<sup>st</sup> DCA).

<sup>39</sup> Each count of a nonwillful violation is limited to a fine of no more than \$5,000, and each count of a willful violation is limited to a fine of no more than \$20,000. Section 626.9521(2), F.S.

<sup>40</sup> *See, e.g.*, Section 626.9521(3)(a), F.S., which makes the offenses of twisting and churning, which must involve fraudulent conduct, punishable as a first degree misdemeanor.

<sup>41</sup> Section 626.9521(3)(b), F.S.

- Mailing, transmitting, or otherwise submitting an invoice for premium payment to a mortgagee or escrow agent in order to institute an insurance policy without the prior informed consent of the owner of the property that will be insured.

These new violations will be punishable as administrative violations under the general provisions of the Unfair Insurance Trade Practices Act. However, the underlying acts that give rise to those administrative violations may also give rise to charges under s. 626.9541(1)(ee), F.S., which prohibits the willful submission of fraudulent signatures on an application or policy-related document, and is punishable as a third-degree felony pursuant to s. 626.9521, F.S.

### **Criminal Penalties for Aiding and Abetting Unlicensed Insurance Activity**

**Section 3** adds a criminal penalty, applicable to any person who helps an unlicensed person transact insurance or engage in insurance activities in Florida. These violations are punishable as third-degree felonies.<sup>42</sup>

**Section 22** amends s. 648.30, F.S., to extend the third-degree felony penalty for unlicensed bail bond activity to those who are licensed under ch. 648, F.S., and who knowingly aid and abet an unlicensed person commit unlicensed bail bond activity,<sup>43</sup> in violation of s. 648.30, F.S.

### **Industrial Life Insurance**

Industrial life insurance is a form of life insurance in which the premiums are payable on a monthly or weekly basis. These policies usually have a face amount of less than \$5,000.<sup>44</sup> Only 38 of the 398 active life insurers maintain existing industrial life insurance policies, and no new industrial life insurance policies have been written in the last year.<sup>45</sup>

**Sections 6-8 and 17** end the sale of industrial life insurance in Florida by prohibiting life insurers from writing a new policy of industrial life insurance beginning July 1, 2020, and otherwise removing language that allows insurance companies to transact industrial life insurance policies. However, these sections do permit the continued collection of premiums on, and servicing of such policies that were written before July 1, 2020.

### **Surplus Lines Export Eligibility**

Surplus lines insurance refers to a category of insurance for which the admitted market is unable or unwilling to provide coverage.<sup>46</sup> There are three basic categories of surplus lines risks:

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<sup>42</sup> A third degree felony is punishable by up to five years imprisonment and a \$5,000 fine. Sections 775.082 and 775.083, F.S.

<sup>43</sup> Unlicensed bail bond activity violative of s. 648.30, F.S., generally consists of representing oneself as a Florida bail bond agent or attempting to detain or arrest an individual on a bond, without proper licensure.

<sup>44</sup> Section 627.502, F.S. *See also*, Department of Financial Services, *Life Insurance Overview: Types of Policies*, <https://www.myfloridacfo.com/Division/Consumers/UnderstandingCoverage/LifeInsuranceOverview.htm> (last visited Jan. 27, 2020).

<sup>45</sup> Florida Department of Financial Services, *SB 1492 Agency Analysis*, 3 (Jan. 15, 2020), (on file with the Senate Committee on Commerce and Tourism).

<sup>46</sup> The admitted market is comprised of insurance companies licensed to transact insurance in Florida. The administration of surplus lines insurance business is managed by the Florida Surplus Lines Service Office. Section 626.921, F.S. *See also*,

- Specialty risks that have unusual underwriting characteristics or underwriting characteristics that admitted insurers view as undesirable;
- Niche risks for which admitted carriers do not have a filed policy form or rate; and
- Capacity risks that are risks where an insured needs higher coverage limits than those that are available in the admitted market.

Surplus lines insurers are not “authorized” insurers as defined in the Florida Insurance Code,<sup>47</sup> which means they do not obtain a certificate of authority from the Office of Insurance Regulation (OIR) to transact insurance in Florida.<sup>48</sup> Rather, surplus lines insurers are “unauthorized” insurers,<sup>49</sup> but may transact surplus lines insurance if they are made eligible by the OIR.

An insurance agent<sup>50</sup> may “export,” or place a policy with an unauthorized insurer under the Surplus Lines Law, with the consent of the insurance applicant. Before an insurance agent can place insurance in the surplus lines market, the insurance agent must make a diligent effort to procure the desired coverage from admitted insurers.<sup>51</sup> A “diligent effort” requires a search for coverage that is ultimately denied by at least three authorized insurers in the admitted market. Additionally, the insurance agent must document the following before exporting the policy to the surplus lines market:<sup>52</sup>

- The premium rate for policies written by a surplus lines insurer cannot be less than the premium rate used by a majority of authorized insurers for the same coverage on similar risks;
- The policy exported cannot provide coverage or rates that are more favorable than those that are used by the majority of authorized insurers actually writing similar coverages on similar risks;
- The deductibles must be the same as those used by one or more authorized insurers, unless the coverage is for fire or windstorm; and
- For personal residential property risks,<sup>53</sup> the policyholder must be advised in writing that coverage may be available and less expensive from Citizens Property Insurance Corporation (Citizens).

Certain types of insurance, deemed “commercial risks,” including medical malpractice, travel, general liability, errors and omissions, and excess or umbrella insurance coverage, are exempt from the above diligent effort requirement. An insured for these commercial risks must sign a disclosure that provides, in substantially the following form:

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Florida Surplus Lines Service Office, *What is Surplus Lines Insurance?*, <https://www.fslso.com/AboutGroup/about/surplus-lines-insurance> (last visited Jan. 27, 2020).

<sup>47</sup> Section 626.914(2), F.S.

<sup>48</sup> Section 624.09(1), F.S.

<sup>49</sup> Section 624.09(2), F.S.

<sup>50</sup> Typically, the applicant’s usual insurance agent works with the surplus lines agent to arrange the placement, rather than the applicant working directly with the surplus lines agent. A surplus lines agent requires separate licensure than a traditional insurance agent, and is permitted to secure insurance coverages with unauthorized insurers whereas traditional insurance agents are not. *See* s. 626.914(1), F.S.

<sup>51</sup> Section 626.916(1)(a), F.S.

<sup>52</sup> Section 626.916(1), F.S.

<sup>53</sup> Personal residential policies include homeowners, mobile homeowners, dwelling fire, tenants, condominium unit owners, and similar policies.

You are agreeing to place coverage in the surplus lines market. Superior coverage may be available in the admitted market and at a lesser cost. Persons insured by surplus lines carriers are not protected under the Florida Insurance Guaranty Act with respect to any right of recovery for the obligation of an insolvent unlicensed insurer.<sup>54</sup>

**Section 11** amends s. 626.916, F.S., to extend the disclosure requirement found in s. 626.916(3)(b)3., F.S., to all insurance policies that are exported into the surplus lines market, rather than just commercial risks.

Additionally, the bill clarifies that the insureds who seek to export the commercial risks listed in s. 626.916(3)(b), F.S., must have signed the disclosure *prior to* the policy's export.

### **Forum Selection Clauses Prohibition**

A forum selection clause is a contractual provision in which the parties agree upon the venue for possible future litigation between them.<sup>55</sup> Generally, ch. 47, F.S., provides that civil actions must be brought in the Florida county where the defendant resides, where the cause accrued, or where the property in question is located.<sup>56</sup> If the defendant is an out-of-state (foreign) corporation, venue resides where the corporation has a representative, the action accrued, or where the property is located.<sup>57</sup> However, “a mandatory forum selection clause must be enforced unless it is shown to be unreasonable or unjust.”<sup>58</sup> In 2014, the Legislature codified case law on the matter, holding that a court could refuse to enforce a forum selection clause if it contravenes public policy, or is unjust and unreasonable.<sup>59</sup>

Several states, including Florida, have attempted to limit forum selection clauses in specific instances. Florida voids as contrary to public policy any contracts that require litigation against Florida contractors and related professions to be filed in non-Florida jurisdictions.<sup>60</sup>

**Section 19** creates s. 627.7031, F.S., which prohibits property insurers from including any clause in their property insurance policies sold to Florida consumers after July 1, 2020, that requires an insured to pursue litigation, arbitration, or mediation outside of Florida. This prohibition also applies to surplus lines insurers and any policies exported to a surplus lines insurer pursuant to ss. 626.913-937, F.S.

### **Florida Insurance Guaranty Association**

The Florida Insurance Guaranty Association (FIGA) is a not-for-profit corporation created by statute that steps into the shoes of insolvent insurers to timely pay certain property and casualty

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<sup>54</sup> Section 626.916(3)(b), F.S.

<sup>55</sup> Black's Law Dictionary (11<sup>th</sup> ed. 2019).

<sup>56</sup> Section 47.011, F.S.

<sup>57</sup> Section 47.051, F.S.

<sup>58</sup> *Illinois Union Ins. Co. v. Co-Free, Inc.*, 128 So.3d 820, 821 (Fla. 1<sup>st</sup> DCA 2014) (citing *Land O'Sun Mgmt. Corp. v. Commerce and Indus. Ins. Co.*, 961 So. 2d 1078, 1080 (Fla 1<sup>st</sup> DCA 2007)). Internal citations omitted.

<sup>59</sup> Section 61.0401, F.S. See also, *Manrique v. Fabbri*, 493 So. 2d 437 (Fla. 1986) and *Atl. Marine Const. Co. v. U.S. Dist. Court for W. Dist. Of Texas*, 571 U.S. 49, 134 S. Ct. 568 (2013).

<sup>60</sup> Section 47.025, F.S.

claims<sup>61</sup> that would otherwise be left unpaid.<sup>62</sup> FIGA does not offer a replacement policy, and coverage offered by FIGA is generally limited to a \$300,000 payment. A consumer may receive additional FIGA coverage of up to \$200,000 for damages to their home's structure or the contents thereof.<sup>63</sup> Condominium and homeowner's association claims have a coverage cap of \$100,000 multiplied by the number of units in the association.<sup>64</sup> All claims filed with FIGA are subject to a \$100 deductible in addition to any deductible identified in the consumer's policy.<sup>65</sup>

**Section 21** amends s. 631.57, F.S., to remove the consumer's obligation to pay a \$100 deductible to FIGA in order to receive payment on their claim through FIGA. The consumer will still be obligated to pay their original insurer's deductible, however.

### **Division of Unclaimed Property**

The DFS administers the Florida Disposition of Unclaimed Property Act. Unclaimed property is a financial asset that is unclaimed or abandoned by its owner.<sup>66</sup> Unclaimed property may include savings and checking accounts, securities, insurance policy payments, refunds, security and utility deposits, and contents of safe deposit boxes.<sup>67</sup> The DFS Division of Unclaimed Property is responsible for receiving property, attempting to locate its rightful owners, returning the property or proceeds to them, and managing the Unclaimed Property Trust Fund.<sup>68</sup> There is no statute of limitations and individuals may claim their property at any time and at no cost.<sup>69</sup>

Florida law allows Florida-licensed private investigators, certified public accountants, and attorneys to serve as claimant's representatives who solicit unclaimed property owners or their heirs to help them recover their property for a fee.<sup>70</sup> There are currently over 350 claimant's representatives registered with the Department.<sup>71</sup> The claimant's representatives may not charge a fee in excess of 20 percent of the account's value, up to \$1,000 maximum per account, unless the claimant's representative discloses that the property is held by the Division of Unclaimed

<sup>61</sup> A "covered claim" is an unpaid claim, including one of unearned premiums, which arises out of, and is within the coverage, and not in excess of, the applicable limits of an insurance policy." Section 631.54, F.S.

<sup>62</sup> See generally, Part II, ch. 631, F.S., "Florida Insurance Guaranty Association Act." See also, Florida Insurance Guaranty Association, *Home*, <https://figafacts.com/> (last visited Jan. 27, 2020).

<sup>63</sup> Section 631.57(2), F.S.

<sup>64</sup> Section 631.57(3), F.S.

<sup>65</sup> Section 631.57(2), F.S., see also, Florida Insurance Guaranty Association, *Frequently Asked Questions: Are There Limits on the Amount that FIGA Will Pay?*, <https://figafacts.com/frequently-asked-questions/> (last visited Jan. 27, 2020).

<sup>66</sup> Florida Department of Financial Services, *Florida Treasure Hunt: Why Should I Search for Unclaimed Property?*, <https://www.fltreasurehunt.gov/UP-Web/sitePages/About.jsp> (last visited Jan. 27, 2020).

<sup>67</sup> Sections 717.104-717.116, F.S. See also, Department of Financial Services, *Florida Unclaimed Property*, <https://www.myfloridacfo.com/Division/UnclaimedProperty/> (last visited Jan. 27, 2020).

<sup>68</sup> Department of Financial Services, *Department of Financial Services Long Range Program Plan: Fiscal Years 2020-21 through 2024-25*, 14 (Sept. 30, 2019), available at <http://floridafiscalportal.state.fl.us/Document.aspx?ID=19566&DocType=PDF> (last visited Jan. 27, 2020).

<sup>69</sup> Section 717.124, F.S., provides the methods by which a person may claim his or her interest from the Division of Unclaimed Property. See also, Florida Department of Financial Services, *Florida Treasure Hunt: Search for and Claim Unclaimed Property*, <https://www.fltreasurehunt.gov/UP-Web/sitePages/FAQs.jsp> (last visited Jan. 27, 2020).

<sup>70</sup> Florida Department of Financial Services, *Florida Treasure Hunt: Have You Been Contacted About Unclaimed Property?* <https://fltreasurehunt.gov/Contacted-by-Unclaimed-Property.jsp> (last visited Jan. 27, 2020).

<sup>71</sup> Florida Department of Financial Services, SB 1492 Agency Analysis at 4 (Jan. 21, 2020) (on file with the Committee on Commerce and Tourism).

Property, and gives the Division's contact information, along with other pertinent information about the property.<sup>72</sup>

Alternatively, a Florida-licensed private investigator, certified public accountant, or attorney may offer to purchase the unclaimed property and pay the seller an agreed upon amount upfront.<sup>73</sup> In this case, the purchaser must pay the agreed upon percentage or amount within 30 days of the contract's execution by the seller, and must provide proof of that payment to the DFS with the claim.<sup>74</sup> The disclosure and contract requirements are substantially similar to the claimant's representative process, except that the seller's identity must be verified by submission of a copy of a valid driver's license, photo I.D., or notarized sworn statement which affirms the seller's identity, full name, and address. Submission of a social security number or taxpayer identification number are only required if that information is available.

Before a claimant's representative or unclaimed property purchaser may execute a power of attorney or purchase agreement, he or she must disclose the following in a separate document to the property owner, and obtain the owner's signed acknowledgement thereof:

- That the property is held by the Division of Unclaimed Property (and the mailing and internet address of the Division);
- Who remitted the property to the Division, and when that last point of contact occurred; and
- The category the property falls under (e.g., cash account, life insurance or annuity contract asset, utility deposit, wages, or contents of safe-deposit boxes).

The power of attorney or purchase agreement must include the:

- Value of the unclaimed property (or approximate value);
- Unclaimed property account number;
- Percentage value of the unclaimed property to be paid to the claimant, if applicable;
- Percentage value of the compensation to be made to the claimant's representative;
- Number of shares of stock, if applicable;
- Claimant's taxpayer identification number or social security number, address, and telephone number;
- Name and address to whom payment shall be made, if different than the claimant's name and address; and
- Claimant's representative's contact information, including his or her:
  - Professional license number,
  - Firm or employer's name, address, and telephone number; and
  - Name, address, and telephone number.

Additionally, the power of attorney or purchase agreement must be a separate document from the disclosure.

**Section 27** substantially amends s. 717.315, F.S., to replace the power of attorney and acquisition of unclaimed property forms used by claimant's representatives with the "Florida Uniform Unclaimed Property Recovery Agreement" (uniform recovery agreement) and the

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<sup>72</sup> Section 717.135(2), F.S.

<sup>73</sup> Section 717.1351, F.S.

<sup>74</sup> Section 717.1351(4), F.S.

“Florida Uniform Property Purchase Agreement” (uniform purchase agreement), respectively (uniform agreements, jointly). The bill prohibits a claimant’s representative from engaging with a claimant or seller to file a claim with the DFS by any means other than the uniform agreement forms and declares any agreement not authorized by s. 717.135, F.S., null and void.

The uniform agreements require substantially the same information as the power of attorney and disclosure or purchase agreement and disclosure, but combines the forms, and otherwise add the following information requirements:

- A statement of the total dollar amount that will be paid to the claimant’s representative, based on the fee or deduction percentage quoted;
- The total dollar amount the claimant will receive, after the above fees or deductions have been subtracted; and
- The claimant’s representative’s e-mail address.

The bill explicitly states that the uniform agreements may not contain language that either makes the contract irrevocable, or creates an assignment of unclaimed property held by the DFS. As an additional consumer protection, the bill clarifies that fees and costs may only be owed or paid pursuant to the uniform agreements and upon approval of the claim filed thereby (thus limiting the overall fees to 20 percent).

The bill allows the DFS to pay out the value of any account that was not claimed at the time that it approved another of the consumer’s claim, if no subsequent claim was filed.

Lastly, the bill directs the DFS to adopt rules to amend its forms to reflect the uniform agreements required disclosures.

**Section 28** repeals s. 717.1351, F.S., regarding acquisition of unclaimed property. This process is replaced by the newly created Florida Uniform Property Purchase Agreement, which is created by section 27 of this bill.

**Sections 23-26** make conforming changes to ss. 717.124, 717.12404, 717.1315, and 717.1322, F.S., respectively, to reflect the adoption of the uniform agreements.

### **Miscellaneous**

**Section 3** deletes unnecessary language from s. 626.112(7), F.S.

**Sections 14 and 15** update cross-references in ss. 626.9957 and 627.062, F.S., respectively.

**Section 29** provides that the bill takes effect upon becoming law.

## **IV. Constitutional Issues:**

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

The bill requires adjusting firms to become licensed, which subjects them to a \$60 application fee. To the extent the bill imposes a fee on adjusting firms while addressing other subjects, the bill may be unconstitutional as a violation the single-subject requirement for the imposition, authorization, or raising of a state tax or fee under article VII, section 19 of the Florida Constitution. Under that section, a “state tax or fee imposed, authorized, or raised under this section must be contained in a separate bill that contains no other subject.” A “fee” is defined by the Florida Constitution to mean “any charge or payment required by law, including any fee for service, fee or cost for licenses, and charge for service.”<sup>75</sup>

E. Other Constitutional Issues:

Section 5 may benefit from further definition of its terms. Agencies generally have wide discretion in interpreting statutes they administer, but “this discretion is somewhat more limited where the statute being interpreted authorizes sanctions or penalties against a person’s professional license.”<sup>76</sup> Statutes that provide for the revocation or suspension of a license to practice are deemed penal in nature and must be strictly construed, with any ambiguity interpreted in favor of the licensee.<sup>77</sup> However, if it is found that the law fails to give a person of ordinary intelligence fair notice of what constitutes forbidden conduct, it may be determined to be void for vagueness.<sup>78</sup>

The DFS’ restriction on engagement with a claimant or seller of unclaimed property may implicate an issue regarding restrictions of commercial speech. The Constitution accords a lesser protection to commercial speech than to other constitutionally protected expression.<sup>79</sup> In fact, the government may ban forms of commercial communication that are more likely to deceive the public than to inform it, but if commercial communication is not misleading or related to unlawful activity, the government’s power to restrict such communication must be supported by a substantial interest, and the limit must be in proportion to that interest.<sup>80</sup> This is generally expressed as a two-part test asking: (1) does

<sup>75</sup> FLA. CONST. art. VII, s. 19(d)(1)

<sup>76</sup> *Beckett v. Department of Financial Services*, 982 So.2d 94, 100 (Fla. 1<sup>st</sup> DCA 2008) (quoting *Elmariah v. Department of Professional Regulation, Board of Medicine*, 574 So.2d 164, 165 (Fla. 1<sup>st</sup> DCA 1990)).

<sup>77</sup> *Tuberville v. Department of Financial Services*, 248 So.3d 194, 196 (Fla 1<sup>st</sup> DCA 2018).

<sup>78</sup> *Accelerated Benefits Corp v. Department of Insurance*, 813 So.2d 117 (Fla 1<sup>st</sup> DCA 2002) (internal citations omitted).

<sup>79</sup> U.S. CONST., amends. I, XIV. *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 447 U.S. 557, 564 (1980).

<sup>80</sup> *Id.*



the restriction directly advance the state interest involved, and (2) could the governmental interest be served as well by a more limited restriction?

**V. Fiscal Impact Statement:**

**A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

Credit Bureaus will no longer be permitted to charge a fee to re-issue a PIN to consumers.

Consumers who seek to have their claims covered by FIGA will no longer be required to pay the \$100 deductible to FIGA.

Certain property adjusting businesses will be required to become licensed by the DFS and pay related application fees; those who fail to submit an application for licensure will be subject to administrative penalties.

Consumers may benefit from the extended cooling-off period, which allows them to void a contract for public adjusting services without penalty.

Certain licensees may be subject to administrative or criminal penalties as a result of the additional penalties created by this bill.

Insurers will be prohibited from selling industrial life insurance policies, although this should have a de minimis impact, as few currently offer this type of policy.

Insurers and certain agents may be required to update forms or mailers to reflect the new surplus lines export disclosure, the hurricane disclosure, the updated homeowner claims bill of rights, and the prohibition of forum selection clauses.

The inclusion of all required information in one uniform agreement may equip an unclaimed property claimant with more information prior to entering into an agreement. This may protect the consumer from entering into predatory or unfair contracts to retrieve their unclaimed property.

**C. Government Sector Impact:**

The DFS will be required to update certain forms and brochures to reflect the amended version of the Homeowner Claims Bill of Rights.

The DFS will likely see an increase in adjusting firm applications as a result of this bill; this will result in an increased licensing workload.

Section 27 requires the DFS to promulgate rules that adopt the uniform agreements relating to unclaimed property.

## **VI. Technical Deficiencies:**

Line 120 uses the term “consumer,” however, this is not a defined term in s. 501.0051, F.S. The KIDS Act defines the terms “protected consumer” to mean a person younger than 16 years of age, and the term “representative” to mean the parent or legal guardian of a protected consumer. An amendment to s. 501.005(13)(b), F.S., would be required to effect a prohibition on fees charged by credit bureaus for the replacement of a consumer’s PIN, which is required to remove a credit freeze.

Several cross-references may need to be updated to reflect the newly required adjusting agency license, e.g., ss. 626.015 and 626.022, F.S.

Section 3 of the bill, at line 154, requires entities to comply with s. 626.8696, F.S., to act as an adjusting firm. Section 626.8696, F.S., outlines the requirements for submitting an application for an adjusting firm license, but does not give licensing requirements. This may be interpreted as requiring adjusting firms only to submit an application (not wait for approval, or even meet approval from the DFS) to comply with s. 626.112, F.S., as amended by the bill. Similarly, line 174 within section 3 of the bill merely requires an adjusting firm to file an application for licensure to avoid a penalty assessed by the DFS.

As written, the bill appears to allow all consumers who have a contract with a public adjuster to cancel the contract during a state of emergency declared by the governor. See lines 264-271. Consideration of an amendment to paragraph proposed s. 626.8443(6), F.S., may be needed to clarify what contracts are voidable by the consumer.

Section 18 and section 20 both generally update references of “days” to “calendar days” or “business days;” however, both sections also leave at least one reference to only “days.” This inconsistency may cause confusion about whether a “day” is a calendar or business day.

Lines 614-621 of the bill add a consumer notice within the Homeowner Claims Bill of Rights that the consumer may be eligible to receive interest payments if the insurance company does not timely remit his or her claim settlement. Generally, the consumer rights reflected in the Homeowner Claims Bill of Rights are the inverse of the duties imposed on insurers by s. 627.70131, F.S. However, lines 614-621 do not accurately reflect s. 627.70131(5)(a), F.S.

Line 959, within section 27 of the bill, requires a claimant’s representative to report the “total percentage of all authorized fees and costs to be paid to the claimant’s representative...” This language may be interpreted as permitting a claimant’s representative to be paid only a portion of the total authorized fees and costs, rather than a percentage of the value of the unclaimed property in question.

## **VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 501.0051, 624.307, 626.112, 626.602, 626.621, 626.782, 626.783, 626.8443, 626.854, 626.916, 626.9541, 626.9741, 626.9957, 627.062, 627.421, 627.502, 627.70131, 627.7142, 631.57, 648.30, 717.124, 717.12404, 717.1315, 717.1322, and 717.135.

This bill creates section 627.7031 of the Florida Statutes.

This bill repeals the following sections of the Florida Statutes: 626.796 and 717.1351.

**IX. Additional Information:****A. Committee Substitute – Statement of Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

None.

**B. Amendments:**

None.