

**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: CS/CS/CS/SB 714

INTRODUCER: Banking and Insurance Committee; Judiciary Committee; Banking and Insurance Committee; and Senator Brandes and others

SUBJECT: Insurance

DATE: April 10, 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>Matiyow</u>	<u>Knudson</u>	<u>BI</u>	<u>Fav/CS</u>
4.	_____	_____	<u>RC</u>	_____

**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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**I. Summary:**

CS/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.
- The bill allows a foreign or alien insurer to operate in Florida if the OIR is satisfied the insurer possesses sufficient capital and surplus to support its plan of operation, which is an exception to the requirement that such insurers must operate satisfactorily for at least 3 years in its state or country of domicile before being authorized to transact business in Florida.
- Classifies health maintenance organizations and prepaid limited health service organizations, which write in Florida and other states, as property and casualty insurers for the purpose of calculating the formula for risk based capital.
- Provides that a residential structure with a dwelling replacement cost of \$700,000 or more may be exported to a surplus lines insurer if an agent seeks coverage from one authorized insurer and is rejected. Current law requires three declinations for residential structures before exporting a residential structure to a surplus lines insurer, with an exception that allows exportation after one declination of a residential structure with a dwelling replacement cost of \$1 million or more.
- Includes insurers to establish rates and forms personal lines residential insurance with a dwelling replacement of \$700,000 or greater using the current deregulation of forms and rates that is allowed for commercial insurance. As to rates, this exempts the insurer from the standard rate review process if the insurer notifies the OIR of rate changes within 30 days after the rate is effective and uses a rate that provides a reasonable rate of return and is not excessive, inadequate, or unfairly discriminatory. The OIR may, in its discretion, examine rates to determine if they are excessive, inadequate, or unfairly discriminatory. No more than 5 percent of all personal lines residential insurance policies written or renewed by the insurer may be rated pursuant to the method created by the bill and through the consent to excess rate process in s. 627.171, F.S. As to forms, this allows an insurer to make an informational form filing with the OIR wherein the insurer certifies the form complies with Florida law when such forms are used in a personal lines residential insurance policy with a dwelling replacement of \$700,000 or greater that is rated pursuant to the alternative process created by the bill.
- 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 by 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 of 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-exempt<sup>1</sup> fund created in 1993<sup>2</sup> after Hurricane Andrew<sup>3</sup> as a form of mandatory reinsurance for residential property insurers. The FHCF is administered by the State Board of Administration (SBA)<sup>4</sup> and is a tax-exempt source of reimbursement to property insurers for a selected percentage (45, 75, or 90 percent)<sup>5</sup> 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.<sup>6</sup> The FHCF is authorized by statute to sell \$17 billion of mandatory layer coverage.<sup>7</sup> 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

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<sup>1</sup> Section 215.555(1)(f), F.S.

<sup>2</sup> Ch. 93-409, Laws of Fla.

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

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

<sup>5</sup> Section 215.555(2)(e), F.S.

<sup>6</sup> *See* s. 215.555(4)(a), F.S.

<sup>7</sup> Section 215.555(4)(c)1., F.S.

reimburse the insurer for 45 percent, 75 percent, or 90 percent of covered losses, plus 5 percent<sup>8</sup> of the reimbursed losses for loss adjustment expenses.<sup>9</sup>

### ***FHCF Premiums***

The FHCF must charge insurers the actuarially indicated premium<sup>10</sup> for the coverage provided, based on hurricane loss projection models found acceptable by the Florida Commission on Hurricane Loss Projection Methodology.<sup>11</sup> 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 charge a risk load as it relates to overhead and operating expenses incurred by other private insurers.<sup>12</sup>

### ***FHCF Bonding and Assessment Authority***

When the moneys in the FHCF are or will be insufficient to cover losses, the law<sup>13</sup> authorizes the FHCF to issue revenue bonds funded by emergency assessments on all lines of insurance except medical malpractice and workers compensation.<sup>14</sup> 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.<sup>15</sup>

### **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, the insurer must obtain the certificate of title and forward it to the DHSMV for processing.<sup>16</sup>

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.<sup>17</sup> However, the company may only receive

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<sup>8</sup> Section 215.555(4)(b), F.S.

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

<sup>10</sup> Section 215.555(2)(a), F.S.

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

<sup>12</sup> [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](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).

<sup>13</sup> Section 215.555(6), F.S.

<sup>14</sup> Section 215.555(6)(b), F.S.

<sup>15</sup> 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).

<sup>16</sup> Section 319.30(3)(b), F.S.

<sup>17</sup> Section 319.30(3)(b)1., F.S.

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.<sup>18</sup>

### **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 limits of the automobile policy.<sup>19</sup> 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.<sup>20</sup>

### **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.<sup>21</sup>

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.

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<sup>18</sup> *Id.*

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

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

<sup>21</sup> 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 insurance<sup>22</sup> 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.<sup>23</sup> The duty to indemnify refers to the insurer’s obligation to issue payment to the insured or a beneficiary on a valid claim.<sup>24</sup> 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.<sup>25</sup>

### 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.<sup>26</sup> 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.<sup>27</sup> As part of the contract, the insured surrenders to the insurer all control over the negotiations and decision making as to third-party claims.<sup>28</sup> The insured’s role is relegated to the obligation to cooperate with the insurer’s efforts to adjust the loss.<sup>29</sup> 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.<sup>30</sup> 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

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<sup>22</sup> 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.

<sup>23</sup> 16 Williston on Contracts s. 49:105 (4th ed.).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Auto. Mut. Indemnity Co. v. Shaw*, 184 So. 852 (Fla. 1938).

<sup>27</sup> Rutledge R. Liles, *Florida Insurance Bad Faith Law: Protecting Businesses and You*, 85 Fla. Bar. J. No. 3, p. 8 (March 2011).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *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.<sup>31</sup> 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.<sup>32</sup> 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”<sup>33</sup> if a third party obtains a judgment against the insured in excess of his or her insurance coverage.<sup>34</sup> 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,<sup>35</sup> or it can be brought by the third party directly or through an assignment of the insured’s rights.<sup>36</sup>

### ***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,”<sup>37</sup> the same as the common law standard.<sup>38</sup> Section 624.155, F.S., codifies third-party claims for “bad faith,” but does not preempt the common law remedy.<sup>39</sup> 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 s. 624.155(3)(a), F.S.”<sup>40</sup>

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.<sup>41</sup> The insurer has 60 days after the required notice is filed to pay the damages or correct the circumstances giving rise to the violation.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup>

<sup>31</sup> *Baxter v. Royal Indem. Co.*, 285 So.2d 652, 655 (Fla. 1st DCA 1973), *cert. discharged*, 317 So.2d 725 (Fla. 1975).

<sup>32</sup> *Id.*

<sup>33</sup> Liles, *supra* note 6.

<sup>34</sup> *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So.2d 263, 265 (Fla. 5th DCA 1987).

<sup>35</sup> *See Powell v. Prudential Prop. and Cas. Ins. Co.*, 584 So.2d 12 (Fla. 3d DCA 1991).

<sup>36</sup> *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).

<sup>37</sup> Section 624.155(1)(b), F.S.

<sup>38</sup> Fla. Standard Jury Instr. 404.4 (Civil).

<sup>39</sup> Section 624.155(8), F.S.

<sup>40</sup> *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)).

<sup>41</sup> Section 624.155(3)(a), F.S.

<sup>42</sup> Section 624.155(3)(d), F.S.

<sup>43</sup> *Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.*, 753 So.2d 1278, 1284 (Fla. 2000).

<sup>44</sup> *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.<sup>45</sup> If a settlement is not reached, the insurer has the burden of showing that there was no realistic possibility of settlement within policy limits.<sup>46</sup> 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.<sup>47</sup> 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.<sup>48</sup>

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.<sup>49</sup>

### ***Property Insurance Appraisers and Umpires***

Insurance companies often include an appraisal clause in property insurance policies.<sup>50</sup> 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.
- The insurance company or the policyholder may challenge the umpire’s impartiality and disqualify a proposed umpire based on criteria set forth in statute.<sup>51</sup>

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<sup>45</sup> See *Powell v. Prudential Property and Casualty Insurance Company*, 584 So.2d 12, 14 (Fla. 3d DCA 1991).

<sup>46</sup> *Id.*

<sup>47</sup> See *Berges v. Infinity Ins. Co.*, 896 So.2d 665, 680 (Fla. 2004).

<sup>48</sup> *Id.*

<sup>49</sup> *Id.* at 677.

<sup>50</sup> *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.

<sup>51</sup> See s. 627.70151, F.S.

### **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,<sup>52</sup> 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 and 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. The RBC standard 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)<sup>53</sup> 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-state<sup>54</sup> HMOs and PLHSOs.<sup>55</sup> 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, 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.

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<sup>52</sup> See s. 624.06(2)-(3), F.S.

<sup>53</sup> 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.

<sup>54</sup> Defined to include those authorized in Florida and one or more other states or countries. Section 636.4085(1)(g), F.S.

<sup>55</sup> Ch. 2014-101, Laws of Fla.

## 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>56</sup> There are three basic categories of surplus lines risks:

- 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>57</sup> which means they do not obtain a certificate of authority from the Office of Insurance Regulation (OIR) to transact insurance in Florida.<sup>58</sup> Rather, surplus lines insurers are “unauthorized” insurers,<sup>59</sup> but may transact surplus lines insurance if they are made eligible by the OIR.

“To export” a policy means an insurance agent,<sup>60</sup> with the consent of the insurance applicant, placing a policy with an unauthorized insurer under the Surplus Lines Law through a surplus lines agent.<sup>61</sup> Unless an exception applies, 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>62</sup> “Diligent effort” means seeking and coverage being rejected from at least three authorized insurers in the admitted market; however, if the cost to replace a residential dwelling is \$1 million or more, then only one coverage rejection is needed prior to export. In that case, diligent effort is seeking and being denied coverage from at least one authorized insurer in the admitted market.<sup>63</sup> The law further specifies that:<sup>64</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>65</sup> the policyholder must be advised in writing that coverage may be available and less expensive from Citizens Property Insurance Corporation (Citizens).

<sup>56</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. S. 626.921, F.S.

<sup>57</sup> The Florida Insurance Code is chapters 624-632, 634, 635, 636, 641, 642, 648, and 651, F.S. S. 624.01, F.S.

<sup>58</sup> S. 624.09(1), F.S.

<sup>59</sup> S. 624.09(2), F.S.

<sup>60</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.

<sup>61</sup> S. 626.914(3), F.S.

<sup>62</sup> S. 626.916(1)(a), F.S.

<sup>63</sup> S. 626.914(4), F.S.

<sup>64</sup> S. 626.916(1), F.S.

<sup>65</sup> Personal residential policies include homeowners, mobile homeowners, dwelling fire, tenants, condominium unit owners, and similar policies.

As of January 1, 2017, Citizens decreased the maximum coverage limit for dwellings from \$1 million to \$700,000 statewide, except for in counties where the OIR has determined there is not a reasonable degree of competition.<sup>66</sup> Currently, the OIR has determined that Miami-Dade and Monroe counties do not have a reasonable degree of competition. A homeowner seeking insurance for a personal residential property with a replacement cost of at least \$700,000 and less than \$1 million in Miami-Dade or Monroe counties is likely to be denied coverage from an authorized Florida insurer and to be referred to and receive coverage from Citizens. Surplus lines coverage may be the only coverage option as an alternative to Citizens in high-risk areas. Consequently, homeowners in Miami-Dade and Monroe counties **of properties with a** replacement cost of \$700,000 or more and less than \$1 million are required to comply with a more burdensome process to become eligible for surplus lines coverage and may be more likely to seek coverage from Citizens.

### **Ratemaking Regulation for Property, Casualty, and Surety Insurance**

The rating requirements for property, casualty, and surety insurance are located in part I of ch. 627, F.S.,<sup>67</sup> which is entitled the “Rating Law,” and applies to all property, casualty, and surety insurance. Section 627.062(1), F.S., specifies that the rates for all classes to which part I applies “shall not be excessive, inadequate, or unfairly discriminatory.”

Section 627.062(2)(a), F.S., describes the filing process and time frames that must be followed by all insurers subject to its provisions. Generally, insurers may choose to submit their rate to the OIR pursuant to either the “file and use” method or the “use and file” method. Under “file and use,” the insurer submits to the OIR their proposed rate at least 90 days before the rate’s effective date and shall not implement the rate until it is approved. Under “use and file,” the insurer may implement the rate before filing for approval, but must then submit the filing within 30 days of the rate’s effective date. If a portion of the rate is subsequently found to be excessive, the insurer must refund to policyholders the portion of the rate that is excessive.

For those insurers that file under s. 627.062(2)(a), F.S., the OIR applies the following factors in determining whether a rate is excessive, inadequate, or unfairly discriminatory.

- Past and prospective loss experience in Florida and in other jurisdictions.
- Past and prospective expenses.
- Degree of competition to insure the risk.
- Investment income reasonably expected by the insurer.
- Reasonableness of the judgment reflected in the filing.
- Dividends, savings, or unabsorbed premium deposits returned to Florida insureds.
- Adequacy of loss reserves.
- Cost of reinsurance.
- Trend factors, including those for actual losses per insured unit.
- Catastrophe and conflagration hazards, when applicable.
- Projected hurricane losses, if applicable.
- Projected flood losses for residential property insurance, if applicable.
- A reasonable margin for underwriting profit and contingencies.

<sup>66</sup> <https://www.citizensfla.com/-/20160726-maximum-coverage-limit-decreased> (last visited March 9, 2019).

<sup>67</sup> Sections 627.011, F.S., through 627.381, F.S.

- Cost of medical services, when applicable.
- Other relevant factors impacting frequency and severity of claims or expenses.<sup>68</sup>

Section 627.062(f), F.S., provides that during its review process, the OIR can require an insurer to submit at the insurer's expense all information that the OIR deems necessary to evaluate the condition of the insurer and the reasonableness of the filing.

### **Types of Insurance Exempt from Filing and Review Requirements**

The following types of insurance and types of commercial lines risks are exempt from the filing and review requirements of s. 627.062(2)(a) and (f), F.S.:

- Excess or umbrella.
- Surety and fidelity.
- Boiler and machinery and leakage and fire extinguishing equipment.
- Errors and omissions.
- Directors and officers, employment practices, fiduciary liability, and management liability.
- Intellectual property and patent infringement liability.
- Advertising injury and Internet liability insurance.
- Property risks rated under a highly protected risks rating plan.
- General liability.
- Nonresidential property, except for collateral protection insurance as defined in s. 624.6085, F.S.
- Nonresidential multiperil.
- Excess property.
- Burglary and theft.
- Travel insurance, if issued as a master group policy with a situs in another state where each certificate holder pays less than \$30 in premium for each covered trip and where the insurer has written less than \$1 million in annual written premiums in the travel insurance product in this state during the most recent calendar year.
- Medical malpractice for a facility that is not a hospital licensed under ch. 395, F.S., a nursing home licensed under part II of ch. 400, F.S., or an assisted living facility licensed under part I of ch. 429, F.S.
- Medical malpractice for a health care practitioner who is not a dentist licensed under ch. 466, F.S., a physician licensed under ch. 458, F.S., an osteopathic physician licensed under ch. 459, F.S., a chiropractic physician licensed under ch. 460, F.S., a podiatric physician licensed under ch. 461, F.S., a pharmacist licensed under ch. 465, F.S., or a pharmacy technician registered under ch. 465, F.S.
- Any other commercial lines categories or kinds of insurance or types of commercial lines risks that the office determines should not be subject to paragraph (2)(a) or paragraph (2)(f) because of the existence of a competitive market for such insurance or similarity of such insurance to other categories or kinds of insurance not subject to paragraph (2)(a) or paragraph (2)(f), or to improve the general operational efficiency of the office.<sup>69</sup>

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<sup>68</sup> Section 627.062(2)(b), F.S.

<sup>69</sup> Section 627.062(3)(d), F.S.

These types of insurance coverages continue to be subject to s. 627.062(1), F.S., which requires that rates shall not be excessive, inadequate, or unfairly discriminatory.

An insurer or rating organization which is exempt under this provision must notify the OIR of any changes for the types of insurance subject to this provision, no later than 30 days after the effective date of the change in rates. The notice to the OIR must include the following:

- The name of the insurer or rating organization.
- The type of insurance.
- The total premium written during the immediately preceding year for that type of insurance (for notice filed by an insurer).
- Loss costs during the immediately preceding year for that type of insurance (for notice filed by a rating organization).
- The average statewide percentage change in rates or loss costs.

Underwriting files, premiums, losses, and expense statistics must be maintained by the insurer and are subject to inspection by the OIR. Loss and exposure statistics must be maintained by the rating organization and are subject to inspection by the OIR. The OIR may require the insurer to provide, at the insurer's expense, all information necessary to evaluate the condition of the company and the reasonableness of the rates.

### **OIR Approval of Forms**

Each basic insurance policy form,<sup>70</sup> unless otherwise exempted,<sup>71</sup> must be approved by the OIR before the form can be used by an insurance company.<sup>72</sup> Each form must be filed at least 30 days prior to its use in policies delivered or issued for delivery in this state. The OIR must approve or disapprove the form within 30 days or it is deemed approved.<sup>73</sup> The OIR, however, under s. 627.410(4), F.S., has the authority to exempt by order an insurance form or type of form from the approval process for as long as it deems proper<sup>74</sup> if the filing and approval process cannot be practicably applied or is not desirable or necessary for the protection of the public.<sup>75</sup>

### **Exemptions from Approval of Forms**

Section 627.4102, F.S., exempts property and casualty forms, except workers' compensation and personal lines forms, from the approval process required under s. 627.410, F.S., if:

- The form has been electronically submitted to the office in an informational filing made through I-File 30 days before the delivery or issuance for delivery of the form within this state; and

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<sup>70</sup> Statutorily required forms requiring the OIR approval prior to use are basic insurance policies, annuity contracts, application forms where a written application is required and is part of the policy or contract, group certificates issued under a master contract delivered in Florida, and printed riders, endorsement forms, or forms of renewal certificates.

<sup>71</sup> Statutorily exempted forms are surety bonds or policies, riders, endorsements, or forms of unique character that are designed and used with relation to insurance upon a particular subject (other than health insurance).

<sup>72</sup> s. 627.410(1), F.S.

<sup>73</sup> The Office may extend the form review process 15 days.

<sup>74</sup> s. 627.410(4), F.S.

<sup>75</sup> Id.

- At the time the informational filing is made, a notarized certification is attached to the filing that certifies that each form within the filing is in compliance with all applicable state laws and rules. The certification must be on the insurer's letterhead and signed and dated by the insurer's president, chief executive officer, general counsel, or an employee of the insurer responsible for the filing on behalf of the insurer. The certification must contain the following statement, and no other language: "I, (name) as (title) of (insurer name) , do hereby certify that this form filing has been thoroughly and diligently reviewed by me and by all appropriate company personnel, as well as company consultants, if applicable, and certify that each form contained within the filing is in compliance with all applicable Florida laws and rules. Should a form be found not to be in compliance with Florida laws and rules, I acknowledge that the Office of Insurance Regulation shall disapprove the form."

The Office of Insurance Regulation (OIR), at its discretion, can subject forms that are not in compliance with state laws and rules to prior review and approval pursuant to s. 627.410, F.S. The period for review and approval established under s. 627.410(2), F.S., begins to run on the date the OIR notifies the insurer of the discovery of the noncompliant form.

A Notice of Change in Policy Terms form required under s. 627.43141(2), F.S., shall be filed as a part of the informational filing for a renewal policy that contains a change. If a renewal policy that was certified requires such form, the insurer must provide a sample copy of the form to the named insured's agent before or upon providing the form to the named insured.

Additionally, insurers can still elect to file any form for approval under s. 627.410, F.S., that would otherwise be exempt.<sup>76</sup>

### **Surplus Lines Agents**

Surplus lines agents are authorized to handle the placement of insurance coverages with surplus lines insurers.<sup>77</sup> Licensed resident general lines agents who meet the statutory criteria for licensure are eligible for licensure as a surplus lines agent.<sup>78</sup> 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.<sup>79</sup> 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.<sup>80</sup> This fee has not been adjusted since it was raised from \$25 to \$35 in 2001.<sup>81</sup> Retail agents involved in the export of policies to surplus lines do not get to charge a fee.

<sup>76</sup> Section 627.4102(4), F.S.

<sup>77</sup> Section 626.914(1), F.S.

<sup>78</sup> 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.

<sup>79</sup> 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).

<sup>80</sup> Section 626.916(4), F.S.

<sup>81</sup> Ch. 2001-213, Laws of Fla.

## Unfair Insurance Trade Practices

The Unfair Insurance Trade Practices Act,<sup>82</sup> among other things, defines unfair methods of competition and unfair or deceptive acts in the business of insurance.<sup>83</sup> 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 insured, prospective insured, or any person for the purpose of advertising.<sup>84</sup> 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.<sup>85</sup>

## 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.<sup>86</sup> 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.<sup>87</sup> 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.<sup>88</sup> 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.<sup>89</sup>

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<sup>82</sup> Chapter 626, F.S., part IX.

<sup>83</sup> Section 626.9541, F.S.

<sup>84</sup> 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).

<sup>85</sup> 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.

<sup>86</sup> See s. 627.426(2), F.S.

<sup>87</sup> See *AIU Ins. Co. v. Block Marina Inv., Inc.*, 544 So.2d 998 (Fla. 1989).

<sup>88</sup> Section 627.426(2)(b), F.S.

<sup>89</sup> *Id.*

### **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.<sup>90</sup> 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.<sup>91</sup>

### **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.<sup>92</sup> 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.<sup>93</sup> 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 insurance<sup>94</sup> and automobile insurance<sup>95</sup> claims. DFS has a neutral evaluation program, similar to mediation, for sinkhole insurance claims.<sup>96</sup> DFS approves mediators used in the two mediation programs and certifies the neutral evaluators used in neutral evaluations for sinkhole insurance claims.<sup>97</sup>

For property insurance claims<sup>98</sup> involving personal lines and commercial residential claims, only the policyholder, as a first-party claimant, or the insurer may request mediation under DFS' program.<sup>99</sup> This means that third parties cannot utilize the program; however, an insurer may

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<sup>90</sup> Section 627.0655, F.S.

<sup>91</sup> 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.

<sup>92</sup> Section 627.453, F.S.

<sup>93</sup> Section 627.4555, F.S.

<sup>94</sup> Section 627.7015, F.S.

<sup>95</sup> Section 626.745, F.S.

<sup>96</sup> Section 627.7074, F.S.

<sup>97</sup> Sections 627.7015, 627.7074, and 627.745, F.S.

<sup>98</sup> 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.

<sup>99</sup> 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

elect to mediate with the third party. This is true even if the policyholder assigns their policy benefit rights to the third party.<sup>100</sup> The insurer must notify the policyholder of the right to mediation under the program upon receipt of the claim.<sup>101</sup> 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.

## **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 Vehicle or Mobile Home**

**Section 3.** Amends s. 390.30, F.S., to allow insurers to electronically transfer a salvage certificate of title or certificate of destruction for 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 January 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.<sup>102</sup>

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coverages of property insurance policies are not eligible for the property insurance mediation program. Section 627.7015(1), F.S.

<sup>100</sup> Section 627.7015(1), F.S.

<sup>101</sup> Section 627.7015(2), F.S.

<sup>102</sup> Section 668.003(4), F.S.

### **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. Also, the bill 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.

### **Right of Contribution**

**Section 5.** Creates s. 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.

### **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., within 60 days after the appraisal process outlined in the insurance contract is invoked by any party in a residential property insurance claim. 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:

Possesses sufficient capital and surplus to support its plan of operation as filed with the office.

### **Risk-Based Capital Requirements for Insurers**

**Section 8.** Amends s. 624.4085, F.S., to exempt health maintenance organizations (HMO) and prepaid limited health service organizations from having their risk-based capital determined in accordance with the formula for life and health insurers 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 for property and casualty insurers if it also operates in another state.

### **Diligent Effort for Residential Structures \$700,000 or Greater**

**Section 9.** Amends s. 626.914, F.S., to provide that a residential structure with a dwelling replacement cost of \$700,000 or more may be exported to a surplus lines insurer if an agent

seeks coverage from one authorized insurer and is rejected. Current law requires three declinations for residential structures before exporting a residential structure to a surplus lines insurer, with an exception that allows exportation after one declination of a residential structure with a dwelling replacement cost of \$1 million or more.

### **Alternative Insurance Rates for Dwellings \$700,000 or Greater**

**Section 10.** Amends s. 627.062, F.S., to exempt personal lines residential insurance with a dwelling replacement of \$700,000 or greater from the standard rate review process if the insurer notifies the OIR of rate changes within 30 days after the rate is effective and uses a rate that provides a reasonable rate of return and is not excessive, inadequate, or unfairly discriminatory. The OIR may, in its discretion, examine rates to determine if they are excessive, inadequate, or unfairly discriminatory.

**Section 11.** Creates s. 627.1711, F.S., which provides that no more than 5 percent of all personal lines residential insurance policies written or renewed by the insurer may be rated pursuant to the method created by Section 10 of the bill and through the consent to excess rate process in s. 627.171, F.S.

### **Forms Allowed for Dwellings \$700,000 or Greater**

**Section 12.** Amends s. 627.4102, F.S., to allow an insurer make an informational form filing with the OIR wherein the insurer certifies the form complies with Florida law when such forms are used in a personal lines residential insurance policy with a dwelling replacement of \$700,000 or greater that is rated pursuant to the alternative process created in Section 10 of the bill.

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

**Section 13.** 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.

The bill makes a conforming change to clarify that the requirements of s. 626.916(1)(a)-(d), F.S., still apply to personal residential policies with a dwelling replacement cost of \$700,000 or greater. Those requirements are that a diligent effort be made to place a policy with a surplus lines insurer, that 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, that 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, and that the deductibles must be the same as those used by one or more authorized insurers, unless the coverage is for fire or windstorm.

### **Unfair Insurance Trade Practices**

**Section 14.** 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 15.** 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 16.** 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 17.** 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 18.** 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 19.** 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.

**Section 20.** Makes a conforming change related to the reduction of felony classification made in Section 4.

### **Effective Date**

**Section 21.** 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:**

None.

## **V. Fiscal Impact Statement:**

### **A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

**Section 2.** Increasing the amount of reimbursement for loss adjustment expense from the Florida Hurricane Catastrophe Fund will have a positive fiscal impact for insurers. Insurers that purchase private market reinsurance to cover loss adjustment expenses that costs more than what the FHCF charges for such coverage will experience a reduction in their premium. Insurers may receive FHCF reimbursement in excess of their actual loss adjustment expenses if their LAE costs are less than 10 percent of reimbursed losses.

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.

**Section 5.** All insurers with a duty to defend an insured will be required to contribute to the defense costs of the insured.

**Section 13.** A surplus lines agent and retail agent will be allowed to charge a reasonable fee for facilitating the export of an insurance policy to a surplus line insurer. Such fees are also included in the calculation for the premium tax.

**Section 14.** Insureds can receive from an insurer or agent unlimited loss mitigation services or devises related to the risks covered by their policy for free or at a discount.

**Section 15.** Insureds will have greater opportunity to receive a multiline discount between multiple insurers.

**Section 16.** There could be an indeterminate cost savings to liability insurers by allowing them multiple delivery options for providing required notices.

**Section 19.** New policyholders for private passenger motor vehicle coverage will only need to prepay one month of premium as opposed to two.

**C. Government Sector Impact:**

**Section 3.** There could be an indeterminate cost savings to the Department of Highway Safety and Motor Vehicles for the electronic transfer of salvage titles as opposed to using USPS.

**Section 6.** There could be an indeterminate cost savings to the Department of Financial Services for no longer needing to review the specificity of notices for bad faith against an insurer.

**Sections 10, 11 and 12.** The Office of Insurance Regulation indicates they will need \$227,396 recurring expenses for staff positions and \$70,129 of nonrecurring expenses associated with implementing these sections of the bill.<sup>103</sup>

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<sup>103</sup> Office of Insurance Regulation 2019 Agency Legislative Bill Analysis for Amendment 712076 to CS/CS/SB 714. (On file with the Banking and Insurance Committee.)

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 215.555, 319.30, 440.381, 624.155, 624.404, 624.4085, 626.914, 626.916, 626.9541, 627.062, 627.0655, 627.4102, 627.426, 627.4555, 627.7015, 627.7295, and 921.0022.

This bill creates the following sections of the Florida Statutes: 624.1055 and 627.1711.

**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/CS by Banking and Insurance on April 8, 2019:**

The CS:

- Provides that a foreign or alien insurer does not need to meet the 3 year operation requirement before being allowed to operate in this state if the OIR is satisfied the insurer possesses sufficient capital and surplus to support its plan of operation.
- Reduces from three to one the number of declinations needed to export to a surplus lines insurer a personal lines residential policy with a dwelling replacement cost of \$700,000 to below \$1 million to a surplus lines insurer.
- Allows personal lines residential insurance with a dwelling replacement of \$700,000 or greater certify policy forms and apply rates in the same ways allowed for commercial insurance. Caps the use of such rates and forms to no more than 5 percent of a company's book of business including the use of excess rates in s. 627.171, F.S.

**CS/CS by Judiciary on April 1, 2019:**

The committee substitute:

- 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 of 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.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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