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**HOUSE OF REPRESENTATIVES
COMMITTEE ON
JUDICIAL OVERSIGHT
ANALYSIS**

BILL #: HB 1245
RELATING TO: Title Insurance
SPONSOR(S): Representative Pickens
TIED BILL(S): None

ORIGINATING COMMITTEE(S)/COUNCIL(S)/COMMITTEE(S) OF REFERENCE:

- (1) JUDICIAL OVERSIGHT
 - (2) COUNCIL FOR SMARTER GOVERNMENT
 - (3)
 - (4)
 - (5)
-

I. SUMMARY:

THIS DOCUMENT IS NOT INTENDED TO BE USED FOR THE PURPOSE OF CONSTRUING STATUTES, OR TO BE CONSTRUED AS AFFECTING, DEFINING, LIMITING, CONTROLLING, SPECIFYING, CLARIFYING, OR MODIFYING ANY LEGISLATION OR STATUTE.

This bill provides a regulatory mechanism for rebating by title insurance agents. This bill contains a finding that the regulation of title insurance rebates is essential to the public interest in order to prevent discriminatory rebating practices and to prevent unregulated rebating from threatening the solvency and soundness of title insurers, title agents, and title agencies.

This bill amends the definition of "premium" to provide that, with respect to title insurance, "premium" includes a separate title insurer portion and a title insurance agency portion. The title insurer portion is the portion of the premium required to be retained under current law and the title insurance agency portion is the amount over and above the amount required to be retained by the title insurer. This bill provides that only the rebatable portion of a title insurance premium may be rebated and provides that "no more than 30 percent of the title insurance agency's portion of the title insurance premium relating to the portion of the policy liability in excess of \$1 million shall constitute the rebatable portion of the premium."

This bill does not appear to have a fiscal impact on state or local governments.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

- | | | | |
|-----------------------------------|------------------------------|--|---|
| 1. <u>Less Government</u> | Yes <input type="checkbox"/> | No <input checked="" type="checkbox"/> | N/A <input type="checkbox"/> |
| 2. <u>Lower Taxes</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 3. <u>Individual Freedom</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 4. <u>Personal Responsibility</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |
| 5. <u>Family Empowerment</u> | Yes <input type="checkbox"/> | No <input type="checkbox"/> | N/A <input checked="" type="checkbox"/> |

For any principle that received a "no" above, please explain:

This bill imposes regulations on the rebating of title insurance premiums by title insurance agents. Under Florida Supreme Court precedent, there is currently no regulation on the rebating of title insurance premiums.

B. PRESENT SITUATION:

Title Insurance Overview

Title insurance insures "owners of real property against loss by encumbrance, defective titles, invalidity, or adverse claim to title." s. 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 whether a past event has clouded the ownership interest or lien interest in real property that the insured believes to exist when the title insurance policy is issued. In many instances, the existence of the past event can, and should, be discovered by the title agent through careful review of the public records.

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 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.

Title Insurance Rates

Section 627.782, F.S., requires the Department of Insurance to adopt a rule specifying the promulgated rate charged by title insurers. The rate formula is found at Rule 4-186.003, F.A.C. Section 627.782, F.S., requires the title insurer to retain at least 30 percent of the promulgated rate charged by title insurance agents. The insurer and agent can negotiate how much of the remaining amount is kept by the agent and how much goes to the insurer. In practice, nearly all insurers offer their agents the full 70 percent.

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, including title 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 as a violation of substantive due process "to the extent they prohibit insurance agents from rebating any portion of their commissions to their customers". 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 the case by revising provisions which prohibit rebating. Rebating is prohibited unless it conforms to the following requirements:

- (a) The rebate shall be available to all insureds in the same actuarial class;
- (b) The rebate must be in accordance with a rebating schedule filed by the agent with the insurer;
- (c) 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;
- (d) Rebates shall not be given to an insured with respect to a policy purchased from an insurer that prohibits its agents from rebating commissions;
- (e) 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;
- (f) 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.

The Legislature did not change the laws relating to rebating of title insurance premiums by title insurance agents. Accordingly, title insurance agents were not permitted to rebate any portion of the premium collected.

Chicago Title Insurance Co. v. Butler

In Chicago Title Ins. Co. v. Butler, 770 So. 2d 1210, 1221 (Fla. 2000), the Florida Supreme Court held prohibitions on the rebating by title insurance agents of portions of the premium violated Art. I, s. 9, Fla. Const.¹ In Chicago Title Ins. Co., Butler, a builder and developer, challenged various provisions of statute which prohibited title insurance agents from negotiating or rebating to their clients any portion of the premium charged for the issuance of title insurance. Butler sought the right to negotiate the agent's share of the premium only. He argued that the prohibition on rebating violated a citizen's right to bargain or negotiate for insurance rates, thereby violating his substantive due process rights under Art. I, s. 9, Fla. Const. The state argued that, unlike general insurance agents, title insurance agents are primarily responsible for researching, detecting, and eliminating any defects in title that would affect the title insurance ultimately issued. Because the services provided by the title agent directly affect the risk of liability to the title insurer, the functions of the title insurance agent are essential to the maintenance of solvency and soundness of the title insurer and, therefore, are directly related to the public interest. See Chicago Title Ins. Co., 770 So. 2d at 1214.

The court held that the statutes at issue violated substantive due process, constituting an "unconstitutional infringement on the public's right to effective bargaining power with those from whom they seek to purchase services". Chicago Title Ins. Co., 770 So. 2d at 1215. The court rejected arguments that the fact that title insurance agents play a greater role in effectuating policies had any bearing on the solvency of the industry. See Id. at 1217. The court noted that nowhere in the legislative history "does the Legislature discuss the anti-rebating provisions as a further means of ensuring the solvency of the title insurance industry." Id. at 1218. The court rejected the claim that if title agents are allowed to negotiate the amount of premium that they collect, they will "cut corners" to remain competitive. Id. at 1218. The court said "the possibility exists that some agents may sacrifice the level of care they place in underwriting title insurance policies, the regulatory laws intended to curb such practices should not outweigh the public's right to effective bargaining power." Id. at 1219-1220. Finally, the court noted that a "blanket" prohibition on rebating does not serve the public interest. Id. at 1220.

Unfair Competition Statutes

Section 626.9521(1), F.S., provides that no person can engage in any practice that is an "unfair method of competition" involving the business of insurance. Person who violate the statute face fines of up to \$2,500 for each nonwillful violation and \$20,000 for each willful violation. See s. 626.9521(2), F.S. Section 626.9541(1)(h)3, F.S., provides that any rebating of a title insurance premium is an unfair method of competition.

C. EFFECT OF PROPOSED CHANGES:

In response to the Florida Supreme Court's opinion in Chicago Title Ins. Co. v. Butler, 770 So. 2d 1210 (Fla. 2000), this bill provides a regulatory mechanism for rebating by title insurance agents. This bill contains a finding that "the regulation of title insurance rebates by title insurers, title agents, and title agencies is nevertheless as essential to the public interest as the regulation of rebates for other types of insurance in order to prevent discriminatory rebating practices and to prevent unregulated rebating from threatening the solvency and soundness of title insurers, title agents, and title agencies".

¹ Article I, s. 9, Fla. Const., provides, in pertinent part: "No person shall be deprived of life, liberty or property without due process of law".

This bill amends the definition of "premium" in s. 627.7711, F.S., to provide that, with respect to title insurance, "premium" shall include a separate title insurer portion and a title insurance agency portion. The title insurer portion is the portion of the premium required to be retained under s. 627.782, F.S and the title insurance agency portion is the amount over and above the amount required to be retained by the title insurer. Relating to rebating, this bill provides in the definition of "premium" that "no more than 30 percent of the title insurance agency's portion of the title insurance premium relating to the portion of the policy liability in excess of \$1 million shall constitute the rebatable portion of the premium."

This bill amends s. 627.780, F.S., to provide that only the rebatable portion of the title insurance premium may be rebated.

This bill creates s. 627.7805, F.S., to provide that the rebatable portion of the title insurance premium may be rebated provided that the age, sex, race, nationality, ethnic origin, marital status, or occupation of the insured or person paying for the policy shall not be considered when determining whether a rebate is available or the percentage of that rebate.

This bill amends s. 626.9541, F.S., to provide that giving an unlawful rebate is an unfair method of competition.

This bill reenacts various provisions of ch. 627 and takes effect on July 1, 2002.

D. SECTION-BY-SECTION ANALYSIS:

See "Present Situation" and "Effect of Proposed Changes".

III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Indeterminate.

D. FISCAL COMMENTS:

None.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds.

B. REDUCTION OF REVENUE RAISING AUTHORITY:

This bill does not reduce the authority that counties or municipalities have to raise revenues in the aggregate.

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

This bill does not reduce the percentage of a state tax shared with counties or municipalities.

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

It is unclear whether the regulation created in this bill will be permitted under Chicago Title Ins. Co.. In that case, the court acknowledged the right of the legislature to enact insurance regulation and explained that "the test to be applied in determining whether a statute violates due process is whether the statute bears a rational relation to a legitimate legislative purpose in safeguarding the public health, safety, or general welfare and is not discriminatory, arbitrary, or oppressive." Chicago Title Ins. Co., 770 So. 2d at 1214-15. This bill contains specific findings to address some of the court's concerns:

WHEREAS, the Legislature finds that regulation of insurance is in the public interest; that it promotes the public health, safety, and welfare by ensuring the solvency and soundness of insurers; that determination of insurability of title to real property prior to insuring such property is essential to the maintenance of the solvency and soundness of title insurers; and that because title agents or title agencies determine insurability on behalf of title insurers, there is a direct relationship between the determination of insurability performed by title agents or title agencies and the public interest, and

WHEREAS, the Florida Supreme Court, based on judicial precedents concerning other types of insurance, determined in the case of Chicago Title Insurance Co. v. Butler, 770 So. 2d 1210 (Fla. 2000) that certain title insurance statutes of this state are unconstitutional to the extent that they prohibit the negotiation of rebates of portions of title insurance premiums from title agents and title agencies, and

WHEREAS, the Legislature finds that the regulation of title insurance rebates by title insurers, title agents, and title agencies is nevertheless as essential to the public interest as the regulation of rebates for other types of insurance in order to prevent discriminatory rebating practices and to prevent unregulated rebating from threatening the solvency and soundness of title insurers, title agents, and title agencies, NOW, THEREFORE,

These findings address the court's concern that nowhere in the legislative history "does the Legislature discuss the anti-rebating provisions as a further means of ensuring the solvency of the title insurance industry" , Id. at 1218, by specifically finding that regulation is necessary to prevent "unregulated rebating from threatening the solvency and soundness" of the industry. This bill does not contain a "blanket" prohibition on rebating that was discussed in Chicago Title Ins. Co. and allows rebating of a certain portion of the premium.

However, portions of Chicago Title Ins. Co. appear to be only a judicial disagreement with the law. The case provides little guidance how to determine whether there is a "rational relation to a legitimate legislative purpose" so the regulatory mechanism under this bill might be subject to challenge.

B. RULE-MAKING AUTHORITY:

None.

C. OTHER COMMENTS:

None.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

N/A

VII. SIGNATURES:

COMMITTEE ON JUDICIAL OVERSIGHT:

Prepared by:

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