STORAGE NAME: h0403s1z.in ****FINAL ACTION****
DATE: June 29, 1999 ****SEE FINAL ACTION STATUS SECTION****

HOUSE OF REPRESENTATIVES
COMMITTEE ON
INSURANCE
FINAL ANALYSIS

BILL #: CS/HB 403, 1st Engrossed (Chapter 99-286, Laws of Florida)

RELATING TO: Title Insurance

SPONSOR(S): Committee on Insurance, Representative Byrd and others

COMPANION BILL(S): CS/SB 746 (s), CS/CS/CS/HB 93 (c), CS/SB 1982(c)

ORIGINATING COMMITTEE(S)/COMMITTEE(S) OF REFERENCE:
(1) INSURANCE YEAS 9 NAYS 4
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I. FINAL ACTION STATUS:

On April 21, 1999, CS/HB 403 was read a second time on the House floor and then four amendments were adopted and engrossed into the bill. Three of the amendments were technical in nature. The other amendment inserted the text of CS/CS/CS/HB 93, relating to title insurance reserves, into the bill. CS/HB 403, 1st Engrossed, then passed the House on April 22, 1999, by a vote of 107-5 and passed the Senate on April 27, 1999, by a vote of 39-0. On June 8, 1999, CS/HB 403 was approved by the Governor, and became Chapter 99-286, Laws of Florida.

II. SUMMARY:

This bill addresses several different issues relating to title insurance reserves and title insurance premiums. For example, the bill:

- revises the release schedule for unearned premium reserves from a uniform 12 year release of 8.34 percent a year to a 20 year release schedule characterized by a 30 percent release the first year and one percent releases the final five years;
- requires each insurer to obtain an actuarial statement regarding the insurer's loss reserves and to supplement their premium reserves if the actuarially recommended level in higher than the insurer's actual level of reserves;
- restores the remuneration framework in existence for title insurance agents before the Leon County Circuit Court ruling in the Butler v. Department of Insurance case -- i.e. the Florida law would again prohibit title insurance agents from negotiating, or offering any rebates on, the 70 percent portion of the premium retained by the title insurance agent;
- reenacts anti-rebating provisions for title insurance;
- establishes title insurance rates in statute for a three year period, including the title insurance rates for original owner's and leasehold and mortgage title insurance, reissue transactions, substitution loans, and new home purchases.
- retains for the same three years period the Department's current rules relating to premium rates that do not conflict with the provisions of the committee substitute
- prohibits the Department of Insurance from granting any deviations from the established rates.

This bill has no fiscal impact on state or local government.

III. SUBSTANTIVE ANALYSIS:

A. PRESENT SITUATION:

Title Insurance Overview

Title insurance insures "owners of real property against loss by encumbrance, defective titles, invalidity, or adverse claim to title." See Section 624.608, F.S. Title insurance is different than traditional property and casualty (P&C) insurance in several ways, including the kind of risk insured and the relationship between losses and expenses.

In traditional P&C insurance, the insurer accepts responsibility for certain risks which are out of its control and which may occur in the future -- e.g., hurricanes, floods, and car accidents. In title insurance, the insurer "insures against ignorance of the past, that is, whether some unknown past event has clouded the ownership interest or lien interest in a parcel of real property that the insured believes to exist when the title insurance policy is issued."[1]

Because of the difference in the type of risk insured, the relationship between losses and expenses in title insurance is also different than in traditional P&C insurance. In P&C insurance, insurers might ordinarily expend the bulk of their revenues to pay for losses and loss adjustment while title insurers are likely to expend only a small portion of their revenues to pay for losses and loss adjustment. Conversely, P&C insurers might spend a small portion of revenues on non-loss expenses, while title insurers might expend the bulk of its revenues on non-loss expenses.

This disparity is due to the fact that there are more activities performed by agents in title insurance than in P&C insurance. Title insurance agents' activities include most of the same activities as P&C insurance agents, such as marketing and producing policies; however, title insurance agents also perform other activities such as conducting title searches and examinations, reviewing public documents, handling funds in escrow, preparing closing documents, and conducting closings.

Title Insurance Reserve Requirements

Florida Law

Under current statutory law, a title insurer ["insurer"] must maintain two types of reserves:

1. An insurer must retain adequate ***loss reserves*** sufficient to cover its unpaid losses, claims and expenses for which the insurer may be liable and for which the insurer has received notice by or on behalf of the insured.[2] See Fla. Stat. §§ 625.101; 625.111.[3]

2. In addition to the reserves required above, an insurer shall establish, segregate and maintain a guaranty fund or ***unearned premium reserve*** to be used for reinsurance in the event the insurer becomes insolvent. Fla. Stat. § 625.111.

Section 625.111, F.S., states in pertinent part that the ***unearned premium reserve*** must consist of not less than an amount computed as follows:

(a) The amount of the unearned premium reserve on June 30, 1992; and

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[1] Nelson R. Lipshutz, The Regulatory Economics of Title Insurance (1994), p. 1.

[2] The purpose of the reserve is to "cover all unpaid losses, claims and allocated loss adjustment expenses arising under title insurance policies, guaranteed certificates of title, guaranteed searches and guaranteed abstracts of title, and all unpaid losses, claims and allocated loss adjustment expenses for which the title insurer may be liable and for which the insurer has received notice by or on behalf of the insured, holder of a guarantee or escrow or security depositor." Section 10, Title Insurers Model Act, April 1996.

[3] If an insurer's loss reserves are inadequate, the Department of Insurance must require the insurer to maintain a ***supplemental loss reserve*** in the needed additional amount. Fla. Stat. § 625.101.

(b) A sum equal to 30 cents for each $1,000 of net retained liability under each title insurance policy on a single risk written on or after July 1, 1992.[4]

Accordingly, the amount in reserves for each insurer throughout the state is different depending upon the number of policies the company writes.

Title Insurers Model Act

The National Association of Insurance Commissioners (NAIC) drafted the Title Insurers Model Act in 1983 (revised April 1996). The NAIC suggest that when establishing an unearned premium reserve, one should keep in mind that there can be a wide difference among insurers as to the correct reserve requirement.[5] Reserve requirements may change over time according to the insurer's varying exposure to risk. Therefore, according to the NAIC, the reserve requirements are best determined by each state.[6]

The NAIC's Title Insurers Model Act does, however, provide in pertinent part, the following:

(a) The amount of the statutory or unearned premium or reinsurance reserve on the effective date of this Act, which balance shall be released in accordance with the law in effect at the time such sums were added to the reserve; and

(b) Out of total charges for policies of title insurance written or assumed commencing with the effective date of this Act, and until December 31, 1997, a title insurer shall add to and set aside in this reserve an amount equal to [insert amount] of the sum of the following items set forth in the title insurer's most recent annual statement on file with the commissioner:

I) Direct premiums written;
ii) Escrow and settlement service fees;
iii) Other title fees and service charges including fees for closing protection letters; and
iv) Premiums for reinsurance assumed less premiums for reinsurance ceded (transferred) during year.

(c) Additions to the reserve after January 1, 1998, shall be made out of the total charges for title insurance policies and guarantees written, equal to the sum of the following items, as set forth in the title insurer's most recent annual statement on file with the commissioner:

I) For each title insurance policy on a single risk written or assumed after January 1, 1998, [insert amount] per $1,000 of net retained liability for policies under $500,000 and [insert amount] per $1,000 of net retained liability for policies of $500,000 or greater; and

ii) [insert amount] of escrow, settlement and closing fees collected in contemplation of the issuance of title insurance policies or guarantees.

The NAIC's Title Insurers Model Act addresses supplemental reserves as follows:

A supplemental reserve shall be established consisting of any other reserves necessary, when taken in combination with the reserves required by Subsections A and B of this

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[4] In 1992, the Legislature changed the basis for determining the amount to be deposited into the unearned premium reserve to a percentage of the liability on the face of the policy instead of a percentage of the premiums collected during a calendar year. ch. 34, § 1(b), 1992 Fla. Laws, 389-390. This remains the law today. Fla. Stat. § 625.111(1)(a)(b).

[5] NAIC Title Insurers Model Act, s. 10, B, ftnt 2.

[6] For example, other states set aside the following reserves on a $100,000 policy: MO $15 ($0.015 per $1,000 liability); PA $11($1 per policy + $0.10 per $1000 liability); TX $25 ($0.25 per $1000 liability); CA $23 (4.5% of revenue); VA $14 ($1.50 per policy + $0.0125 per $1000 liability); MN $23 (10% of total premiums); and LA $0. American Pioneer Title Insurance Company's Comparison of Statutory Premium Reserve (SPR) for a $100,000 Policy, Florida Calculation vs. Calculation of Domiciliary State (12/31/98).

section, to cover the company's liabilities with respect to all losses, claims and loss adjusted expenses. Title Insurers Model Act, § 10 (C), April 1996.(Subsection A, NAIC Title Insurers Model Act, references the statutory reserve and subsection B references a percentage of premiums.)

Releasing Unearned Premium Reserve

Florida Law

Section 625.111, F.S., provides that the adequacy of the unearned premium reserve existing on December 31, 1992, must be determined in accordance with the unearned premium reserve requirements existing on July 1, 1992, and the reserves must be released in 12 equal annual installments (or approximately 8.34 percent) beginning with the calendar year 1993.[7] Section 625.111(2)(a), F.S. With regard to amounts reserved on or after January 1, 1993, the insurer must release amounts reserved during a particular calendar year in 12 equal annual installments, beginning in the subsequent calendar year.

Some title insurance companies assert that Florida's method for the release of unearned premium reserve requires insurers to reserve more money than is actuarially necessary and disadvantages Florida insurers competing in other states. For instance, American Pioneer Title Insurance Company, which has an almost 8 percent share of Florida's title insurance market, reportedly holds $17 million in unearned premium reserves which, according to its own actuarial study, is three times the indicated reserve level of $5.5 million.

Also, according to the Department of Insurance, Florida insurers are bound by Florida's reserve requirements even when writing policies in other states. According to the NAIC, most states have this same requirement. Florida's reserve rates are higher than some other states' reserve rates. For example, Florida requires insurers to reserve $0.30 per $1,000 of liability while states such as Missouri ($0.15 per $1,000) and Texas ($0.25 per $1,000) require insurers to reserve less. Therefore, on a $100,000 title insurance policy sold in Missouri, a Florida insurer would have to reserve $30 while a Missouri insurer would only have to reserve $15.

Title Insurers Model Act

The NAIC's Title Insurers Model Act provides the following schedule with regard to the release of the unearned premium reserves to the net profit of the insurer:

> thirty-five percent (35%) of the aggregate sum on July 1 of the year next succeeding the year of addition; fifteen percent (15%) of the aggregate sum on July 1 of each of the succeeding two (2) years; ten percent (10%) of the aggregate sum of July 1 of the next succeeding year; three percent (3%) of the aggregate sum on July 1 of each of the next three (3) succeeding years; two percent (2%) of the aggregate sum on July 1 of each of the next three (3) succeeding years; and one percent (1%) of the aggregate sum on July 1 of each of the next succeeding ten (10) years. Title Insurers Model Act, § 10 (B)(d), April 1996.

Title Insurance Agents

A title insurer's primary function is to reduce the likelihood of loss by increasing the level of knowledge of potential defects in the title prior to issuing the policy. In order to gain this knowledge, title insurers must have access to a variety of local public documents, such as deeds, mortgages, and court judgments. This need for local information, in addition to the expanded activities discussed above, can require title insurance agents to play a more active role than traditional P&C insurance agents.

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[7] Prior to 1992, the unearned premium reserves were to be released at a rate of 5 percent of the original amount of such reserve for 20 years. Fla. Stat. § 625.111 (1991). In 1992, s. 625.111, F.S., was amended authorizing release of the reserves in 12 equal annual installments. ch. 34, § 1(b), 1992 Fla. Laws, 389-390.

Insurance agents are regulated by the Department of Insurance (Department) pursuant to Chapter 626, F.S.[8]

Section 626.752, F.S., sets forth the requirements relating to the exchange or brokering of insurance business. It is not clear whether this provision presently applies to title insurance agents.[9]

Rebating

In the insurance context, "rebating" refers to the return of money by an insurance agent to an insured. Typically, rebates are given as an inducement to conduct business with a particular insurance agent. Historically, this practice has been prohibited entirely by the Department for all lines of insurance. See eg., ss. 626.6215(5)(b) and 626.9541(1)(h), F.S. (1983). However, in 1986, the Florida Supreme Court in Department of Insurance v. Dade County Consumer Advocate's Office, 492 So.2d 1032, 1035 (1986), found Florida's laws prohibiting rebating by life insurance agents to be unconstitutional "to the extent they prohibit insurance agents from rebating any portion of their commissions to their customers" (emphasis added).[10] The Court held that the prohibitions on rebating unnecessarily limited consumers' bargaining power and did not advance a legitimate state purpose in safeguarding the public health, safety, or general welfare. Id.

In 1990, the Legislature responded to this case by revising provisions which prohibit rebating -- but only in certain circumstances.[11] Currently, rebating is prohibited to the extent it does not conform to the following requirements:

- The rebate shall be available to all insureds in the same actuarial class;
- The rebate must be in accordance with a rebating schedule filed by the agent with the insurer;
- The rebating must be uniformly applied so that all insureds who purchase the same policy through the agent for the same amount of insurance receive the same rebate;
- Rebates shall not be given to an insured with respect to a policy purchased from an insurer that prohibits its agents from rebating commissions;
- The rebate schedule must be prominently displayed in public view in the agent's place of business and must be available to the insured on request;
- The age, sex, place of residence, race, nationality, ethnic origin, marital status, or occupation of the insured or location of the risk must not be utilized in determining the percentage of the rebate or whether a rebate is available.

See s. 626.572(1), F.S.

Rebating is also addressed in s. 626.9541, F.S., relating to unfair insurance trade practices. Section 626.9541, F.S., sets forth a lengthy list of practices which are deemed to be unfair methods of competition and unfair or deceptive acts. On this list is a practice known as "unlawful rebating." Section 626.9541(1)(h), F.S. This provision, prior to 1990, prohibited all "rebating," however in 1990 (in conformity with the Florida Supreme Court case) the Legislature inserted the word "unlawful" before the word "rebating." As a result of this change, rebating is prohibited under s. 626.9541(1)(h), F.S., only when it does not conform to Florida law (i.e., s. 626.572, F.S.).

Title Insurance Rates

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[8] Title insurance agents are specifically regulated in Part V of Chapter 626, F.S. (ss. 626.841 - 626.8473, F.S.). Section 626.8411, F.S., describes to what extent other provisions (outside of Part V) apply, or do not apply, to title insurance agents.

[9] According to s. 626.8411(2), F.S., certain provisions of Part I of Chapter 626, F.S., **do not** apply to title insurance agents. Among the provisions listed in s. 626.8411(2), F.S., is s. 626.752, F.S., relating to exchange of business. As such, it would seem that s. 626.752, F.S., relating to exchange of business, does not apply to title insurance agents. However, s. 626.752, F.S., is not a provision within Part I of Chapter 626, F.S. (it is in Part II of Chapter 626, F.S.).

[10] The statutes found to be unconstitutional were ss. 626.611 and 626.9541(1)(h), F.S. (1983).

[11] See CS/HB 3621 (1990); Ch. 90-363, Laws of Florida.

Adoption of Rates

Title insurance rates are uniform and are promulgated by the Department through the rulemaking process. See Rule 4-186.003, F.A.C. The rates promulgated by the Department specify the "risk premium" to be charged by title insurers. "Risk premium" is defined as:

> the charge . . . that is made by a title insurer for the assumption of the risk, under the several classifications of title insurance contracts and forms, and upon which charge a premium tax is paid under s. 624.509.

Section 627.7711(2), F.S. (emphasis added). Florida law requires title insurers to retain at least 30 percent of the "risk premium" on title policies sold by title insurance agents.

"Risk premium" does not include any other charges relating to title insurance such as preparing and obtaining title information, handling funds in escrow, preparing closing documents, and conducting closings. These services are paid for separately and are included in what are called "related title services." See s. 627.7711(1), F.S. According to Department rule, title insurance agents may not charge less than actual cost for the "related title services."

According to s. 627.7711(1), F.S., the "risk premium," together with the charge for "related title services," constitutes the "regular title insurance premium."

Rate Deviations

Although the Department promulgates uniform rates, Florida law permits title insurers to petition the Department for a deviation from the adopted "risk premium." See s. 627.783(1), F.S. Any authorized title insurers are allowed to join in other insurers' petition for deviations in order to receive like authority.

Remuneration for Title Insurance Agents' Activities

Florida law requires title insurers to retain at least 30 percent of the promulgated "risk premium" -- which means 70 percent of the "risk premium" is retained by the title insurance agent. Since Florida law prohibits rebating, title insurance agents may not return any portion of the "risk premium" to the customer. In addition, title insurance agents are required to charge separately for "related title services" at no less than actual cost for those services. This remuneration framework is currently the source of litigation in Leon County Circuit Court.

Butler v. Department of Insurance

In Butler v. Department of Insurance, Butler, a developer, and intervenors, Florida Home Builders Association and National Title Insurance Company, (collectively referred to as "Butler") challenged the constitutionality of Florida's laws prohibiting title insurance agents from unlawfully rebating any portion of the "risk premium" retained by the agent. In essence, Butler argues that these laws constitute an unjustified exercise of police power and infringe upon his due process right to bargain for services. The Department of Insurance defended the case along with the following Defendant/Intervenors: Chicago Title Insurance Company, American Pioneer Title Insurance Company, Florida Land Title Association, Attorneys' Title Insurance Fund, Inc., Florida Association of Independent Title Agents, Commonwealth Land Insurance Company, Lawyers Title Insurance Company, and Stewart Title Insurance Company.

Butler's position in this litigation is that:

- the 70 percent portion of the "risk premium" retained by title insurance agents constitutes a non-negotiable "sales commission" paid to the agent for doing nothing more than procuring a customer;

- all activities performed by the title insurance agent, including any underwriting activities, are compensated for in the separate charges for "related title services;"

- there is no legitimate state interest advanced by prohibiting agents from rebating any portion of their 70 percent of the risk premium because agents are compensated separately at no less than cost for the activities which bear on the solvency of the title insurer;

- this case is no different than Dade County Consumer Advocates (discussed above), which invalidated laws prohibiting life insurance agents from rebating any portion of their commission; and

- the 70 percent portion of the "risk premium" paid to title insurance agents cannot constitutionally be set without giving Butler the right to negotiate a reduction of that amount.

The position of the Department of Insurance and Defendant/Intervenors is that:

- the 70 percent retained portion of the "risk premium" is not a sales commission paid for procuring a customer, rather it is paid to the title insurance agent for performing underwriting activities such as determining insurability of the risk and removing objections to the title;

- title insurance agents are different than other insurance agents in that they perform these underwriting activities which are normally performed by the insurer;

- underwriting activities performed by title insurance agents are not included within, nor compensated for in the charges for, "related title services;"

- there is a legitimate state interest in prohibiting title insurance agents from rebating any portion of the 70 percent of the "risk premium" because the activities of title insurance agents have a direct impact on the potential risk borne by, and solvency of, title insurers;

- since title insurance agents are different than life insurance agents, this case is not controlled by the Dade County Consumer Advocates case; and

- the statutes prohibiting rebating of the "risk premium" by title insurance agents are constitutional.

On February 26, 1999, Leon County Circuit Judge, Terry Lewis, entered an order granting summary judgment in favor of Butler and declaring unconstitutional ss. 626.611(11), 626.8437, 626.9541(1)(h)3.a., 627.780(1), 627.782, and 627.783, F.S., and Rule 4-186.003(13)(a), F.A.C.

The Department of Insurance and the Defendant/Intervenors filed motions seeking clarification and reconsideration of this order. On March 8, 1999, Judge Lewis clarified his order by stating that his previous order declared as unconstitutional "only those portions of the Statutes and Rules that prohibit a title insurance agent from discounting or rebating any portion of his or her commission." Judge Lewis also clarified that, in the context of his order, "commission" means "the agents share of the risk premium." As a result of this decision, title insurance agents may now negotiate, or offer rebates on, their portion of the title insurance risk premium.

The Real Estate Settlement Procedures Act (RESPA)

Enacted in 1974, RESPA is a federal consumer protection statute designed to help consumers in the home buying process. Congress enacted RESPA because it wanted to effect changes in the settlement process for residential real estate that will result --

(1) in more effective advance disclosure to home buyers and sellers of settlement costs;
(2) in the elimination of kickbacks or referral fees that tend to increase unnecessarily the cost of certain settlement services;
(3) in a reduction in the amounts home buyers are required to place in escrow accounts established to insure the payment of real estate taxes and insurance; and
(4) in significant reform and modernization of local record keeping of land title information.

12 U.S.C. Section 2601(a). RESPA applies to real estate transactions involving a federally related mortgage loan and is enforced by the United States Department of Housing and Urban Development (HUD).

B. EFFECT OF PROPOSED CHANGES:

The release schedule for unearned premium reserves would be changed from a 12 year release schedule of 8.34 percent per year to a 20 year release schedule characterized by a 30 percent release the first year and one percent releases in each of the final five years. The bill would actually create two releases schedules. One schedule would be for unearned premium reserves established before July 1, 1999 and would include specific dates for the release of these funds. The other would be for unearned premiums reserves established on or after July 1, 1999, and would include a generic 20 year release schedule from the date the reserve was established. These schedules are identical in the percentages that are released in each of the 20 years of the schedule.

These release schedules would be substantially similar to the schedule provided in the current NAIC Title Insurers Model Act.

All domestic insurers would be required to obtain a Statement of Actuarial Opinion from a qualified actuary regarding the insurer's loss and loss adjustment expense reserves, including: reserves for known claims; adverse development on known claims; incurred but not reported claims and unallocated loss adjustment expenses. If the amount of the recommended reserve level stated in the actuarial opinion is greater than the sum of both the known claim reserve and the unearned premium reserve, then the insurer must add the difference to the unearned premium reserve. The additional actuarial reserves would be released according to the same schedule as the other reserves.

Smaller title insurers, because of their size, could experience a higher risk of loss than larger title insurers. A higher risk of loss could lead to an actuarial opinion with a higher recommended reserve level. Pursuant to this bill, when a smaller title insurer's recommended reserve level increases, it will owe more money into the reserve. This may create a financial concern for smaller title insurance companies.

This bill would reenact the definitions of "net retained liability" (total liability retained by a title insurer for a single risk, after taking into account the deduction for ceded liability, if any) and "single risk" (the insured amount of any title insurance policy and provides for an exception where two or more title insurance policies are issued simultaneously covering different estates in the same real property).

In addition, the remuneration framework in existence for title insurance agents before the Butler case would be restored. Title insurance agents would retain up to 70 percent of the premium, which is not subject to rebate or negotiation, and would charge no less than cost for "related title services."

The bill would achieve this by providing a legislative finding that the title insurance agent receives his or her portion of the premium for performing certain activities, called "primary title services." In the bill, "primary title services" would include determining insurability, determining and clearing objections, preparing and issuing the title insurance commitments, and preparing and issuing the policy. Moreover, the term "risk premium" would be changed to "premium" and would be redefined to specifically include a charge for "primary title services" performed by title insurance agents.

In addition, the bill would revise provisions relating to rebating in order to prohibit the practice entirely by title insurance agents and title insurance agencies. In doing this, however, the bill would permit attorneys to abate the fees charged for "legal services."

This bill would revise the rate adoption provision so that the Department would promulgate by rule the "premium" (as defined in the committee substitute) instead of the "risk premium" (as defined in current law). The bill would also prohibit title insurance agents in RESPA transactions from receiving any portion of the premium as payment for primary title services, unless the agent actually performs the primary title services. However, the bill would not prohibit agents in non-RESPA transactions from retaining portions of the premium when they do not perform primary title services.

In addition to revising the rate adoption provision, the bill would establish in statute for a three year period beginning July 1, 1999, the title insurance rates for original owner's and leasehold and mortgage title insurance, reissue transactions, substitution loans, and new home purchases. The bill would retain for the same three year period the Department of Insurance's current rules relating to premium rates that do not conflict with the provisions of the committee substitute. The bill would also prohibit the Department of Insurance from granting any deviations from the established rates for the three year period.

Lastly, the bill would remove references to outdated title insurance terms such as "title binders" and "guarantees of title" which are no longer part of the modern title insurance business.

For additional detail on the effects of the proposed changes, see the section-by-section analysis, below.

C. APPLICATION OF PRINCIPLES:

1. Less Government:

a. Does the bill create, increase or reduce, either directly or indirectly:

(1) any authority to make rules or adjudicate disputes?

The bill revises language authorizing the Department of Insurance to adopt uniform title insurance rates and provides rulemaking authority for the Department to adopt rules to implement this act. However, the bill establishes in statute for a three year period (ending June 30, 2002) the rates for original title insurance, reissue transactions, new home purchases, and substitution loans. Therefore, the committee substitute, in effect, freezes the Department's rulemaking authority with respect to title insurance rates for a three year period.

(2) any new responsibilities, obligations or work for other governmental or private organizations or individuals?

No.

(3) any entitlement to a government service or benefit?

No.

b. If an agency or program is eliminated or reduced:

(1) what responsibilities, costs and powers are passed on to another program, agency, level of government, or private entity?

N/A

(2) what is the cost of such responsibility at the new level/agency?

N/A

(3) how is the new agency accountable to the people governed?

N/A

2. Lower Taxes:

   a. Does the bill increase anyone's taxes?

      No.

   b. Does the bill require or authorize an increase in any fees?

      No.

   c. Does the bill reduce total taxes, both rates and revenues?

      No.

   d. Does the bill reduce total fees, both rates and revenues?

      No.

   e. Does the bill authorize any fee or tax increase by any local government?

      No.

3. Personal Responsibility:

   a. Does the bill reduce or eliminate an entitlement to government services or subsidy?

      No.

   b. Do the beneficiaries of the legislation directly pay any portion of the cost of implementation and operation?

      N/A

4. Individual Freedom:

   a. Does the bill increase the allowable options of individuals or private organizations/associations to conduct their own affairs?

      No. The bill specifically restores the remuneration framework for title insurance agents to its status prior to the Butler case. As such, private organizations and individuals would not be permitted to negotiate any portion of the title insurance premium retained by the title insurance agent.

   b. Does the bill prohibit, or create new government interference with, any presently lawful activity?

      The bill responds to a circuit court ruling which declared Florida's anti-rebating laws unconstitutional as they relate to title insurance agents. Therefore, absent the bill (and if the circuit court decision is affirmed by appellate courts), negotiation of the agents portion of the premium would be permitted. However, see the Comments section of the analysis for further discussion.

5. Family Empowerment:

a. If the bill purports to provide services to families or children:

(1) Who evaluates the family's needs?

N/A

(2) Who makes the decisions?

N/A

(3) Are private alternatives permitted?

N/A

(4) Are families required to participate in a program?

N/A

(5) Are families penalized for not participating in a program?

N/A

b. Does the bill directly affect the legal rights and obligations between family members?

N/A

c. If the bill creates or changes a program providing services to families or children, in which of the following does the bill vest control of the program, either through direct participation or appointment authority:

(1) parents and guardians?

N/A

(2) service providers?

N/A

(3) government employees/agencies?

N/A

D. STATUTE(S) AFFECTED:

This bill amends ss. 624.509, 625.111, 626.841, 626.8411, 626.9541, 627.7711, 627.777, 627.7773, 627.7776, 627.780, 627.783, 627.7831, 627.784, 627.7841, 627.7842, 627.7845, 627.786, 627.791, and 627.792, F.S., and creates ss. 627.7825 and 627.793, F.S.

E. SECTION-BY-SECTION ANALYSIS:

Section 1: Amends s. 624.509, F.S., to change the term "risk premium" to "premium" to conform to other provisions of the bill. See section 6 of the bill.

Section 2: Amends s. 625.111, F.S., relating to title insurance reserve requirements. Currently, title insurers are required to reserve 30 cents for each $1,000 of liability written. Insurers are permitted to release this unearned premium reserve in equal amounts over a 12 year period (equaling 8.34 percent annually).

This section adopts a sliding release schedule similar to the NAIC Model Act which permits insurers to release unearned premium reserves over a longer (20 year) period, but allows larger percentages to be released during the first several years (30 percent the first year, 15 percent the second year and 10 percent the third and fourth years) and smaller amounts to be released in the later years (1 percent in the final five years). This section also requires insurers to obtain an actuarial statement of the insurer's reserve levels and to supplement their reserves if the actuarially recommended level is higher than the insurer's actual reserve level. These supplemental reserves would be released according to the same sliding release schedule adopted in the bill.

Section 3: Amends s. 626.841, F.S., modifying the definitions of "title insurance agent" and "title insurance agency." Currently, "title insurance agents" and "title insurance agencies" are defined as persons or insurance agencies who perform a variety of functions on behalf of title insurers, including (but not limited to) issuing and countersigning binders, commitments of title insurance, and guarantees of title.

This section would delete all references to the outdated terms, "binders," "commitments of title insurance," and "guarantees of title" from the definitions of "title insurance agent" and "title insurance agency."

Section 4: Amends s. 626.8411, F.S. Currently, s. 626.8411(2), F.S., lists the provisions from Part I of Ch. 626, F.S. (general provisions relating to insurance agents), which do not apply to title insurance agents and title insurance agencies. Among these provisions is s. 626.752, F.S., relating to exchange of business. Section 626.752, F.S, however, is not a provision within Part I of Ch. 626, F.S. Therefore, it is unclear whether this provision currently applies to title insurance agents and title insurance agencies.

This section strikes from s. 626.8411(2), F.S., the reference to s. 626.752, F.S., and inserts a reference to s. 626.572, F.S. As a result, this section makes s. 626.752, relating to exchange of business, applicable to title insurance agents and title insurance agencies and makes s. 626.572, relating to rebating, when allowed, inapplicable to title insurance agents and title insurance agencies.

Section 5: Amends s. 626.9541, F.S. Currently, s. 626.9541(1)(h), F.S., deems "unlawful rebating" to be an unfair method of competition and unfair or deceptive practice. Relating to title insurance, Florida law prohibits title insurers, title insurance agents, and attorneys from giving any "unlawful rebate or abatement of the charge made incident to the issuance of such insurance, any special favor or advantage, or any monetary consideration or inducement whatever." Section 626.9541(1)(h)3.a., F.S.

Florida law also currently provides that nothing precludes an abatement in an attorney's fee charged for "services rendered incident to the issuance" of title insurance. Moreover, presently, nothing in s. 626.9541(1)(h), F.S., prohibits the payment of fees to attorneys for professional services "in the actual examination of title to real property as a condition to the issuance of title insurance."

*This section deletes the modifying term, "unlawful," from the phrase "unlawful rebate" in subparagraph 3., which relates to title insurance. This section also provides that title insurers, title insurance agents, and title insurance agencies may not rebate any portion of their share of the premium **or** any charge for related title services below the cost of such services. As a result, all rebating in title insurance would be deemed an unfair method of competition and unfair or deceptive practice.*

In addition, this section appears to broaden the circumstances in which attorney's fees may be abated by permitting abatement of attorney's fees charged for "legal services" instead of only permitting abatement of attorney's fees for services rendered "incident to the issuance" of title insurance. According to the Florida Association of Independent Title Agents, this language would permit attorney agents to avoid the rebating prohibition and induce title insurance business through reduction of fees for "legal services." In addition, this section also appears to broaden the circumstances in which attorney's fees are permitted by allowing fees to be paid to attorneys for

all "professional services" instead of merely for "professional services in the actual examination of title."

Finally, this section also provides that the payment of earned portions of premium to agents who actually perform services for the title insurer is not considered rebating.

Section 6: Amends s. 627.7711, F.S. Current law defines the terms "related title services" and "risk premium." See "Present Situation" section of analysis for a discussion of these terms.

This section would revise the definitions of the terms "risk premium" and "related title" services and would create and define the term "primary title services." The term "primary title services" would include "determining insurability in accordance with sound underwriting practices based upon an evaluation of a reasonable search and examination of the title, determination and clearance of underwriting objections and requirements to eliminate risk, preparation and issuance of a title insurance commitment setting forth the requirements to insure, and preparation and issuance of the policy." The existing term "risk premium" would be modified so that it would simply be referred to as "premium" and its definition would be revised to specifically include a charge for "primary title services" performed by a title insurer or title insurance agent and would specifically not include a commission. Lastly, this section revises the definition of "related title services" to specifically include preparing or obtaining the title "search" and "examining title" instead of current law which states, preparing or obtaining "title information."

This section, in effect, specifically responds to the issue presented in the Butler v. Department of Insurance case relating to how the title insurance agent is compensated for performing underwriting activities. This section states that these underwriting services are called "primary title services" and are compensated as a part of the premium rather than in the charges for "related title services" as asserted by Butler.

Section 7: Amends s. 627.777, F.S., to remove references to outdated terms, "title insurance binder" and "preliminary report."

Section 8: Amends s. 627.7773, F.S., to make forms accounting and auditing requirements applicable to title insurance "agencies" as well as to title insurance agents.

Section 9: Amends s. 627.7776, F.S., to make the requirements relating to furnishing supplies applicable to title insurance "agencies" as well as to title insurance agents.

Section 10: Amends s. 627.780, F.S., relating to illegal dealings in risk premium, to change the term "risk premium" to "premium". This change would conform to the definitional changes made in section 6 of the bill.

Section 11: Amends s. 627.782, F.S., relating to adoption of title insurance rates. Under current law, the Department of Insurance is authorized to adopt by rule a uniform "risk premium" to be charged for title insurance. The Department of Insurance is also authorized to establish limitations on the charges for "related title services."

Currently, under 12 U.S.C. s. 2607(b) of RESPA, no person shall give or accept any portion, split, or percentage of any charge received for the rendering of a real estate settlement service in a transaction involving a federally related mortgage loan, *other than for services actually performed*. This is basically a prohibition against kickbacks and unearned fees.

In 1995, HUD, in an investigation of Florida title insurance companies, found that some title insurers and title insurance agents were violating s. 2607(b) by providing and receiving things of value (such as providing pro forma commitments and title evidence at less than cost) as an inducement for the title insurance agent to send business to the title insurer.

This section would change the rate which is adopted by the Department of Insurance to provide that the Department adopt a "premium" (as is defined in section 6 of the bill) instead of a "risk premium" (as defined in current law). See section 6 of the section-by-section analysis for the bill's definition of "premium."

This section would also prohibit title insurance agents in RESPA transactions from retaining any portion of the premium paid for primary title services, unless the agent actually performs those primary title services. There is no prohibition in the bill, however, against agents retaining premium in non-RESPA transactions where they do not actually perform primary title services. As such, this language appears to suggest that agents who write non-RESPA transactions may retain portions of the premium even though they do not actually perform primary title services..

Section 12: Creates s. 627.7825, F.S. Under current law, the Legislature grants the Department of Insurance the authority to promulgate the premium for title insurance transactions. See section 627.782(1), F.S. The current rates for original owner's and leasehold and mortgage title insurance are found in Rule 4-186.003, Florida Administrative Code (F.A.C.). The current rates for original owner's and leashold and mortgage title insurance established in Rule 4-186.003(1) and (4), F.A.C., are as follows:

	Per thousand
From $0 to $100,000 of liability written	$5.75
From $100,000 to $1 million, add	$5.00
Over $1 million and up to $10 million, add	$3.00
Over $10 million, add	$2.25

This rule also provides for reduced title insurance rates in certain circumstances -- such as for the reissue rates and substitution loan rates. Reissue rates involve the situation where a previous owner's policy was issued insuring the seller or the mortgagor in the current transaction and both the reissuing agent and the reissuing underwriter retain copies of the prior owner's policy. Reissue rates currently apply to several types of policies, including policies on the first sale of improved property (new homes) and on policies issued with an effective date within one year of the effective date of the policy insuring the seller or mortgagor in the current transaction. If the reissue rate applies, the rates are as follows:

	Per thousand
Up to $100,000 of liability written	$3.30
From $100,000 to $1 million, add	$3.00
Over $1 million and up to $10 million, add	$2.00
Over $10 million, add	$1.50

A substitution loan involves situations where the same borrower and the same lender make a substitution loan on the same property which was insured by an insurer in connection with the original loan. If the substitution loan rates applies, the rates are as follows:

Age of Previous Loan	Rates
3 years or under	30% of original rates
From 3 years to 4 years	40% of original rates
From 4 years to 5 years	50% of original rates
From 5 years to 10 years	60% of original rates
Over 10 years	100% of original rates

In addition to these rates, Rule 4-186.003, F.A.C., contains provisions relating to contract purchaser -- lessee rates, simultaneous issue rates, binders and commitments, and construction loans.

This section would establish in statute for a three-year period (ending June 30, 2002) the title insurance rates for original owner's and leasehold and mortgage title insurance, substitution loans, and reissue transactions. In addition, this section would establish a new home purchase discount. This section would also prohibit the Department of Insurance from granting rate deviations pursuant to s. 627.783, F.S., (for the same three-year period) from either the rates established in this section or from the Department rules that do not conflict with this section. Moreover, the Department would be prohibited from granting deviations from the Department rules that are in direct conflict with this section since these rules have been replaced by the statutory language. In

effect, the Department would be prohibited from granting any rate deviations for this three-year period.

The rates established in this section would differ from the original title insurance rates. Plus, the conditions which must be for met in order for reissue rates and substitution loan rates to apply have been relaxed in certain circumstances.

The original title insurance rates for owner's and leasehold and mortgage title insurance established in this section would differ in that the rates for high end transactions have been reduced and the minimum retention for insurers has been increased. They would be as follows:

	Per thousand	*Retention*
From $0 to $100,000 of liability written	*$5.75*	*30%*
From $100,000 to $1 million, add	*$5.00*	*30%*
Over $1 million and up to $5 million, add	*$2.50*	*35%*
Over $5 million and up to $10 million, add	*$2.25*	*40%*
Over $10 million, add	*$2.00*	*40%*

In addition, this section would modify the situations to which the reissue rates would apply by prohibiting reissue rates on new home purchases and by permitting reissue rates on policies issued with an effective date of less than three years (instead of one year) after the effective date of the policy insuring the seller or mortgagor in the current transaction.

This section would also relax the criteria for substitution loan rates by permitting the substitution loans rates for transactions of $250,000 or more even where the lender may be different than the lender on the previous loan.

Lastly, this section would create a new home purchase discount. This discount would apply to the first sale of residential property with an improvement (new homes) and would reduce the title insurance premium on the purchase of the new home by the amount of title insurance premium paid on any prior loan policy on the same property. For instance, if the new home were purchased for $100,000, the original title insurance premium would be $575 ($5.75 per thousand multiplied by $100,000). Assume the builder previously paid premium on a title insurance policy insuring the same property in the amount of $100. The final premium paid by the new home purchaser would be $475 ($575, original title insurance premium, minus $100, the builders premium on the previous policy).

Section 13: Amends s. 627.783, F.S., relating to rate deviations. Under current law, title insurers may petition the Department of Insurance for authority to deviate from the promulgated title insurance rate. Title insurance agents may also file a petition for a deviation from the established charge for related title services. When one insurer or agent petitions for a deviation, other insurers or agents are permitted to join in the request for like authority or to oppose the deviation.

This section would modify the deviation statute so that title insurance agencies may also request deviations from the established rate for related title services. This section would also specifically provide that when a deviation is granted it applies only to those petitioners named in the order.

Section 14: Amends s. 627.7831, F.S., relating to title binders and commitments, to remove all references to title "binders" and add references to title insurance "agencies."

Section 15: Amends s. 627.784, F.S., relating to casualty title insurance, to make a technical, grammatical change in the language.

Section 16: Amends s. 627.7841, F.S., relating to insurance against adverse matters or defects in the title, to delete references to title "binders" and add references to title insurance "agencies."

Section 17: Amends s. 627.7842, F.S., relating to policy exceptions, to delete references to title "binders."

Section 18: Amends s. 627.7845, F.S., relating to determination of insurability and preservation of evidence of title, to delete references to title "binders" and add references to title insurance "agencies."

Section 19: Amends s. 627.786, F.S., relating to transaction of title insurance, to add a reference to "agencies" and delete a reference to "guarantee of title."

Section 20: Amends s. 627.791, F.S., relating to penalties against title insurers, to delete references to title "binders" and "guarantees of title."

Section 21: Amends s. 627.792, F.S., relating to liability of title insurers for defalcation by agents, to add references to title insurance "agencies."

Section 22: Creates s. 627.793, F.S., to authorize the Department of Insurance to adopt rules implementing the provisions of this act.

Section 23: Provides and effective date of July 1, 1999.

IV. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE AGENCIES/STATE FUNDS:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

4. Total Revenues and Expenditures:

N/A

B. FISCAL IMPACT ON LOCAL GOVERNMENTS AS A WHOLE:

1. Non-recurring Effects:

N/A

2. Recurring Effects:

N/A

3. Long Run Effects Other Than Normal Growth:

N/A

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

1. Direct Private Sector Costs:

The bill restores the remuneration framework in existence prior to the Butler case and, as a result, restores the prohibition against title insurance agents negotiating or rebating any amount of the title insurance agent's portion of the premium. Therefore, the bill would

eliminate the opportunity for prospective purchasers of title insurance to negotiate the title insurance agent's portion of the premium.

Assuming the current risk premium rate ($5.75 per $1,000 for the first $100,000 of liability), the following basic examples illustrate the nature of the bill's potential impact on consumers.

Example 1 - Current law (after the Butler case)

- Title insurance risk premium for $100,000 house = $575
- 30% portion retained by title insurer = $172.50
- 70% portion retained by title insurance agent = $402.50
- Potential reduction in the risk premium for consumers due to negotiation of the title insurance agent's portion of the risk premium = Up to $402.50
- Final risk premium paid by the consumer = Between $172.50 and $575

Example 2 - Under the bill (restoring law prior to Butler case)

- Title insurance premium for $100,000 house = $575
- 30% portion retained by title insurer = $172.50
- 70% portion retained by title insurance agent = $402.50
- Potential reduction in the premium for consumers due to negotiation of the title insurance agent's portion of the premium = $0 (not allowed)
- Final premium paid by the consumer = $575

As illustrated above, the bill would remove the opportunity for negotiation of the title insurance agent's portion of the premium. In practice, however, it is more likely that the ability to negotiate would benefit purchasers of commercial property and other large transactions where the purchasers' bargaining power is greater.

2. Direct Private Sector Benefits:

The bill would establish title insurance rates in statute for a three year period. These rates would be the same as in current Department rule for transactions under $1 million, but lower than the rates in current Department rule for transactions over $1 million. The bill would relax the criteria for the application of reissue rates and substitution loans rates. The bill would also create a new home purchase discount. See Section 12 of the Section-by-Section. As a result of these provisions, certain private individuals would benefit from lower title insurance rates.

However, for the purchase of property under $1 million which is not a new home, the title insurance rates would be no different than they are currently.

3. Effects on Competition, Private Enterprise and Employment Markets:

The bill may increase Florida domiciled title insurers' ability to compete with out-of-state insurers because the release of unearned premium reserves would be more in line with the practice throughout the country.

D. FISCAL COMMENTS:

N/A

V. CONSEQUENCES OF ARTICLE VII, SECTION 18 OF THE FLORIDA CONSTITUTION:

A. APPLICABILITY OF THE MANDATES PROVISION:

N/A

B. REDUCTION OF REVENUE RAISING AUTHORITY:

N/A

C. REDUCTION OF STATE TAX SHARED WITH COUNTIES AND MUNICIPALITIES:

N/A

VI. COMMENTS:

In Butler v. Department of Insurance, the Leon County Circuit Court declared unconstitutional Florida laws prohibiting title insurance agents from rebating their portion of the premium. This decision is currently on appeal. If the decision is reversed by the appellate court, title insurance agents would not be permitted to rebate any portion of the premium retained by them -- regardless of whether this bill passes the Legislature.

However, if the bill passes and the appellate court upholds the decision in the Butler case, it is not clear whether the bill will rectify the constitutional problems identified in the Butler case. The relevant constitutional issue would be whether the bill's explicit prohibition against rebating by title insurance agents violates Article 1, Section 9 of the Florida Constitution. This issue would be resolved in light of the bill's emphasis on the difference between the services rendered by title insurance agents and the services rendered by agents in other lines of insurance.

VII. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

CS/HB 403, 1st Engrossed, differs from CS/HB 403 in that it includes four amendments that were adopted on the floor of the House on April 21, 1999. Three of the amendments were technical in nature. The other amendment, offered by Representative Starks, added to the bill the text of CS/CS/CS/HB 93 (by Judiciary, Insurance, Real Property & Probate; Starks) relating to title insurance reserves.

VIII. SIGNATURES:

COMMITTEE ON INSURANCE:
Prepared by: Staff Director:

Robert E. Wolfe, Jr. Stephen Hogge

FINAL ANALYSIS PREPARED BY THE COMMITTEE ON INSURANCE:
Prepared by: Staff Director:

Robert E. Wolfe, Jr. Stephen Hogge