

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 111 Title Insurance  
**SPONSOR(S):** Jobs & Entrepreneurship Council and Galvano  
**TIED BILLS:** None. **IDEN./SIM. BILLS:** SB 636

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REFERENCE	ACTION	ANALYST	STAFF DIRECTOR
1) <u>Committee on Insurance</u>	<u>10 Y, 0 N</u>	<u>Overton</u>	<u>Overton</u>
2) <u>Jobs &amp; Entrepreneurship Council</u>	<u>11 Y, 0 N, As CS</u>	<u>Overton</u>	<u>Thorn</u>
3) _____	_____	_____	_____
4) _____	_____	_____	_____
5) _____	_____	_____	_____

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### SUMMARY ANALYSIS

Currently there is no requirement that a nonresident title insurance agent take an exam or complete continuing education requirements. The bill provides that in order to be licensed as a nonresident title insurance agent the individual must pass the required examination for licensure and must complete the continuing education requirements in the same manner as resident title insurance agents.

The premium for title insurance is divided between the title insurance company and the title insurance agent. The insurance company must receive at least 30% of the premium to cover risk. The agent may receive the remaining 70%; however, the agent is not allowed to lower or rebate the agent's share of the premium. The bill repeals the prohibition against a title insurance agent rebating or lowering the agent's share of the title insurance premium.

Title insurance agents provide services that are related to the closing of the real property transaction, but not part of the charge for the title insurance premium. Currently the agent may not charge less than actual cost for these services. The bill repeals the prohibition against an agent charging less than actual cost for closing services.

The bill repeals the requirement that the title insurer or agency must maintain a record of the related title service charges made for issuance of the policy.

Title insurers may execute and record the certificate of release if a satisfaction or release of the mortgage has not been executed and recorded after the loan is paid in full. The bill clarifies application of the certificate of release and repeals requirement that the Financial Services Commission adopt rules establishing a minimum premium charge for each certificate of release recorded.

If title insurance agents discount their portion of the title insurance premium, there may be a reduction in insurance premium tax revenues.

The bill has an effective date of October 1, 2007.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. HOUSE PRINCIPLES ANALYSIS:

**Provide limited government** – The bill allows citizens and title insurance agents to negotiate a fee for the agent's share of the premium and for the closing services performed by the agent rather than having the fees set by the government.

#### B. EFFECT OF PROPOSED CHANGES:

##### **Title Insurance**

Title insurance is defined by s. 624.608, F.S., as "insurance of owners of real property or others having an interest in real property or contractual interest derived therefrom, or liens or encumbrances on real property, against loss by encumbrance, or defective titles, or invalidity, or adverse claim to title." Title insurance is a policy issued by a title insurer that, after performing a search of the title, represents the state of that title and insures the accuracy of its search against claims of title defects.<sup>1</sup> Title insurance is usually taken out by the purchaser of property or an entity that is loaning money on a mortgage.

Purchasers of real property and lenders utilize title insurance to protect themselves against claims by others that claim to be the rightful owner of the property.<sup>2</sup> Most lenders require title insurance when they underwrite loans for real property.<sup>3</sup> Title insurance provides a duty to defend related to an adverse claim against title, and also promises to indemnify the policyholder for damage to the lender's security interest created by a cloud on title, unmarketable title, or adverse title that was not discovered by the title insurer.<sup>4</sup>

##### **Nonresident Title Insurance Agents**

Part V of Chapter 626 sets forth the requirements to be a Florida title insurance agent. The applicant must:

- not be found to be untrustworthy or incompetent.
- have completed a 40-hour classroom course in title insurance within the 4 years immediately preceding the date of the application for license, the applicant must, 3 hours of which shall be on the subject matter of ethics, as approved by the Department of Financial Services, or must have had at least 12 months of experience in responsible title insurance duties, while working in the title insurance business as a substantially full-time, bona fide employee of a title agency, title agent, title insurer, or attorney who conducts real estate closing transactions and issues title insurance policies.
- have passed the required examination for licensure.<sup>5</sup>

Additionally, s. 626.8414, F. S., provides that the applicant must be a Florida resident. However, s. 624.84201, F.S., which was enacted in 2005<sup>6</sup>, provides that notwithstanding the residency requirement, the Department of Financial Services, upon application and payment of the fees, may issue a license as a nonresident title insurance agent to an individual not a Florida resident in the same manner

<sup>1</sup> BLACK'S LAW DICTIONARY (8th ed. 2004).

<sup>2</sup> See e.g. American Land Title Association; <http://www.alta.org/consumer/questions.cfm> (last visited 1/31/07)

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> s. 626.8417, F.S.

<sup>6</sup> Ch. 2005-257, s. 30, Laws of Florida

applicable to the licensure of nonresident general lines agents. The Department of Financial Services may issue a license as a nonresident general lines agent to an individual licensed in his or her home state as a resident agent for the same line of authority as a Florida resident general lines agent and otherwise qualified under Florida law, but who is not a Florida resident, if by the laws of the individual's home state, residents of Florida may be licensed in a similar manner as a nonresident agent of his or her home state.<sup>7</sup>

The bill amends s. 624.84201, F.S., to provide that in order to be licensed as a nonresident title insurance agent the individual must pass the required examination for licensure. Also nonresident title insurance agents must complete the continuing education requirements in the same manner as resident title insurance agents. This change will ensure that nonresident title insurance agents have the same substantive knowledge of Florida real property law as resident title insurance agents.

### **Title Insurance Premiums**

Under current law a title insurer charges a premium for title insurance that includes the charge for performance of primary title services<sup>8</sup> by a title insurer or title insurance agent or agency, and incurring the risks incident to such policy.<sup>9</sup> The title insurer must receive at least 30% of the premium to cover the risks and insure insurer solvency.<sup>10</sup> Therefore the title insurance agent may retain up to 70% of the premium for performing the primary title services. The title insurance agent may not rebate or lower the agent's share of the premium; such rebating is considered an unfair method of competition.<sup>11</sup>

The title insurance agent also performs related title services<sup>12</sup> and must charge at least the actual cost of these services to the customer.<sup>13</sup>

In the insurance context, "rebating" refers to the return of money by an insurance agent to an insured. Historically, this practice has been prohibited entirely for all lines of insurance. However, in 1986, *the Florida Supreme Court in Department of Insurance v. Dade County Consumer Advocate's Office*<sup>14</sup> 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". 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.<sup>15</sup>

In 1990, the Legislature responded to this case by revising provisions which prohibit rebating<sup>16</sup>; however, in *Chicago Title Insurance Co. v. Butler*<sup>17</sup>, the prohibition against an agent rebating or lowering the agent's share of the title insurance premium was again found to be unconstitutional.

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<sup>7</sup> s. 626.741, F.S.

<sup>8</sup> "Primary title services" means determining insurability in accordance with sound underwriting practices based upon evaluation of a reasonable search and examination of the title or the records of a Uniform Commercial Code filing office and such other information as may be necessary, 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. s. 627.771(1)(b), F.S.

<sup>9</sup> s. 627.771(2), F.S.

<sup>10</sup> s. 627.782(1), F.S.; Rule 690-186.003(9), F.A.C.

<sup>11</sup> s. 626.9541(1)(h)3., F.S.

<sup>12</sup> "Related title services" means services performed by a title insurer or title insurance agent or agency, in the agent's or agency's capacity as such, including, but not limited to, preparing or obtaining a title search, examining title, examining searches of the records of a Uniform Commercial Code filing office and such other information as may be necessary, preparing documents necessary to close the transaction, conducting the closing, or handling the disbursing of funds related to the closing in a real estate closing transaction in which a title insurance commitment or policy is to be issued. The premium, together with the charge for related title services, constitutes the regular title insurance premium. s. 627.771(1)(a), F.S.

<sup>13</sup> Rule 690-186.003(11)(a), F.A.C.

<sup>14</sup> 492 So.2d 1032, 1035 (1986)

<sup>15</sup> Id.

<sup>16</sup> Ch. 90-363, LOF

<sup>17</sup> 770 So. 2d 1210 (Fla. 2000)

Specifically the court found that the anti-rebate statutes infringe upon a citizen's property rights and unconstitutionally restrict a citizen's rights to freely bargain for services.<sup>18</sup> Since the Legislature has guaranteed 30% of the premium to the title insurer for the sole purpose of ensuring industry solvency, the court found that the rebate of the agent's share of the premium would not adversely impact the insurer's solvency.<sup>19</sup>

In 1999, the Legislature specifically addressed the rebating of title insurance premiums.<sup>20</sup> *Chicago Title Insurance Co.* was not yet pending before the Florida Supreme Court, but the state had received an unfavorable ruling in the circuit court. Ch. 99-262, LOF was designed to restore the payment framework in existence for title insurance agents before the *Chicago Title Insurance Co.* case.<sup>21</sup>

The law provided that 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." Additionally the law contained the legislative finding that the title insurance agent receives his or her portion of the premium for performing certain activities, called "primary title services." "Primary title services" would include determining insurability, determining and clearing objections, preparing and issuing the title insurance commitments, and preparing and issuing the policy. The term "risk premium" was changed to "premium" and was redefined to specifically include a charge for "primary title services" performed by title insurance agents.

The bill will repeal the prohibition on the rebate or lowering of the agent's share of the title insurance premium and will allow title agents to charge less than actual cost for closing services.

Section 626.9541(1)(h)3., F.S., is amended to remove the rebate or abatement of the agent's share of the premium from the list of activities that constitute unfair methods of competition and unfair or deceptive acts. Charging less than cost for related title services is also removed from the list. The prohibition against otherwise rebating premium remains in law. Additionally also allowed is the rebate or abatement of an attorney's fee charged for professional services or any other agent charge or fee. However, nothing may be paid directly or indirectly for a referral of title insurance business.

Section 627.782(1), F.S., is amended to repeal the authorization of the Financial Services Commission by rule establish limitations on related title services charges made in addition to the premium based upon the expenses associated with the services rendered and other relevant factors.

Section 627.7711, F.S., provides definitions related to title insurance contracts. The bill amends the definitions of "related title services" and "primary title services."

"Related title services" are renamed "closing services" and "preparing or obtaining a title search" is removed from the list of services. Closing services will not be considered part of the title insurance premium. Closing services can be rebated or lowered by the title agent.

"Primary title services" is amended to mean conducting a title search or other search to obtain information necessary to determine insurability and also is amended to state that such services do not include closing services, for which a separate charge is or separate charges are made.

"Title search" is defined to mean the compiling of title information from official or public records.

The definition of "premium" is not amended. The definition continues to mean the charge that is made by a title insurer for a title insurance policy, *including the charge for performance of primary title*

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<sup>18</sup> Id. at 1220.

<sup>19</sup> Id. at 1218.

<sup>20</sup> Ch. 99-286, LOF

<sup>21</sup> Final Bill Analysis for CS/HB 403, 1st Engrossed (1999) by Florida House of Representatives, Committee on Insurance

services by a title insurer or title insurance agent or agency, and incurring the risks incident to such policy “Premium” does not “include a commission”.

The bill also amends s. 627.7845(3), F.S., to repeal the requirement that the title insurer or agency must maintain a record of the related title service charges made for issuance of the policy.

### **Real Estate Settlement Procedures Act of 1974<sup>22</sup>**

The Real Estate Settlement Procedures Act, know as RESPA, is a federal law protecting consumers from abuses and usury that requires lenders to give homebuyers advance notice of closing costs, settlement costs, relationships and lending practices. 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). Congress specifically found that RESPA should provide:

- more effective advance disclosure to home buyers and sellers of settlement costs;
- the elimination of kickbacks or referral fees that tend to increase unnecessarily the costs of certain settlement services;
- 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
- significant reform and modernization of local recordkeeping of land title information.<sup>23</sup>

The RESPA and the Federal Regulations<sup>24</sup> promulgated to implement the Act use the term “determine the insurability of the title” rather than “examination of the title.”

The bill amends s. 627.7711(1)(b), F.S.,<sup>25</sup> and s. 627.7845, F.S.,<sup>26</sup> to remove the phrase “examination of title”. The determination of insurability will be based on sound underwriting practices and based upon an evaluation of a reasonable title search.

### **Cancellation of Mortgages**

Section 701.04, F.S., provides that within 14 days after receipt of the written request of a mortgagor, the holder of a mortgage shall deliver an estoppel letter setting forth the unpaid “principal balance, interest due, and the per diem rate.” Whenever the amount of money due on any mortgage is fully paid to the person entitled to the payment, the person to whom such payment is made, must execute in writing an instrument acknowledging satisfaction of mortgage, lien, or judgment and have the satisfaction properly recorded in the proper county.

The bill amends s. 701.04, F.S., to provide that an estoppel letter shall set forth the unpaid “balance of the loan secured by the mortgage, including principal, interest, and any other charges properly due under or secured by the mortgage and interest on a per-day basis for the unpaid balance.”

### **Certificate of Release**

Section 1, Chapter 2005-122, Laws of Florida, created s. 701.041, F.S., which allows title insurers to execute a certificate of release and record the certificate of release if a satisfaction or release of the mortgage has not been executed and recorded after the loan is paid in full. This certificate of release must be recorded in the real property records of each county in which the mortgage is recorded. This addresses situations where a mortgage is paid but the documents showing the mortgage is paid are not timely filed.

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<sup>22</sup> 12 U.S.C. 2601 et seq.

<sup>23</sup> 12 U.S. C. 2601

<sup>24</sup> 24 CFR Part 3500

<sup>25</sup> The definition of “primary title services.”

<sup>26</sup> Relating to determination of insurability.

A certificate of release operates as a release of the mortgage described in the certificate of release. Recording of certificate of release by a title insurer does not relieve the mortgagor from any personal liability on the loan or other obligations secured by the mortgage. A certificate of release serves to fulfill the obligation of the mortgagee or mortgage servicer to file a satisfaction or release of the mortgage. The provisions relating to a certificate of release only apply to mortgages in the principal amount of \$500,000 or less.

The requirements of a certificate of release include the name of the mortgagor, the name of the original mortgagee, the date of the mortgage, and the date of recording. The certificate of release must include: (1) a statement that the mortgage was in the principal amount of \$500,000 or less; (2) a statement that the person executing the certificate of release is an officer or a duly appointed agent of a title insurer; (3) a statement that the certificate of release is made on behalf of the mortgagor or a person who acquired title from the mortgagor to all or a part of the property described in the mortgage; and (4) a statement that payment in full of the unpaid balance of the loan secured by the mortgage was made in accordance with the payoff statement.

A certificate of release must be duly executed, sworn, and recorded and may be executed by an officer of a title insurer or by a duly appointed agent of a title insurer. A title insurer recording a certificate of release is liable to the mortgagee for actual damage sustained due to the recording of the certificate of release and provides for prevailing party attorney fees. However, the title insurer shall have no liability if the title insurer shows that payment in full of the unpaid balance of the loan secured by the mortgage was made in accordance with the payoff statement furnished by the mortgagee or the mortgage servicer.

The Financial Services Commission is required to adopt rules establishing a minimum premium charge for each certificate of release recorded.

The Real Property, Probate, and Trust Law Section of the Florida Bar maintains that ambiguities and difficulties with s. 701.041, F.S., has rendered the certificate of release provisions ineffective.<sup>27</sup> The difficulties include inconsistent definitions of “payoff statement” in s. 701.041 and “estoppel letter” in s. 701.04 and ambiguities about which mortgages the certificates of release apply. Also, the Financial Services Commission has not adopted rules establishing a minimum premium charge for each certificate of release recorded. No rules have been adopted since the Commission has indicated that a premium cannot be justified for the preparation, execution, and recording of the release.

The bill changes references in s. 701.041 to a “payoff statement” to an “estoppel letter” thus giving the term the same meaning in s. 701.04 and s. 701.041.

The bill clarifies that provision regarding the certificate of release apply only to a mortgage securing a loan, in the principal amount of \$500,000 or less as determined from the recorded mortgage; and which contains no disclosure of record that the mortgage secures an open-end or revolving line of credit agreement.

The bill provides that title insurance agents recording a certificate of release may also be liable for actual damage sustained due to the recording of the certificate of release.

The bill repeals the provision requiring the Financial Services Commission to adopt rules establishing a minimum premium charge for each certificate of release recorded.

## C. SECTION DIRECTORY:

Section 1. Amends s. 626.84201, F.S., providing additional requirements for nonresident title insurance agent licensure.

Section 2. Amends s. 626.9541, F.S., revising unlawful rebate specifications.

Section 3. Amending s. 627.7711, F.S.; revising definitions relating to title insurance.

Section 4. Amends s. 627.780, F.S., providing an exception to a prohibition against dealing in certain premium.

Section 5. Amends s. 627.782, F.S., revising rate and rate deviation requirements.

Section 6. Amends s. 627.783, F.S., revising rate and rate deviation requirements.

Section 7. Amends s. 627.7845, F.S., revising determination of insurability and records retention requirements.

Section 8. Amends s. 701.04, F.S.; revising information contained in an estoppel letter.

Section 9. Amends s. 701.041, F.S.; revising provisions relating to certificate of release.

Section 10. Provides an effective date of October 1, 2007.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

### **A. FISCAL IMPACT ON STATE GOVERNMENT:**

#### **1. Revenues:**

Since additional nonresident applicants will be required to pay an exam fee of \$56 for the title insurance agent examination, the Department of Financial Services estimates an increase in revenue to the Insurance Regulatory Trust Fund annually of \$10,864 (194 additional title examinations x \$56).

See D. Fiscal Comments.

#### **2. Expenditures:**

The Department of Financial Services estimates that it will incur \$1,100 in expenses to make technical programming changes to the Agent Education Database (DICE) to accommodate nonresident title agents having to meet Florida's continuing education requirement in the same manner as Florida resident title agents.

### **B. FISCAL IMPACT ON LOCAL GOVERNMENTS:**

#### **1. Revenues:**

See D. Fiscal Comments.

#### **2. Expenditures:**

None.

### **C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:**

Persons purchasing title insurance will be able to negotiate with title insurance agents for lower rates on the agent's share of the title insurance premium and lower rates on closing services.

Florida's nonresident title agents would incur additional costs associated with examination and continuing education course fees.

D. FISCAL COMMENTS:

If title insurance agents discount their portion of the title insurance premium, there may be a reduction in insurance premium tax revenues.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

This bill does not require counties or municipalities to spend funds or to take an action requiring the expenditure of funds. This bill does not reduce the percentage of a state tax shared with counties or municipalities. This bill does not reduce the authority that counties and municipalities have to raise revenue.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

No new rule-making authority is provided by the bill.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

D. STATEMENT OF THE SPONSOR

No statement submitted.

**IV. AMENDMENTS/COUNCIL SUBSTITUTE CHANGES**

On February 22, 2007, the Committee on Insurance adopted two amendments.

**Amendment 1** clarifies that the source of the title insurance premium rebate is the portion of the premium retained by the title insurance agent, i.e., the portion that is not required to go to the insurer to cover the risk.

**Amendment 2** clarifies that a separate charge may be made for primary title services such services, but the charge is not required to be separate.

On March 12, 2007, the Jobs & Entrepreneurship Council adopted three amendments and favorably reported the bill as a Council Substitute. The original bill did not contain sections concerning cancellation of mortgages or certificates of release. The analysis was updated to reflect the adoption of the amendments.