The Florida Senate

BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Judiciary

BILL:	CS/CS/SB 570
INTRODUCER:	Judiciary Committee; Banking and Insurance Committee; and Senator Galvano
SUBJECT:	Title Insurance
DATE:	March 12, 2014 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Billmeier	Knudson	BI	**Fav/CS**
2.	Munroe	Cibula	JU	**Fav/CS**

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 570 changes the unearned premium reserve requirement for title insurers holding $50 million or more in surplus to policyholders. Those title insurers must have a reserve of a minimum of 6.5 percent of the total of (1) direct premiums written and (2) premiums for reinsurance assumed, with certain adjustments. Title insurers having less than $50 million in surplus as to policyholders must continue to record unearned premium reserve in accordance with current law (30 cents per $1,000 of net retained liability).

This bill creates a schedule for the release of the unearned premium reserve over 20 years for companies with more than $50 million in surplus, as follows: 35 percent of the initial sum during the year following the year the premium was written or assumed, 15 percent during each year of the next succeeding 2 years, 10 percent during the next succeeding year, 3 percent during each of the next succeeding 3 years, 2 percent during each of the next succeeding 3 years, and 1 percent during each of the next succeeding 10 years.

This bill allows a title insurer organized under the laws of another state which transfers its domicile to Florida to have an unearned premium reserve as required by the laws of the title insurer's former state. That reserve is released according to the requirements of law in effect in the former state at the time of domicile. The release of reserve based on premium written after the insurer moves to Florida is governed by Florida law.

The bill also responds to a recent Florida Supreme Court decision by providing that only contract remedies are available for the breach of a duty that arises solely from the terms of a contract of

title insurance or other instrument, relating to real estate closings, issued and approved by the Office of Insurance Regulation.

This bill provides that title insurance agency and agent applications created by the Department of Financial Services need not be on a printed form. This change allows the use of online applications. Current law allows an applicant for licensure as a title insurance agent to substitute work experience in the title insurance business for classroom instruction. This bill provides that the work experience must be under the supervision of a licensed title insurance agent, a title insurer, or an attorney.

This bill applies the same naming requirements applicable to title insurance agents to title insurance agencies. This bill provides that the naming requirements do not apply to a title insurer acting as an agent for another title insurer if both insurers hold active certificates of authority to transact title insurance and both are acting under the names designated on such certificates. The changes to the naming requirements are effective October 1, 2014.

This bill removes the requirement that a title insurance agency deposit securities with the Department of Financial Services having a market value of $35,000 or a bond in the same amount at the time of application for licensure. This requirement is no longer necessary because a title insurance agency must obtain a surety bond of at least $35,000 payable to the title insurer. This bill provides that a title insurance agent must be licensed and appointed in order to sell title insurance.

This bill changes from March 31 to May 31, the date which title insurers and agencies must report information required by the Office of Insurance Regulation for the analysis of title insurance premium rates.

II. Present Situation:

Title Insurance

Title insurance is (1) 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; or (2) insurance of owners and secured parties of the existence, attachment, perfection, and priority of security interests in personal property under the Uniform Commercial Code.[1] Title insurance serves to indemnify the insured against financial loss caused by defects in title arising out of events that occurred before the date of the policy.[2]

Title insurance agents and agencies are licensed and regulated by the Department of Financial Services ("Department") while title insurance companies are licensed and regulated by the Office of Insurance Regulation.

[1] *See* s. 624.608, F.S.
[2] *See Lawyers Title Insurance Co. v. Novastar Mortgage, Inc.*, 862 So. 2d 793,797 (Fla. 4th DCA 2004).

Title Insurance Reserve Requirements

Insurance companies must maintain cash or liquid assets on hand to pay claims and satisfy other liabilities. These are called reserves. A title insurer must maintain two types of reserves. First, a title insurer must maintain reserves sufficient to pay all of its unpaid losses.[3] In addition, a title insurer must maintain a guaranty fund or unearned premium reserve to be used for reinsurance in the event the insurer becomes insolvent.[4]

Section 625.111, F.S., provides that the unearned premium reserve must consist of at least the sum of:

- A reserve with respect to unearned premiums for policies written or title liability assumed in reinsurance before July 1, 1999, equal to the reserve established on June 30, 1999, for those unearned premiums. For domestic title insurers subject to this section, such amounts must be calculated in accordance with provisions of law of this state in effect at the time the associated premiums were written or assumed and as amended prior to July 1, 1999.
- A total amount equal to 30 cents for each $1,000 of net retained liability[5] for policies written or title liability assumed in reinsurance on or after July 1, 1999.
- An additional amount, if deemed necessary by a qualified actuary.

Title Insurance Unearned Premium Reserve Requirements in Other States

According to the Office of Insurance Regulation (OIR), Florida "has one of the highest statutory premium reserve requirements of all the states in which major title insurers are domiciled."[6] As examples, the OIR cited:

California	4.5% of premium and fees
Florida	$.30 per $1,000 of net retained liability
Minnesota	6.5% of premium and fees
Nebraska	$.17 per $1,000 of net retained liability
Texas	$.185 per $1,000 of net retained liability.[7]

Releasing Unearned Premium Reserve

In 1999, the Legislature changed the law to require a domestic title insurer to release the reserve over a period of 20 years.[8] Section 625.111, F.S., set the following schedule for release of reserves:

For policies written before July 1, 1999, an insurer shall release:

- 30 percent of the initial aggregate sum during 1999

[3] *See* ss. 625.041, 625.111, F.S.
[4] *See* s. 625.111, F.S.
[5] "Net retained liability" means the "total liability retained by a title insurer for a single risk, after taking into account the deduction for ceded liability, if any." s. 625.11(4)(a), F.S.
[6] *See* Office of Insurance Regulation, *SB 758 2014 Agency Legislative Bill Analysis* (February 10, 2014) (on file with the Senate Committee on Banking and Insurance).
[7] *See* Office of Insurance Regulation, *SB 758 2014 Agency Legislative Bill Analysis* (February 10, 2014) at p. 2 (on file with the Senate Committee on Banking and Insurance).
[8] *See* Chapter 99-336, Laws of Florida.

- 15 percent during calendar year 2000
- 10 percent during each of calendar years 2001 and 2002
- 5 percent during each of calendar years 2003 and 2004
- 3 percent during each of calendar years 2005 and 2006
- 2 percent during each of calendar years 2007-2013
- 1 percent during each of calendar years 2014-2018

For policies written after July 1, 1999, an insurer shall release:

- 30 percent of the initial sum during calendar year next succeeding the year the premium was written
- 15 percent during the next succeeding year
- 10 percent during each of the next succeeding 2 years
- 5 percent during each of the next succeeding 2 years
- 3 percent during each of the next succeeding 2 years
- 2 percent during each of the next succeeding 7 years
- 1 percent during each of the next succeeding 5 years

Title Insurance and the Economic Loss Rule

The economic loss rule is a "judicially created doctrine that sets forth circumstances under which a tort action is prohibited if the only damages suffered are economic losses."[9] Parties to a contract are generally prohibited from recovering damages in tort for matters arising from the contract.[10] The Florida Supreme Court has explained:

> Underlying [the economic loss] rule is the assumption that the parties to a contract have allocated the economic risks of nonperformance through the bargaining process. A party to a contract who attempts to circumvent the contractual agreement by making a claim for economic loss in tort is, in effect, seeking to obtain a better bargain than originally made. Thus, when the parties are in privity, contract principles are generally more appropriate for determining remedies for consequential damages that the parties have, or could have, addressed through their contractual agreement. Accordingly, courts have held that a tort action is barred where a defendant has not committed a breach of duty apart from a breach of contract.[11]

In *Tiara Condominium Association v. Marsh & McClennan*, the Florida Supreme Court held that the economic loss rule does not bar an insured's suit against an insurance broker where the parties are in contractual privity and the damages are solely economic.[12] The court further held that the economic loss rule is limited to products liability cases.[13] In limiting the economic loss

[9] *Tiara Condominium Association v. Marsh & McClennan*, 110 So. 3d 399, 401 (Fla. 2013).
[10] *Id.* at 402.
[11] *Indemnity Ins. Co. of North America v. American Aviation, Inc.*, 891 So. 2d 532, 536-537 (Fla. 2004) (internal citations omitted).
[12] *Tiara Condominium Association*, 399 So. 3d at 402.
[13] *Tiara Condominium Association*, 399 So. 3d at 402.

rule to product liability cases, the court explained that it had long "expressed its desire" to return the economic loss rule to its intended purpose of limiting actions in product liability cases.[14]

Prior to *Tiara Condominium*, Florida followed a majority view that title insurers owe no duty to the insured.[15] A leading case on the applicability of the economic loss rule and the title insurance industry was *Chicago Title Insurance Co. v. Commonwealth Forest Investments*, Inc.[16] In that case, the court found that "the economic loss rule protects these contractual expectations, including the important expectation that a title insurer's risk will be limited to the dollar amount shown on the face of the policy."[17] The court concluded that the negligence action against the title insurer was barred by the economic loss rule and the unambiguous language of the policy which precluded an independent tort action for negligence.[18]

Licensing and Appointment of Title Insurance Agents

A person may not act as a title insurance agent until the person is licensed by the Department.[19, 20] Once a person obtains a license, the person must be authorized or appointed by a title insurer to transact insurance on behalf of the insurer.[21] In order to obtain a license, an applicant must complete a 40-hour classroom course in title insurance or have had 12 months of experience in responsible title insurance duties while working as a substantially full-time employee of a title agency, title agent, title insurer, or an attorney who conducts real estate closings and issues title insurance policies but is exempt from licensure.[22] An applicant must also qualify to take and pass a required examination.[23]

Naming of Title Insurance Agencies

Florida law generally prohibits an insurance agency name from being deceptive or misleading. Section 626.8413, F.S., provides that a title insurance agent shall not adopt a name which contains the words "title insurance," "title guaranty," or "title guarantee" unless such words are followed by the word "agent" or "agency." The restrictions on names make clear to a purchaser that title insurance is being purchased from an agent or agency rather than directly from a title insurer. The naming requirements in s. 626.8413, F.S., do not apply to a title insurer acting as an agent for another title insurer.

[14] *Tiara Condominium Association*, 399 So. 3d at 407.
[15] *See e.g., MacDonald v. Old Republic Nat. Title Ins. Co.*, 882 F.Supp.2d 236, 244 (D.Mass. 2012).
[16] *Chicago Title Ins. Co. v. Commonwealth Forest Inv. Inc.*, 494 F.Supp.2d 1332, (M.D. Fla. 2007).
[17] *Chicago Title Ins. Co.*, 494 F.Supp.2d at 1337.
[18] *Chicago Title Ins. Co.*, 494 F.Supp.2d at 1337-38.
[19] *See* s. 626.8417, F.S.
[20] Title insurers and attorneys admitted to practice law in Florida and in good standing with The Florida Bar are exempt from the licensing and appointment requirements. *See* s. 626.8417(4)(a), F.S.
[21] *See* s. 626.841(1), Florida Statutes, defining "title insurance agent" as one appointed by a title insurer to issue policies on its behalf.
[22] *See* s. 626.8417(3)(a), F.S.
[23] *See* s. 626.8417(3)(b), F.S.

Bond Requirement

Section 626.8418(2), F.S., requires an applicant for licensure as a title insurance agency to deposit security with the Department of at least $35,000 or post a surety bond payable to the Department of at least $35,000 for the benefit of any appointing insurer damaged by a violation by the title insurance agency of its contract with the appointing insurer. Section 626.8419(1)(c), F.S., requires a title insurance agency to obtain a surety bond of at least $35,000 payable to the title insurer appointing the agency. The bond must be for the benefit of any appointing insurer damaged by a violation by the title insurance agency of its contract with the appointing insurer.

Reports to the Office of Insurance Regulation

Title insurance agencies and title insurers are required to submit information including revenue, loss, and expense data to the Office of Insurance Regulation (OIR) on March 31 of the year after the reporting year.[24] The Office of Insurance Regulation uses the information to assist in the analysis of title insurance premium rates, title search costs, and the condition of the title insurance industry.[25]

III. Effect of Proposed Changes:

Title Insurance Reserve Requirements (Sections 1 & 2)

This bill provides that a title insurer must reserve the amount necessary to pay all of its known unpaid losses and claims incurred on or before the date of the financial statement, together with the expenses of adjustment or settlement. This requirement is in addition to the reserves required under s. 625.111, F.S. This bill removes references to unreported claims – claims where the loss has occurred but has not been reported – as a liability to be charged against a title insurers assets because unreported claims are accounted for in title insurance by the unearned premium reserve.[26]

This bill creates a new unearned premium reserve requirement for title insurers holding $50 million or more in surplus as to policyholders. Those insurers must have a reserve of a minimum of 6.5 percent of the total of (1) direct premiums written and (2) premiums for reinsurance assumed, plus other income, less premiums for reinsurance ceded as displayed in Schedule P of the title insurer's most recent annual statement filed with the OIR. Title insurers having less than $50 million in surplus as to policyholders must continue to record unearned premium reserve in accordance with current law (30 cents per $1,000 of net retained liability).

The effect of this change will reduce the unearned premium reserve requirement for title insurers having more than $50 million in surplus. This change will not have an immediate effect because there are no title insurers with $50 million in surplus domiciled in Florida.[27] According to the OIR, reducing the statutory premium reserve requirement for larger title insurers could

[24] *See* s. 627.782(8), F.S.
[25] *Id*.
[26] *See* Office of Insurance Regulation, *SB 758 2014 Agency Legislative Bill Analysis* (February 10, 2014) (on file with staff of Senate Judiciary Committee) at p. 2.
[27] *Id*.at 3.

encourage foreign title insurers to re-domesticate to Florida.[28] Nationwide, seven title insurers have a surplus in excess of $50 million.[29] The two Florida insurers placed in the rehabilitation since 2008 had less than $50 million in surplus prior to the entry of the rehabilitation orders.[30] A third Florida insurer ceased writing new policies when its surplus dropped from $27 million to $6 million.[31]

The bill does not remove the requirement that title insurers having a surplus of $50 million or more also reserve 30 cents for each $1,000 of net retained liability.[32]

Releasing Unearned Premium Reserve (Section 2)

This bill creates a schedule for the release of unearned premium reserve for companies with more than $50 million in surplus. This bill provides that the unearned premium for policies written or title liability assumed during a particular calendar year shall be released from reserve as follows:

The insurer shall release 35 percent of the initial sum during the year following the year the premium was written or assumed, with one quarter of that amount being released on March 31, June 30, September 30, and December 31 of such year.

Thereafter, this bill provides that the insurer shall release, on the same quarterly basis:

- 15 percent during each year of the next succeeding 2 years
- 10 percent during the next succeeding year
- 3 percent during each of the next succeeding 3 years
- 2 percent during each of the next succeeding 3 years
- 1 percent during each of the next succeeding 10 years

Reserve Requirement When a Title Insurer Moves to Florida (Section 2)

Currently, no title insurers are domiciled in Florida. If a title insurer moves to the state, it must immediately comply with Florida's reserve requirements. This bill allows a title insurer organized under the laws of another state that transfers its domicile to Florida to have an unearned premium reserve as required by the laws of the title insurer's former state of domicile. The reserve is released according to the requirements of law in effect in the former state at the time of domicile.

This bill requires that, for new business written after the effective date of the transfer of domicile to Florida, the domestic title insurer shall add to and set aside in the statutory or unearned premium reserve the appropriate amount as determined by the company's surplus.

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[28] *Id.*
[29] *Demotech Performance of Title Insurance Companies 2013* at p. 253.
[30] *See* http://www.myfloridacfo.com/Division/Receiver/Companies/KEL/default.htm#.UxD1zfldUeE and http://www.myfloridacfo.com/Division/Receiver/Companies/National_Title/default.htm#.UxD2BPldUeF (last visited February 28, 2014).
[31] See http://www3.ambest.com/ambv/bestnews/presscontent.aspx?altsrc=0&refnum=14608 (last visited February 28, 2014).
[32] Requiring insurers with a surplus of more than $50 million to have both a reserve of additional 6.5 percent of premium and a reserve of 30 cents per $1,000 of net retained liability appears to be a drafting error. *See* Section VI of this analysis.

Bulk Reserves (Section 2)

This bill provides that a domestic title insurer is not required to record a separate bulk reserve. "Bulk reserve" means provision for subsequent development on known claims. This bill further provides that if a separate bulk reserve is recorded, the statutory premium reserve must be reduced by the amount recorded for such bulk reserve.

The Economic Loss Rule (Section 11)

This bill responds to the 2013 decision of the Florida Supreme Court *Tiara Condominium Association v. Marsh & McClennan*, by providing that only contract remedies are available for breach of a duty which arises solely from the terms of a contract of title insurance or an instrument, such as closing protection letter, issued pursuant to s. 627.786(3), F.S.

Licensing and Appointment of Title Insurance Agents (Sections 5 and 7)

This bill amends s. 626.8412, F.S., to provide that a title insurance agent must be licensed by the Department of Financial Services and appointed by a title insurer in order to sell title insurance.

This bill provides that the Department's license application need not be on a printed form. This change allows the Department to use online applications. This bill specifies that the 12 months of experience in responsible title insurance duties required as an alternative to classroom instruction must be under the supervision of a licensed title insurance agent, a title insurer, or an attorney.

Naming of Title Insurance Agencies (Section 6)

This bill applies the same naming requirements applicable to title insurance agents to title insurance agencies. It provides that a title insurance agent or agency may not adopt a name which contains the words "title insurance," "title company," "title guaranty," or "title guarantee" unless such words are followed by the word "agent" or "agency." This bill provides that the naming restrictions do not apply to a title insurer acting as an agent for another title insurer if both insurers hold active certificates of authority to transact title insurance and both are acting under the names designated on such certificates. The changes to the naming requirements are effective October 1, 2014.

Bond Requirement (Sections 8 and 9)

The bill removes the requirement that a title insurance agency deposit with the Department securities having a market value of $35,000 or a bond in the same amount at the time of application for licensure for the benefit of any appointing insurer damaged by a violation by the title insurance agency of its contract with an appointing insurer. This requirement is no longer necessary because s. 626.8419(1)(c), F.S., requires a title insurance agency to obtain a surety bond of at least $35,000 payable to the title insurer.

Technical Changes

Sections 10 and 13 of this bill removes obsolete language relating to binders and guarantees of title. Those terms are no longer used.

Section 12 changes the date which title insurers and title insurance agencies must report required revenue, loss, and expense data to the Office of the Insurance Regulation from March 31 to May 31.

Other technical changes which clarify existing law, without changing its meaning, are made throughout the bill.

Effective Date (Section 14)

The bill takes effect July 1, 2014.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Limiting liability to contract remedies could benefit insurers by making remedies for breach of contract more predictable.

According to the Office of Insurance Regulation, this bill may encourage foreign title insurers to re-domesticate to Florida which may increase business opportunities.[33] Concerns have been expresses that the "two tier" reserve system created by the bill may disadvantage smaller title insurers. First, there is concern that lenders could use $50

[33] Office of Insurance Regulation, *SB 758 2014 Agency Legislative Bill Analysis* (February 20, 2014) (on file with staff of Senate Judiciary Committee).

million as a benchmark for acceptable surplus. Finally, there is concern that smaller title insurers would be at a disadvantage when offering reissue rates to consumers.[34]

C. Government Sector Impact:

According to the Office of Insurance Regulation, this bill may encourage foreign title insurers to re-domesticate to Florida which could increase tax and fee revenues to state and local governments.[35]

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 625.041, 625.111, 624.407, 624.408, 626.8412, 626.8413, 626.8417, 626.8418, 626.8419, 626.8437, 627.778, 627.782, and 627.7845.

IX. Additional Information:

A. Committee Substitute – Statement of Substantial Changes:
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS/CS by Judiciary on March 11, 2014:
The committee substitute adds to the underlying bill the substance of CS/SB 758, which relates to title insurance reserves.

CS by Banking and Insurance on February 4, 2014:
The CS provides that only contract remedies are available for a breach of duty arising from the terms of an instrument issued pursuant to s. 627.786(3), F.S., and changes the date which title insurers and title insurance agencies must report information to the Office of Insurance Regulation from March 31 to May 31.

B. Amendments:

None.

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

[34] Discussion points provided by representatives at Westcor Land Title Insurance Company (on file with the staff of the Senate Banking and Insurance Committee).
[35] Office of Insurance Regulation, *SB 758 2014 Agency Legislative Bill Analysis* (February 20, 2014) (on file with staff of Senate Judiciary Committee).