

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** CS/HB 301 Insurance

**SPONSOR(S):** Insurance & Banking Subcommittee; Santiago and others

**TIED BILLS:** IDEN./SIM. **BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	9 Y, 4 N, As CS	Lloyd	Luczynski
2) Civil Justice Subcommittee			
3) Commerce Committee			

### SUMMARY ANALYSIS

The bill makes the following changes regarding insurance:

- **Civil Remedies Against Insurers** – Insurance claimants are permitted to sue insurers for bad faith in claims handling practices, in certain circumstances, following a required pre-suit notice and after a 60-day cure period. The bill allows the insurer to invoke the property damage appraisal process during the 60-day cure period following the receipt of the required pre-suit notice. Additionally, if the insurer timely pays the result of the appraisal process, if payment is required, the insured will have no action for bad faith.
- **Surplus Lines Export Eligibility** – Statewide, except in Miami-Dade and Monroe Counties, Citizens Property Insurance Corporation (Citizens) limits private dwelling coverage to \$700,000; in Miami-Dade and Monroe, the limit is \$1 million. All homeowners with homes over \$1 million in value may purchase insurance in the surplus market following a single coverage rejection from a Florida insurer, this is known as “exporting coverage.” The bill lowers the home value threshold from \$1,000,000 to \$700,000 for exporting a homeowner’s property insurance for a residential dwelling to a surplus lines insurer following a single coverage rejection.
- **Unfair Insurance Trade Practices** – Insurers may only give gifts of \$100 or less per insured, or prospective insured, per calendar year for advertising purposes. The bill permits an insurer to offer and give insureds goods or services of any value for the purposes of loss control or loss mitigation related to covered risks.
- **Discounts for Purchase of Multiple Insurance Policies** – Insurers may provide premium discounts if the insured has purchased another policy from the same insurer or insurer group or if the agent services multiple policies where one policy is a Citizens policy or was taken out of Citizens. The bill expands this allowance of multiple policy discounts to also allow premium discounts for: 1) an insured’s purchase of policies from insurers operating under a joint marketing arrangement, 2) where the same agent is servicing policies for an insured where one was obtained through the Citizens clearinghouse process, or 3) the same agent is servicing policies the insured purchased from multiple insurers.
- **Secondary Notice Prior to Life Insurance Policy Lapse** – Life insurers are currently required to issue a pre-lapse notice to the insured and a second person designated by the insured following a grace period. The bill requires a life insurer to also provide a notice of lapse to the agent servicing a life insurance policy 21 days prior to the effective date of the lapse. The insurer is not required to issue secondary notice to the agent servicing the life insurance policy, if: 1) the insurer provides an online method for the agent to identify lapsing policies, 2) the insurer has no record of the agent servicing the policy, or 3) the agent is employed by the insurer or its affiliate. Receipt of the notice does not make the agent responsible for any lapse.
- **Property Insurance Claim Mediation** – Insurers are required to issue a notice of right to mediate upon receipt of a first-party claim. The bill allows the insurer to issue the required notice at the time the insurer decides that a loss is covered and is issuing payment (which is an outcome the insured may disagree with) or, as currently provided, at the time a claim is filed (which is before the insurer has adjusted the claim).

The bill has no impact on state or local government revenues or expenditures. It has positive and negative impacts on the private sector.

The bill is effective July 1, 2019.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

**STORAGE NAME:** h0301.IBS

**DATE:** 2/14/2019

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Civil Remedies Against Insurers**

##### INSURANCE AND INSURER OBLIGATIONS

Insurance is a contract, commonly referred to as a "policy," under which, for stipulated consideration called a "premium," one party, the insurer, undertakes to compensate the other, the insured, for loss on a specified subject from specified perils. Florida residents often obtain two major categories of insurance: property insurance and liability insurance. Property insurance protects individuals from the loss of or damage to property and, in some instances, personal liability pertaining to the property. One of the common lines of insurance in this category is homeowner's insurance. Automobile liability insurance<sup>1</sup> covers suits against the insured for such damages as injury or death to another driver or passenger, as well as property damage. It is insurance for those damages for which the driver can be held liable due to the operation of the automobile.

A liability insurer generally owes two major contractual duties to its insured in exchange for premium payments—the duty to indemnify and the duty to defend.<sup>2</sup> The duty to indemnify refers to the insurer's obligation to issue payment to the insured or a beneficiary on a valid claim.<sup>3</sup> The duty to defend refers to the insurer's duty to provide a defense for the insured in court against a third party with respect to a claim within the scope of the insurance contract.<sup>4</sup>

##### STATUTORY AND COMMON LAW BAD FAITH

##### *Common Law Bad Faith - "Third Party Claims"*

As early as 1938, Florida courts recognized an additional duty that does not arise directly from the contract, the common law duty of good faith on the part of an insurer to the insured in negotiating settlements with third-party claimants.<sup>5</sup> Under a liability policy, the insured's role is essentially limited to selecting the type and desired level of coverage and paying the corresponding premium.<sup>6</sup> As part of the contract, the insured surrenders to the insurer all control over the negotiations and decision making as to third-party claims.<sup>7</sup> The insured's role is relegated to the obligation to cooperate with the insurer's efforts to adjust the loss.<sup>8</sup> The insurer makes all the decisions with regard to third-party claims handling and thereby has the power to settle and foreclose an insured's exposure to liability, or to refuse to settle and leave the insured exposed to liability in excess of the policy limits.<sup>9</sup> As a result, "the relationship between the parties arising from the bodily injury liability provisions of the policy is fiduciary in nature, much akin to that of attorney and client," because the insurer owes a duty to refrain from acting solely on the basis of its own interests in the settlement of third-party claims.<sup>10</sup> Accordingly, and because of

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<sup>1</sup> In Florida, every owner or operator of an automobile is required to maintain liability insurance to cover a minimum of \$10,000 in coverage for damage to another's property in a crash. Additionally, every owner or registrant of an automobile is required to maintain personal injury protection, which covers medical expenses related to a car accident regardless of fault up to \$10,000. Ss. 324.022 and 627.733, F.S.

<sup>2</sup> 16 Williston on Contracts s. 49:105 (4th ed.).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> *Auto. Mut. Indemnity Co. v. Shaw*, 184 So. 852 (Fla. 1938).

<sup>6</sup> Rutledge R. Liles, *Florida Insurance Bad Faith Law: Protecting Businesses and You*, 85 Fla. Bar. J. No. 3, p. 8 (March 2011).

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

<sup>9</sup> *State Farm v. Laforet*, 658 So. 2d 55, 58 (Fla. 1995).

<sup>10</sup> *Baxter v. Royal Indem. Co.*, 285 So. 2d 652, 655 (Fla. 1st DCA 1973), *cert. discharged*, 317 So. 2d 725 (Fla. 1975).

this relationship, the insurer owes a duty to the insured to “exercise the utmost good faith and reasonable discretion in evaluating the claim” and negotiating for a settlement within the policy limits.<sup>11</sup> When the insurer fails to act in the best interests of the insured in settling a third-party claim, an injured insured is entitled to hold the insurer accountable for its “bad faith”<sup>12</sup> if a third party obtains a judgment against the insured in excess of his or her insurance coverage.<sup>13</sup> A third-party claim can be brought by the insured, having been held liable for judgment in excess of policy limits by the third-party claimant,<sup>14</sup> or it can be brought by the third party directly or through an assignment of the insured’s rights.<sup>15</sup>

### *Statutory Bad Faith -- First- and Third-Party Claims*

In 1982 the Legislature enacted s. 624.155, F.S., which provides that *any person* may bring a claim for “bad faith” against an insurer for “not attempting in good faith to settle claims when, under all the circumstances, it could and should have done so, had it acted fairly and honestly toward its insured with due regard for her or his interests,”<sup>16</sup> the same as the common law standard.<sup>17</sup> Section 624.155, F.S., codifies third-party claims for “bad faith,” but does not preempt the common law remedy.<sup>18</sup>

Additionally, s. 624.155, F.S., recognizes a claim for bad faith against an insurer not only in the instance of settlement negotiations with a third party, but also for an insured seeking payment from his or her own insurance company. Although Florida courts recognized a bad faith cause of action in the context of liability policies at common law, they did not impose the same obligation in the context of first-party insurance contracts, when the injured party was also the insured under the insurance policy.<sup>19</sup> At common law, first-party insurance policies were enforced solely through traditional contract remedies.<sup>20</sup>

In a first-party action under s. 624.155, F.S., there is never a fiduciary relationship between the parties, but an arm’s length contractual one based on the insurance contract. A first-party claim against the insurer does not accrue until the conclusion of the underlying litigation for contractual benefits or the insured prevails in the appraisal process and coverage is otherwise established by acceptance or court decision.<sup>21</sup> The underlying action against the insurer must be resolved in favor of the insured, because the insured cannot allege bad faith if it is not shown that the insurer should have paid the claim.

In order to bring a bad faith claim under the statute, a plaintiff must first give the insurer 60 days’ written notice of the alleged violation.<sup>22</sup> The insurer has 60 days after the required notice is filed to pay the damages or correct the circumstances giving rise to the violation.<sup>23</sup> Because first-party claims are only statutory, that cause of action does not exist until the 60-day cure period provided in the statute expires without payment by the insurer.<sup>24</sup> However, because third-party claims exist both in statute and at

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<sup>11</sup> *Id.*

<sup>12</sup> Liles, *supra* note 6.

<sup>13</sup> *Opperman v. Nationwide Mut. Fire Ins. Co.*, 515 So. 2d 263, 265 (Fla. 5th DCA 1987).

<sup>14</sup> *See Powell v. Prudential Prop. and Cas. Ins. Co.*, 584 So. 2d 12 (Fla. 3d DCA 1991).

<sup>15</sup> *See Thompson v. Commercial Union Ins. Co.* 250 So. 2d 259 (Fla. 1971)(recognizing a direct third-party claim under the common law before the enactment of s. 624.155, F.S.); *State Farm Fire and Cas. Co. v. Zebrowski*, 706 So. 2d 275 (Fla. 1997).

<sup>16</sup> S. 624.155(1)(b), F.S.

<sup>17</sup> Fla. Standard Jury Instr. 404.4 (Civil).

<sup>18</sup> S. 624.155(8), F.S.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Cammarata v. State Farm Florida Ins. Co.*, 152 So. 3d 606 (Fla. 4th DCA 2014).

<sup>22</sup> S. 624.155(3)(a), F.S.

<sup>23</sup> S. 624.155(3)(d), F.S.

<sup>24</sup> *Talat Enterprises, Inc. v. Aetna Cas. & Sur. Co.*, 753 So. 2d 1278, 1284 (Fla. 2000).

common law, the insurer cannot guarantee avoidance of a third-party bad faith claim by curing within the statutory period.<sup>25</sup>

#### "ACTING FAIRLY" TO SETTLE THIRD-PARTY CLAIMS

In interpreting what it means for an insurer to act fairly toward its insured, Florida courts have held that when the insured's liability is clear and an excess judgment is likely due to the extent of the resulting damage, the insurer has an affirmative duty to initiate settlement negotiations.<sup>26</sup> If a settlement is not reached, the insurer has the burden of showing that there was no realistic possibility of settlement within policy limits.<sup>27</sup> Failure to settle on its own does not mean that an insurer acts in bad faith.

The question of whether an insurer has acted in bad faith in handling claims against the insured is determined under the totality of the circumstances standard. Each case is determined on its own facts and ordinarily the question of failure to act in good faith with due regard for the interests of the insured is for the jury.<sup>28</sup>

In light of the heightened duty on the part of the insurer as a fiduciary, Florida courts focus on the actions of the insurer during the time when it was acting under a duty to the insured, not the claimant.<sup>29</sup>

#### PROPERTY INSURANCE APPRAISERS AND UMPIRES

Insurance companies often include an appraisal clause in property insurance policies.<sup>30</sup> The appraisal clause provides a procedure to resolve disputes between the policyholder and the insurer concerning the value of a covered loss. The appraisal clause is used only to determine disputed values. An appraisal cannot be used to determine what is covered under an insurance policy. Coverage issues are litigated and determined by the courts.

The appraisal process *generally* works as follows:

- The insurance company and the policyholder each appoint an independent, disinterested appraiser.
- Each appraiser evaluates the loss independently.
- The appraisers negotiate and attempt to reach an agreed amount of the damages.
- If the appraisers agree as to the amount of the claim, the insurer pays the claim.
- If the appraisers cannot agree on the amount, they together choose a mutually acceptable umpire.
- Once the umpire has been chosen, the appraisers each present their loss assessment to the umpire.
- The umpire will subsequently provide a written decision to both appraisers. A decision agreed to by any two of the three will set the amount of the loss.
- The insurance company or the policyholder may challenge the umpire's impartiality and disqualify a proposed umpire based on criteria set forth in statute.<sup>31</sup>

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<sup>25</sup> *Macola v. Gov. Employees Ins. Co.*, 953 So. 2d 451, 458 (Fla. 2007) (holding that an insurer's tender of the policy limits to an insured in response to the filing of a civil remedy notice, after the initiation of a lawsuit against the insured but before entry of an excess judgment, does not preclude a common law cause of action against the insurer for third-party bad faith).

<sup>26</sup> *See Powell v. Prudential Property and Casualty Insurance Company*, 584 So. 2d 12, 14 (Fla. 3d DCA 1991).

<sup>27</sup> *Id.*

<sup>28</sup> *See Berges v. Infinity Ins. Co.*, 896 So. 2d 665, 680 (Fla. 2004).

<sup>29</sup> *Id.* at 677.

<sup>30</sup> *Citizens Property Insurance Corporation v. Mango Hill Condominium Association 12 Inc.*, 54 So. 3d 578 (Fla. 3d DCA 2011) and *Intracoastal Ventures Corp. v. Safeco Ins. Co. of America*, 540 So. 2d 162 (Fla. 3d DCA 1989), contain examples of appraisal clauses.

<sup>31</sup> *See* s. 627.70151, F.S.

## RIPENESS OF BAD FAITH CLAIMS FOLLOWING INCREASES IN PROPERTY DAMAGE AMOUNTS WON THROUGH THE APPRAISAL PROCESS (*Cammarata v. State Farm Florida Ins. Co.*<sup>32</sup>)

In 2014, the Fourth District Court of Appeal (4<sup>th</sup> DCA) issued an opinion in *Cammarata v. State Farm Florida Ins. Co.* (*Cammarata*) dealing with the ripeness of bad faith actions against insurers, which resolved an apparent conflict between two prior 4<sup>th</sup> DCA cases.<sup>33</sup> Both cases involved property damage from Hurricane Wilma and followed a nearly identical fact pattern, including the use of the appraisal process following a lawsuit for breach of contract. In both cases, the insured achieved an increase in the assessed damages compared to the insurer's appraisal and the insurer paid both claims following the appraisal process. In both cases, the insurer, by paying following the appraisal process, admitted that coverage existed and the insured prevailed on the claim because more insurance benefits were paid than were offered in settlement. These are the two generally accepted prerequisites to a bad faith claim. However, both cases resulted in appeals related to the breach of contract claims.

In the first case, known as *Lime Bay*, the 4<sup>th</sup> DCA upheld a dismissal by the trial court. The 4<sup>th</sup> DCA found that the insured must win a breach of contract claim to be able to pursue the insurer for bad faith. In other words, a breach of contract was required to claim insurer bad faith. In the other case, known as *Trafalgar*, the 4<sup>th</sup> DCA found that since the insured won in the appraisal process, there was no requirement for a finding that the insurer breached the contract to support a bad faith claim. So, in the *Cammarata* case, in which the insured prevailed in the appraisal process but had not claimed there was a breach of contract, the insurer argued for summary using *Lime Bay*'s required breach finding, while the insured countered with *Trafalgar*'s finding that prevailing in the appraisal process was sufficient to support a bad faith claim. The trial court granted the insurer summary judgement, relying on *Lime Bay* and the breach of contract requirement. The *Cammarata* case was appealed to the 4<sup>th</sup> DCA.

Following a review and analysis of relevant case law,<sup>34</sup> the Court stated that "we stand by our numerous prior opinions holding that, where the insurer's liability for coverage and the extent of damages have not been determined in any form, an insurer's liability for the underlying claim and the extent of damages must be determined before a bad faith action becomes ripe."<sup>35</sup> The 4<sup>th</sup> DCA receded from *Lime Bay* and held that the insured's success in the appraisal process and the insurer's admission that coverage existed were sufficient to support a bad faith claim.

### *Effect of the Bill*

The bill allows the insurer to invoke the appraisal process during the 60-day cure period following the receipt of the required pre-suit notice.<sup>36</sup> Additionally, if the insurer timely pays the result of the appraisal process, if payment is required, the insured will have no action for bad faith. This incorporates the 4<sup>th</sup> DCA's decision in the *Cammarata* case into statute; however, the insured will have no claim for bad faith following an increase in the amount of damages following the appraisal process, whereas, under *Cammarata*, an insured that prevails in the appraisal process by achieving an increase in the damage valuation may proceed with a bad faith claim.

This reduces the number of bad faith claims and the insurer's exposure to punitive damages in cases where the appraisal process was used to establish the amount of damages and the insurer admits to coverage by paying the amount determined by the appraisal process. This will affect only statutory bad

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<sup>32</sup> *Cammarata v. State Farm Florida Ins. Co.*, 152 So. 3d 606 (Fla. 4th DCA 2014).

<sup>33</sup> *Lime Bay Condominium, Inc. v. State Farm Florida Insurance Co.*, 94 So. 3d 698 (Fla. 4th DCA 2012) and *Trafalgar at Greenacres, Ltd. v. Zurich American Insurance Co.*, 100 So. 3d 1155 (Fla. 4th DCA 2012).

<sup>34</sup> *Blanchard v. State Farm Mut. Auto. Ins. Co.*, 575 So. 2d 1289 (Fla. 1991), *Vest v. Travelers Ins. Co.*, 710 So. 2d 982, 984 (Fla. 1st DCA 1998) and *Brookins v. Goodson*, 640 So. 2d 110 (Fla. 4th DCA 1994).

<sup>35</sup> *Cammarata* at 613.

<sup>36</sup> The bill does not affect the right to a bad faith cause of action, if any, of an insured where the appraisal process was completed prior to the filing of the required pre-suit notice.

faith claims, i.e., first-party claims and those third-party claims where the third party elects to pursue statutory remedies.

## Surplus Lines Export Eligibility

Surplus lines insurance refers to a category of insurance for which the admitted market is unable or unwilling to provide coverage.<sup>37</sup> There are three basic categories of surplus lines risks:

- Specialty risks that have unusual underwriting characteristics or underwriting characteristics that admitted insurers view as undesirable;
- Niche risks for which admitted carriers do not have a filed policy form or rate; and
- Capacity risks that are risks where an insured needs higher coverage limits than those that are available in the admitted market.

Surplus lines insurers are not “authorized” insurers as defined in the Florida Insurance Code,<sup>38</sup> which means they do not obtain a certificate of authority from Office of Insurance Regulation (OIR) to transact insurance in Florida.<sup>39</sup> Rather, surplus lines insurers are “unauthorized” insurers,<sup>40</sup> but may transact surplus lines insurance if they are made eligible by OIR.

“To export” a policy means to place it with an unauthorized insurer under the Surplus Lines Law.<sup>41</sup> Unless an exception applies, before an insurance agent can place insurance in the surplus lines market, the insurance agent must make a diligent effort to procure the desired coverage from admitted insurers.<sup>42</sup> “Diligent effort” means seeking and coverage being rejected from at least three authorized insurers in the admitted market; however, if the cost to replace a residential dwelling is \$1,000,000 or more, then only one coverage rejection is needed prior to export. In that case, diligent effort is seeking and being denied coverage from at least one authorized insurer in the admitted market.<sup>43</sup> The law further specifies that:<sup>44</sup>

- The premium rate for policies written by a surplus lines insurer cannot be less than the premium rate used by a majority of authorized insurers for the same coverage on similar risks;
- The policy exported cannot provide coverage or rates that are more favorable than those that are used by the majority of authorized insurers actually writing similar coverages on similar risks;
- The deductibles must be the same as those used by one or more authorized insurers, unless the coverage is for fire or windstorm; and
- For personal residential property risks,<sup>45</sup> the policyholder must be advised in writing that coverage may be available and less expensive from Citizens Property Insurance Corporation (Citizens).

As of January 1, 2017, Citizens decreased the maximum coverage limit for dwellings from \$1,000,000 to \$700,000 statewide, except for in counties where OIR has determined there is not a reasonable degree of competition.<sup>46</sup> Currently, OIR has determined that Miami-Dade and Monroe counties do not

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<sup>37</sup> The admitted market is comprised of insurance companies licensed to transact insurance in Florida. The administration of surplus lines insurance business is managed by the Florida Surplus Lines Service Office. S. 626.921, F.S.

<sup>38</sup> The Florida Insurance Code is chapters 624-632, 634, 635, 636, 641, 642, 648, and 651, F.S. S. 624.01, F.S.

<sup>39</sup> S. 624.09(1), F.S.

<sup>40</sup> S. 624.09(2), F.S.

<sup>41</sup> S. 626.914(3), F.S.

<sup>42</sup> S. 626.916(1)(a), F.S.

<sup>43</sup> S. 626.914(4), F.S.

<sup>44</sup> S. 626.916(1), F.S.

<sup>45</sup> Personal residential policies include homeowners, mobile homeowners, dwelling fire, tenants, condominium unit owners, and similar policies.

<sup>46</sup> <https://www.citizensfla.com/-/20160726-maximum-coverage-limit-decreased> (last visited Feb. 8, 2019).

have a reasonable degree of competition. A homeowner seeking insurance for a personal residential property with a replacement cost of at least \$700,000 and less than \$1 million in Miami-Dade or Monroe counties is likely to be denied coverage from an authorized Florida insurer and to be referred to and receive coverage from Citizens. Surplus lines coverage may be the only coverage option as an alternative to Citizens in high risk areas. Consequently, homeowners in Miami-Dade and Monroe counties of properties with a replacement cost of \$700,000 or more and less than \$1 million are required to comply with a more burdensome process to become eligible for surplus lines coverage and may be more likely to seek coverage from Citizens.

### *Effect of the Bill*

The bill allows homeowner's property insurance for a residential dwelling with a replacement cost of \$700,000 or more to be exported to a surplus lines insurer following a single coverage rejection. This reduces, from three to one, the number of coverage rejections required prior to exportation for homes valued between \$700,000 and \$1,000,000. This aligns the exporting provision with the coverage limitation from Citizens in the majority of Florida and may mitigate the volume of coverage Citizens writes in Miami-Dade and Monroe.

### **Unfair Insurance Trade Practices**

The Unfair Insurance Trade Practices Act,<sup>47</sup> among other things, defines unfair methods of competition and unfair or deceptive acts in the business of insurance.<sup>48</sup> It provides an extensive list of prohibited methods and acts. Among these are prohibitions on certain inducements to the purchase of insurance, including rebates, dividends, stock, and contracts that promise to return profits to the prospective insurance purchaser. The law also describes prohibited discrimination. There are also many exceptions to the prohibitions defined by law.

Among the exceptions is authorization for insurers and their agents to offer and make gifts of charitable contributions, merchandise, goods, wares, store gift cards, gift certificates, event tickets, anti-fraud or loss mitigation services, and other items up to \$100 per calendar year to an insured, prospective insured, or any person for the purpose of advertising.<sup>49</sup> There are several similar limitations on advertising gifts under the Florida Insurance Code related to the advertising practices of title insurance agents, agencies and insurers, public adjusters, group and individual health benefit plans, and motor vehicle service agreement companies.<sup>50</sup>

### *Effect of the Bill*

The bill adds another exception, authorizing an insurer to offer and give insureds goods or services for the purposes of loss control or loss mitigation related to covered risks.<sup>51</sup>

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<sup>47</sup> Ch. 626, F.S., part IX.

<sup>48</sup> S. 626.9541, F.S.

<sup>49</sup> Rule 69B-186.010, F.A.C., Unlawful Inducements Related to Title Insurance Transactions, governs inducements related to title insurance, but exempts gifts within the value limitation of s. 626.9541(1)(m), F.S. However, federal law prohibits any fee, kickback or thing of value given for referral of real estate settlement services on mortgage loans related to federal programs. 12 U.S.C. §2607 (2017).

<sup>50</sup> Public adjusters, their apprentices, and anyone acting on behalf of the public adjuster are prohibited from giving gifts of merchandise valued in excess of \$25 as an inducement to contract. S. 626.854(10), F.S. A group or individual health benefit plan may provide merchandise without limitation in value as part of an advertisement for voluntary wellness or health improvement programs. S. 626.9541(4)(a), F.S. Motor vehicle service agreement companies are prohibited from giving gifts of merchandise in excess of \$25 to agreement holders, prospective agreement holders, or others for the purpose of advertising. S. 634.282(17), F.S.

<sup>51</sup> Loss control devices related to a covered risk could include things such as sensors that sound an alarm when the environment around high-value art exceeds set temperature or humidity levels or when a leak is detected. Loss mitigation services may include remediation of hazardous conditions or temporary secured storage.

## Discounts for Purchase of Multiple Insurance Policies

Florida law allows an insurer to include a discount in the premium charged for any policy, contract, or certificate of insurance, because another policy, contract, or certificate of any type has been purchased by the insured from the same insurer or insurer group.<sup>52</sup> Additionally, the discount is allowed when an agent is servicing both an open-market policy for the insured and one issued by Citizens or an insurer that removed the policy from Citizens through the takeout process.<sup>53</sup>

### *Effect of the Bill*

The bill expands this allowance of multiple policy discounts to also allow premium discounts for:

- An insured's purchase of policies from insurers operating under a joint marketing arrangement;
- Where the same agent is servicing policies for an insured where one was obtained through the Citizens clearinghouse process; or
- The same agent is servicing policies the insured purchased from multiple insurers.

## Secondary Notice Prior to Life Insurance Policy Lapse

Insurance coverage may lapse for non-payment of premium. The Florida Insurance Code provides a number of protections to insureds before a lapse in coverage can be enforced by the insurer through a cancellation or denial of coverage following expiration of a grace period. Generally, this occurs through a notice of lapse or notice of cancellation sent by the insurer to the insured. Cognitive impairment, loss of functional capacity, or extended convalescence can prevent individuals from receiving the notice or understanding that their insurance policy may lapse due to non-payment.

In the case of long-term care insurance, the insurer must allow a grace period of no less than 30 days and issue the notice of lapse to the insured and a second person, designated by the insured, at least 30 days before the effective date of the cancellation.<sup>54</sup> Additionally, the long term care policy must be reinstated during a minimum five-month period following cancellation, in certain circumstances.<sup>55</sup>

In the case of life insurance, the insured is entitled to a minimum 30-day grace period for non-payment.<sup>56</sup> A notice of lapse must be issued after expiration of the grace period and at least 21 days prior to the effective date of the lapse. If the policy provides a grace period greater than 51 days (the standard minimum 30-day grace period, plus the 21-day pre-lapse notice period), then the insurer must issue the notice of lapse at least 21 days prior to the expiration of the grace period.<sup>57</sup> In addition, the insured is entitled to name a second person to receive the notice of lapse on their behalf.

### *Effect of the Bill*

The bill requires a life insurer to notify<sup>58</sup> the agent of the lapsing policy or provide<sup>59</sup> a copy of the notice of lapse to the agent servicing the policy, in addition to the insured and a second person designated by

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<sup>52</sup> S. 627.0655, F.S.

<sup>53</sup> Florida law provides two methods to depopulate Citizens policies: 1) insurers may "takeout" policies currently issued by Citizens through offers of coverage, and 2) insurance applicants may be prevented from being issued a Citizens policy if an insurer offers the applicant coverage for no more than 15 percent more than the Citizens' premium through a clearinghouse listing process prior to being issued a Citizens policy. S. 627.351(6) and 627.3518, F.S.

<sup>54</sup> S. 627.94073(1) and (2), F.S.

<sup>55</sup> S. 627.94073(3), F.S.

<sup>56</sup> S. 627.453, F.S.

<sup>57</sup> S. 627.4555, F.S.

<sup>58</sup> See Section III. C., Drafting Issues or other Comments, below.

<sup>59</sup> The insurer must provide the agent their copy of the pre-lapse notice by mail or electronically.



the insured, 21 days prior to the effective date of the lapse (i.e., cancellation of coverage). The insurer is not required to issue secondary notice to the agent servicing the life insurance policy, if:

- The insurer provides an online method for the agent to identify lapsing policies;
- The insurer has no record of the agent servicing the policy; or
- The agent is employed by the insurer or its affiliate.

The agent's receipt of the notice required by the bill does not make the agent responsible for the lapse.

### **Property Insurance Claim Mediation**

The Department of Financial Services (DFS) administers alternative dispute resolution programs for various types of insurance. DFS has mediation programs for property insurance<sup>60</sup> and automobile insurance<sup>61</sup> claims. DFS has a neutral evaluation program, similar to mediation, for sinkhole insurance claims.<sup>62</sup> DFS approves mediators used in the two mediation programs and certifies the neutral evaluators used in neutral evaluations for sinkhole insurance claims.<sup>63</sup>

For property insurance claims<sup>64</sup> involving personal lines and commercial residential claims, only the policyholder, as a first-party claimant, or the insurer may request mediation under DFS' program.<sup>65</sup> This means that third parties cannot utilize the program; however, an insurer may elect to mediate with the third party. This is true even if the policyholder assigns their policy benefit rights to the third party.<sup>66</sup> The insurer must notify the policyholder of the right to mediation under the program upon receipt of the claim. The mediation costs are generally the responsibility of the insurer.

#### *Effect of the Bill*

The bill allows the insurer to issue the required notice of right to mediate at the time the insurer decides that a loss is covered and is issuing payment (which is an outcome the insured may disagree with) or, as currently provided, at the time a claim is filed (which is before the insurer has taken any action that the insured may disagree with).

#### **B. SECTION DIRECTORY:**

**Section 1.** Amends s. 624.155, F.S., relating to civil remedy.

**Section 2.** Amends s. 626.914, F.S., relating to definitions.

**Section 3.** Amends s. 626.9541, F.S., relating to unfair methods of competition and unfair or deceptive acts or practices defined.

**Section 4.** Amends s. 627.0655, F.S., relating to policyholder loss or expense-related premium discounts.

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<sup>60</sup> S. 627.7015, F.S.

<sup>61</sup> S. 626.745, F.S.

<sup>62</sup> S. 627.7074, F.S.

<sup>63</sup> Ss. 627.7015, 627.7074, and 627.745, F.S.

<sup>64</sup> An eligible claim is one that does not involve: suspected fraud; there is no coverage under the policy; one where the insurer reasonably believes the policyholder has made material misrepresentations relevant to the claim and request for payment has been denied for that reason; one for less than \$500 (unless agreed to by the parties); or, windstorm or hurricane loss if the required notice of claim was not issued in compliance with law. S. 627.7015(9), F.S.

<sup>65</sup> Policyholders may have the assistance of legal counsel during the mediation process. Litigants in the county and circuit court may be referred to the program. Commercial coverages, private passenger motor vehicle coverages, and liability coverages of property insurance policies are not eligible for the property insurance mediation program. S. 627.7015(1), F.S.

<sup>66</sup> S. 627.7015(1), F.S.

**Section 5.** Amends s. 627.4555, F.S., relating to secondary notice.

**Section 6.** Amends s. 627.7015, F.S., relating to alternative procedure for resolution of disputed property insurance claims.

**Section 7.** Provides an effective date of July 1, 2019.

## **II. 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:**

Limiting bad faith actions to prevent them if the appraisal process results in a favorable outcome to the insured may reduce insurance costs, and therefore rates, because punitive damages would be available in fewer instances.

Reducing the number of coverage rejections required prior to exportation of a residential dwelling valued between \$700,000 and \$1,000,000 to the surplus lines market may remove some of these risks from the admitted market in the state. Owners in this home value range may find it easier to obtain coverage at a price acceptable to them. In Miami-Dade and Monroe counties, this will allow easier access to the surplus lines market for more homeowners, which should help reduce Citizens' policy count. Outside of Miami-Dade and Monroe counties, this will provide easier access to the surplus lines for higher-valued homes that may have special coverage needs (and are ineligible for Citizens coverage).

Allowing the gifting of loss control devices and loss mitigation services may reduce losses, and therefore rates.

Expanding opportunities for multiple policy discounts may reduce insurance costs for consumers purchasing multiple policies through a single agent who represents multiple insurers.

Requiring a secondary notice of lapse of life insurance coverage to the agent may keep coverage in force, thus keeping premium in the market and avoiding inadvertent loss of coverage and benefits by the insured and beneficiaries. Implementing the additional secondary notice may increase administrative costs of life insurers.

### **D. FISCAL COMMENTS:**

None.

### III. COMMENTS

#### A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not Applicable. This bill does not appear to affect county or municipal governments.

2. Other:

None.

#### B. RULE-MAKING AUTHORITY:

The bill neither authorizes nor requires administrative rulemaking.

#### C. DRAFTING ISSUES OR OTHER COMMENTS:

Civil Remedies Against Insurers – s. 624.155(3)(f), F.S., tolls the applicable statute of limitations for 65 days from the mailing of the pre-suit notice. The two actions the insurer can currently take during the 60-day cure period to effectively cure their prior actions, i.e., pay the damages or correct the circumstances giving rise to the violation, can be accomplished within the tolling period. However, the appraisal process, which can be invoked for the first time following receipt of the pre-suit notice,<sup>67</sup> is unlikely to be completed within the 60-day cure period or the 65-day tolling of the applicable statute of limitations. A revision to clarify the intended effect, if any, on the statute of limitations tolling period when the appraisal process extends beyond the 60-day cure period may avoid potential confusion.

Secondary Notice Prior to Life Insurance Policy Lapse – the bill provides that the insurer must notify the agent of an impending policy lapse or provide the agent a copy of the notice of lapse by mail or electronically. The method of notification is unclear, unless a copy is mailed or emailed to the agent. Clarifying the term “notify” would improve comprehension of the allowable methods of notifying the agent.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 13, 2019, the Insurance & Banking Subcommittee considered a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute made the following changes to the bill:

- **Deletions**

The bill no longer:

- Authorizes the Florida Workers' Compensation Joint Underwriting Association, Inc., to retain unclaimed dividends and premium refunds instead of continuing to report them to the Department of Financial Services, Division of Unclaimed Property;
- Reduces the Citizens Property Insurance Corporation premium increase glide path in Monroe County from 10 percent to 5 percent;
- Prohibits application of a contingency risk multiplier for attorney fees allowed under the Florida Insurance Code for life insurance policies and annuity contracts;
- Clarifies application of the deductible to Personal Injury Protection insurance medical reimbursements.

- **Revisions**

- Unfair Insurance Trade Practices – the bill clarifies the sponsor's intent by replacing the term “offerings” with the term “merchandise, goods, wares, or other items of value;”

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<sup>67</sup> Invoking the appraisal process along with timely payment, if required, can be used by the insurer to cure its claims handling violations and prevent a bad faith claim. See *Effect of the Bill*, p. 5.

- Discounts for Purchase of Multiple Insurance Policies – as filed, the bill proposed to broaden the authority of insurers to offer multiple policy premium discounts to allow such discounts whenever an insured purchases multiple policies, rather than only in the specific circumstances provided under current law. As revised, the bill expands the list of specific circumstances where such discounts may be offered to authorize such discounts: 1) for an insured's purchase of policies from insurers operating under a joint marketing arrangement, 2) where the same agent is servicing policies for an insured where one was obtained through the Citizens clearinghouse process, or 3) if the same agent is servicing policies the insured purchased from multiple insurers;
- Secondary Notice Prior to Life Insurance Policy Lapse – the bill clarifies the process the insurer must follow when issuing a pre-lapse notice to the agent on the policy and specifies the circumstances when an insurer is not required to provide the required pre-lapse notice to the agent on the policy.

The staff analysis has been updated to reflect the committee substitute.