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**HOUSE OF REPRESENTATIVES  
COMMITTEE ON  
INSURANCE  
ANALYSIS**

**BILL #:** HB 193  
**RELATING TO:** Insurer Rehabilitation and Liquidation  
**SPONSOR(S):** Representative Gannon  
**TIED BILL(S):** HB 195

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

- (1) INSURANCE
  - (2) JUDICIAL OVERSIGHT
  - (3) COUNCIL FOR COMPETITIVE COMMERCE
  - (4)
  - (5)
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I. SUMMARY:

When solvency protections fail, the Department of Insurance (Department) may seek to be appointed Receiver of an insurer through a judicial proceeding (i.e., a delinquency proceeding) for the purpose of rehabilitating an impaired insurer or, if rehabilitation is unsuccessful or otherwise inappropriate, liquidating the insolvent company. The Department, as Receiver, is placed in control of the impaired or insolvent insurer. If the assets of liquidated insurers are not sufficient to meet their obligations to policyholders, then the appropriate guaranty fund must levy assessments against other insurers to pay these obligations. Changes related to the insurer rehabilitation and liquidation process include:

- specifically granting the receivership court (i.e., the Circuit Court in Leon County) jurisdiction over third parties (e.g., insurers other than the one in receivership, policyholders, agents, brokers, current or former officers), for the purposes of delinquency proceedings, in lieu of collateral actions in other venues;
- tolling the statutes of limitation for actions by or against the insurer to benefit the estate or others;
- authorizing the Department, as Receiver, to exercise rights of certain third parties to maximize the value of the estate;
- allowing the Department, as Receiver, to recover additional costs from third parties in certain circumstances;
- authorizing the Department, as regulator and Receiver, to investigate the causes of an insurer insolvency;
- expanding the scope of the Department's examination authority to include certain third parties currently or formerly associated with the insurer, such as agents, brokers, and officers;
- delegating from the court to the Department, as court-appointed receiver, the authority to determine the scope of discovery; and
- creating a civil cause of action, including treble damages, and additional criminal penalties, for certain fraudulent acts.

The bill may decrease state government expenditures. See Section III.D., Fiscal Comments.

II. SUBSTANTIVE ANALYSIS:

A. DOES THE BILL SUPPORT THE FOLLOWING PRINCIPLES:

1. Less Government Yes  No  N/A

The bill would create new governmental authority and power within the Department of Insurance, both as regulator and Receiver, when investigating or overseeing an insolvent insurer, and civil causes of action and criminal penalties for certain specified fraudulent acts.

2. Lower Taxes Yes  No  N/A

3. Individual Freedom Yes  No  N/A

4. Personal Responsibility Yes  No  N/A

5. Family Empowerment Yes  No  N/A

B. PRESENT SITUATION:

The Florida Insurance Code<sup>1</sup> (the Insurance Code) regulates the business of insurance in Florida. Under the Insurance Code, the Department of Insurance (Department) has a wide range of options when it determines through financial reports, examinations, or other sources that an insurer has failed, or is at risk of failing, any of the solvency tests or is otherwise in unsound financial condition. General powers of the Department include the authority to suspend or revoke an insurer's certificate of authority; impose administrative fines; issue cease-and-desist orders; and remove, suspend, or restrict the activities of those individuals operating or directing the affairs of the insurer.

In addition to these general powers, the Department may place insurers of "unsound condition"<sup>2</sup> under administrative supervision or attempt to place the insolvent insurer<sup>3</sup> in receivership, with or without the consent of the insurer.<sup>4</sup> Administrative supervision is an administrative proceeding in which the Department, with the consent of a financially troubled insurance company, supervises the management of the insurance company in an attempt to cure the company's troubles rather than close it down. Receivership is a judicial proceeding in which the Department is placed in control of the insurer for the purpose of rehabilitating or liquidating the insurer. The Department may seek to

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<sup>1</sup> Chapters 624-632, 634, 635, 641, 642, 648, and 651 constitute the "Florida Insurance Code." S. 624.01, F.S.

<sup>2</sup> "Unsound condition" means any of the following conditions: (a) The insurer's required surplus, capital, or capital stock is impaired to an extent prohibited by law; (b) The insurer continues to write new business when it has not maintained the required surplus or capital; or (c) The insurer attempts to dissolve or liquidate without first having made provisions, satisfactory to the Department, for liabilities arising from insurance policies issued by the insurer. S. 624.80(2), F.S.

<sup>3</sup> While insolvent insurers are not the only insurers placed in receivership, this analysis will use the term "insolvent insurer" interchangeably with the other instances where the Department may seek to be named Receiver. Other grounds for the Department to be named Receiver include: failure to comply with departmental orders; engaging in business practices or creating conditions hazardous to policyholders, creditors, stockholders, and the public; failure to submit to examination or inspection; concealment or removal of records; managerial deadlock; unauthorized merger; willful violation of corporate charter or law; under the control of dishonest or untrustworthy individuals, as determined by the Department; failure to pay court judgments in a timely manner; and unreasonable delay of settlement payments. Sections 631.051, 631.061, 631.071, 631.081, 631.091, F.S.

<sup>4</sup> Part VI of Ch. 624, F.S.

be appointed Receiver<sup>5</sup> through a delinquency proceeding in court for the purpose of rehabilitating an impaired insurer or, if rehabilitation is unsuccessful or otherwise inappropriate, liquidating the insolvent company. The primary goal of rehabilitation is to restore the financial solvency of the insurer; the primary goal of liquidation is to secure and maximize the assets of the insolvent company for the benefit of its policyholders.

A delinquency proceeding under Ch. 631, F.S., is the “sole and exclusive method of liquidating, rehabilitating, reorganizing, or conserving an insurer.”<sup>6</sup> Delinquency proceedings against insolvent insurers must be brought in Leon County Circuit Court, while other collateral actions against third parties (e.g., insurers other than the one in receivership, policyholders, agents, brokers, current or former officers) relating to the underlying insolvency may occur in other parts of the state where jurisdiction is appropriate.

### **The Department as Receiver**

It is important to differentiate between the Department in its usual role as the state insurance regulator and the Department in its role as the court-appointed Receiver. As the state insurance regulator, the Department is empowered by law to protect the health, safety and welfare of the citizens of Florida. As the court-appointed receiver, the Department is an officer of the court and is empowered by the court and statute to protect the individualized rights and assets of the insurer’s estate, as well as, the rights of the insurer’s creditors and policyholders. According to the Department, once the court exercises its jurisdiction over the insurer by granting the delinquency petition, the insurer is no longer under the general regulatory authority of the Department and the Receiver only has the authority conferred upon it by Part I of Ch. 631, F.S., the court, or common law.

### Investigatory Authority

While there is no express statutory authority for the Receiver to conduct an inquiry into the reasons for the insolvency, the Receiver has the authority and responsibility to conduct the affairs of the insolvent insurer. The Receiver has implicit authority under s. 631.391, F.S., to conduct investigations “preliminary or incidental to the [delinquency] proceeding.”

The Department has the authority pursuant to s. 624.316, F.S., to “examine the affairs, transactions, accounts, records, and assets of each authorized insurer . . . as often as it deems advisable.” These so-called “desk exams” may occur any time the Department deems it necessary to protect policyholders; however, all insurers must be examined on a schedule that depends on the length of time they have held a certificate of authority. Also, the Department is authorized to conduct “investigations of insurance matters . . . as it deems proper.”<sup>7</sup> The Department also has the authority to administer oaths, and compel attendance of witnesses or the production of materials.<sup>8</sup> Additionally, the Division of Insurance Fraud is authorized to investigate violations of the Insurance Code by administering oaths, compelling attendance of witnesses or production of materials, and

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<sup>5</sup> A receiver is “a person appointed by a court for the purpose of preserving property of a debtor pending an action against him, or applying the property in satisfaction of a creditor’s claim, whenever there is danger that, in the absence of such an appointment, the property will be lost, removed or injured.” Black’s Law Dictionary, 7th Ed. 1990. In this case the debtor is the insolvent insurer and the creditor is the claimant policyholder (and/or others such as lenders, lienholders, and contractors). Since the Receiver in a delinquency proceeding under Ch. 631, F.S., may exercise powers and duties beyond the scope of a traditional receiver, s. 631.011(15), F.S., defines “Receiver” to mean receiver, liquidator, rehabilitator, or conservator.

<sup>6</sup> S. 631.021(3), F.S. Also, insurers generally are exempt from federal bankruptcy laws.

<sup>7</sup> S. 624.307(3), F.S.

<sup>8</sup> S. 624.321, F.S.

collecting of evidence. The Division's investigators have general arrest powers, may execute warrants, and serve subpoenas.<sup>9</sup>

#### Protection and Collection of Insurer Assets, Funds, and Property and Payment of Claims

When the insolvent insurer is placed under the Receiver's control, the Receiver "steps into the shoes" of the company and marshals all of the insurer's assets and property to accomplish the rehabilitation or liquidation. The Receiver takes over the day-to-day management of the insurer and is given title to all "property, contracts, rights of action, and all of the books and records, of the insurer, as of the date of entry of the [court's] order . . ." <sup>10</sup> Also, the Receiver is empowered to recover the property of the insurer from others (e.g., affiliates, third party administrators, and certain purchasers). The Receiver must issue a written demand for the return of funds or property from third parties. The third party is required to either deliver the funds or property or assert its right to retain the funds or property by filing a petition with the receivership court within twenty days of the Receiver's demand. Third parties who fail in their claim to retain property are liable for costs necessary to the recovery effort. <sup>11</sup>

The Receiver also may void certain transfers of property. The Receiver may void transfers within a year prior to the delinquency proceeding upon a showing that the transfer was fraudulent. Transfers within six months of the delinquency are presumed fraudulent and the burden of proof is shifted to the property holder to show otherwise.

Innocent third parties who receive legitimate transfers of insurer property can retain the property. A legitimate transfer involves a "bona fide holder for value" or other person who in "good faith" has provided "fair consideration" for the property. <sup>12</sup> Transfers occurring after the delinquency petition is filed are only valid if the recipient has acted in "good faith" and provided "present fair equivalent value." <sup>13</sup>

After the Receiver has liquidated the insolvent insurer, the Receiver distributes the estate in accordance with a plan authorized by the court. Claims are paid in a priority order established in statute. <sup>14</sup> Every claim in each class is paid in full before those in the next class may be paid. The first class of claims paid is the costs and expenses of the Receiver, followed by the expenses incurred by a guaranty association in handling claims. Funds, assets and property that cannot be disposed of in a cost-effective or economical manner are turned over to the Comptroller as abandoned property and placed in the Unclaimed Property Trust Fund.

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<sup>9</sup> S. 626.989, F.S.

<sup>10</sup> S. 631.141(2), F.S.

<sup>11</sup> S. 631.154, F.S.

<sup>12</sup> S. 631.262, F.S. "Bona fide holder for value," "good faith," and "fair consideration" are not defined for these purposes.

<sup>13</sup> S. 631.263, F.S. "Good faith" and "present fair equivalent value" are not defined for these purposes. While this statute does not define "good faith," it does identify one situation where a person is not acting in good faith. As to persons who engage in a transfer of property or asset from an impaired or insolvent insurer after the filing of a delinquency petition, those persons with actual knowledge of the delinquency proceeding are deemed not to be acting in good faith. This means that, rather than the Receiver having to prove bad faith, the transferee has to prove good faith. The burden of proof has shifted by operation of statute.

<sup>14</sup> S. 631.271, F.S.

## **Claims Payments by Guaranty Associations**

Three guaranty funds<sup>15</sup> exist to pay the covered claims of insolvent insurers to the extent the assets of the insolvent insurer after liquidation are insufficient to do so or the terms of any takeover or purchase by another insurer do not provide for the assumption of this obligation. Payment of these claims is funded by assessments against insurers, up to specified limits, and, ultimately, individual policyholders in the form of a premium surcharge or higher premiums.

Delaying the liquidation of an insolvent insurer frequently can increase the size of the insolvency and increase the size of any necessary assessment. Rehabilitation enables the insurer to continue to participate in the market without burdening the applicable guaranty association.

## **Civil and Criminal Sanctions**

All generally applicable civil and criminal statutes also apply to activities occurring in the transaction of insurance. For example, theft is punishable under s. 812.014, F.S., and fraudulent practices are punishable under Ch. 817, F.S. However, the Insurance Code imposes specific civil and criminal penalties, as well.

Under the Insurance Code, a person is guilty of a third degree felony for knowingly and willfully filing, or signing for filing, with the Department a materially false or materially misleading financial statement or supporting document with the intent to deceive.<sup>16</sup>

Generally, a violation of the Insurance code is a second-degree misdemeanor, unless a greater penalty is provided.<sup>17</sup> Other relevant criminal activities and associated penalties are: diverting or misappropriating funds – ranges from a first degree misdemeanor to a first degree felony depending on the amount involved;<sup>18</sup> unlawful removal of records – third degree felony;<sup>19</sup> failure to record or preserve records of transfers prior to delinquency petition – first degree misdemeanor;<sup>20</sup> failure to comply with insolvency notice requirements, by unlicensed, registered, or authorized persons – first degree misdemeanor;<sup>21</sup> failure of cooperation by certain persons and obstruction by others of the Department in a delinquency proceeding – first degree misdemeanor.<sup>22</sup>

The Insurance Code also imposes civil penalties. Activities subject to civil penalties include; unfair claim settlement practices, illegal premiums, illegal refusal to insure, illegally favoring an agent or insurer, illegal dealings in life or disability insurance, failure to settle claims in good faith, and payment of benefits without disclosing coverage.<sup>23</sup> Victims of prohibited acts may recover actual damages. Punitive damages may be recovered if the activity is proven to be a general business practice. Also, unauthorized insurers and persons representing or aiding them are subject to up to a \$1,000 fine per non-willful violation and up to a \$10,000 fine per willful violation of any Department order or provision of the Insurance Code.<sup>24</sup>

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<sup>15</sup> The Florida Insurance Guaranty Association pays the claims of insolvent property and casualty insurers other than workers' compensation. The Florida Workers' Compensation Insurance Guaranty Association pays the claims of insolvent workers' compensation insurers other than individually self-insured employers. The Florida Life and Health Insurance Guaranty Association pays the claims of life and health insurers.

<sup>16</sup> S. 634.3101, F.S.

<sup>17</sup> S. 624.15, F.S.

<sup>18</sup> S. 626.561, F.S.

<sup>19</sup> S. 628.271, F.S.

<sup>20</sup> S. 631.262, F.S.

<sup>21</sup> S. 631.341, F.S.

<sup>22</sup> S. 631.391, F.S.

<sup>23</sup> S. 624.155, F.S.

<sup>24</sup> S. 626.910, F.S.

C. EFFECT OF PROPOSED CHANGES:

**Protection and Collection of Insurer Assets, Funds, and Property and Payment of Claims**

Certain operative terms would be defined to help identify legitimate transfers of insurer funds, assets, and property and aid in recovering funds and property that have been inappropriately transferred in accordance with the provisions of Ch. 631, F.S. The stated jurisdiction of the receivership court would be expanded to include actions against third parties involved in insurance, in lieu of collateral actions for related matters in other courts in other parts of the state. Statutes of limitation would be tolled to prevent the loss of valuable rights that might not be immediately apparent to the Receiver. The Receiver would be specifically authorized to exercise the rights of certain third parties that could add to the value of the estate. Also, the Receiver would be allowed to recover costs "expended in," rather than "necessary to," the recovery of funds and property from third parties.

**Investigatory Authority**

The Department would be authorized to conduct insolvency investigations prior to instituting a delinquency proceeding and, as Receiver, would be required to conduct these investigations during the delinquency proceeding. The scope of the Department's authority to examine books, records and documents of authorized insurers would be expanded to include those of third parties currently or formerly associated with the insolvent insurer. As a result, the Receiver, rather than the court, would determine the scope of permissible discovery.

**Civil and Criminal Sanctions**

New civil and criminal penalties would be created and applied to certain persons for specified fraudulent acts that jeopardize the solvency of the insurer and/or are a significant cause of the delinquency proceeding.

**Claims Payments by Guaranty Associations**

In addition to the current prohibition on claims for subrogation,<sup>25</sup> claims for contribution<sup>26</sup> and indemnity<sup>27</sup> against the Florida Insurance Guaranty Association by reinsurers, insurers, insurance pools, or underwriting associations would be prohibited. The current limitations on liability of the Association would be revised to prevent claims that would impose liabilities on the Association that either exceed statutory caps on Association liability or exceed the applicable liability of the insurer or Receiver.

**For further discussion of the changes proposed by the bill, please see Section II.D., Section-by-Section Analysis.**

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<sup>25</sup> Subrogation is the principal under which an insurer that has paid a loss under an insurance policy is entitled to all the rights and remedies belonging to the insured against a third party with respect to any loss covered by the policy. Black's Law Dictionary, Abridged 7th Ed. 2000.

<sup>26</sup> Contribution is the right to demand that another who is jointly liable for a third party's loss supply part of what is required to compensate the third party (in proportionate share). Black's Law Dictionary, Abridged 7th Ed. 2000.

<sup>27</sup> Indemnity is the right of a party that is secondarily liable for reimbursement from the party that is primarily liable for reimbursements paid to a third party (in the entire amount). Black's Law Dictionary, Abridged 7th Ed. 2000.

D. SECTION-BY-SECTION ANALYSIS:

**Section 1:** Amends paragraph (w) of subsection (1) of s. 626.9541, F.S., to make technical cross-reference changes.

**Section 2:** Substantially rewrites s. 631.001, F.S., the statement of the purposes of part I of ch. 631, F.S., to support revisions proposed by the bill.

**Section 3:** Amends s. 631.011, F.S., to apply the existing definition of “assets” to all of part I of ch. 631, F.S., because of the addition of several phrases using that term. This section also would define “bona fide holder for value,” “fair consideration,” “good faith,” and “property.” These terms operate to qualify or void the transfer of property, assets, or funds from an insurer prior to or during an insolvency.

**Section 4:** Creates s. 631.025, F.S., to identify those persons, other than the insolvent insurer, over whom the receivership court could exercise jurisdiction. This could enable the Receiver to avoid having to pursue collateral actions against those parties in other parts of Florida. The receivership court would be authorized to exercise jurisdiction over third parties currently or formerly operating in the insurance industry.

**Section 5:** Amends paragraph (d) of subsection (1) of s. 631.041, F.S., to make technical cross-reference changes. Creates subsection (6) of s. 631.041, F.S., to preserve rights of action, both by and against the insurer, which may expire between the time the Department files its petition to be appointed Receiver and the court issues its order granting or denying the request. Answering a delinquency petition may require all of the insurer’s attention and resources resulting in the insurer, and others, sitting on or overlooking legal rights.

**Section 6:** Creates s. 631.113, F.S., to preserve the insolvent insurer’s rights of action by tolling statutes of limitations for up to four years from the date the court places the insurer in receivership. This provision also would prevent the accrual of rights or running of statutes of limitations while the insurer’s management is acting against the company’s interests or while operative facts are concealed from the Department or the insurer’s management. Time periods for actions, such as those established by contract or court order, that would benefit the value of the estate would be extended for 180 days.

**Section 7:** Renumbers subsections (6) – (9) and creates a new subsection (6) of s. 631.141, F.S., to allow the Receiver to exercise the third party rights of policyholders and creditors to aide the Receiver in maximizing the value of the estate. This provision would not extend to individual claims that are personal and unique to the third party that would not increase the value of the estate.

Since the Receiver does not currently have the express authority to enforce the rights of third parties, parties opposing the Receiver’s attempt to recover property or assets may assert that the Receiver lacks standing to enforce the rights of third parties. Accordingly, the Receiver must litigate its standing to pursue recovery actions based upon third party rights.

**Section 8:** Amends paragraph (d) of subsection (6) of s. 631.154, F.S., to allow the Receiver to recover costs “expended in,” rather than those “necessary to,” actions to recover the insurer’s funds and property from third parties. This would expressly include the Department’s in-house costs. While this would remove the court’s oversight in determining what costs are “necessary to” recovery of insurer funds and property. Additional costs that are currently borne by the estate would be shifted to the third party that failed in a claim to retain to those funds or property.

**Section 9:** Creates s. 631.156, F.S. This section would expand the Department's investigatory authority,<sup>28</sup> at least with respect to investigations conducted by the Department as the Receiver. It would authorize the Department to conduct investigations into insurer solvency prior to a delinquency proceeding and require the Receiver to conduct this investigation if the court grants the receivership. The scope of the Department's authority would be expanded from examinations of authorized insurers to examination and review of the books, records, and documents of third parties associated with the insolvent insurer. These third parties include affiliates, officers, directors, managers, employees, agents, adjusters, independent contractors, and persons currently or formerly in control of the company.

The Department would be permitted to share investigatory information with the Department's Division of Insurance Fraud and other state and federal agencies without waiving any privilege or rule preventing disclosure, including the Public Records Law.

Authority to determine the scope of discovery would be shifted from the court to the Receiver. A party disputing the Receiver's access to information would be required to prove to the court that the Receiver's actions are an abuse of its discretion. Parties withholding requested evidence from the Receiver would be subject to being held in contempt of court.

**Section 10:** Creates s. 631.157, F.S., to allow the Receiver to pursue civil damages, within 4 years of the date of the initial order of rehabilitation or liquidation, or the close of the action, whichever is earlier, against persons engaged in specified fraudulent activities. Recovered damages would be added to the value of the estate.

Under this provision, the Receiver would be immune from awards of attorney's fees and costs to a prevailing "small business party" under s. 57.111, F.S. A "small business party" is defined as a business with fewer than 25 employees or a net worth up to \$2 million.

**Section 11:** Amends s. 631.193, F.S., to preserve the statutory cap on claims payments by the guaranty association by specifying that the guaranty association's liability is the same regardless of whether or not a claim is filed with the Receiver. Under s. 631.193, F.S., an insured is released from personal liability to the extent of the insured's policy limit. According to the Florida Insurance Guaranty Association, claimants have asserted that when the insured's policy limit exceeds the statutory limit on claims against the guaranty association, claimants should not be forced to take a lower recovery from the guaranty association while the insured is released from liability in an amount greater than the claimant's possible recovery from the Association.

**Section 12:** Creates s. 631.3995, F.S., to provide for closing the estate in a liquidation proceeding and to pour over any assets that cannot be distributed in a cost-effective manner to the Closed Estate Trust Fund, if created by law, rather than to the Comptroller's office as abandoned property for deposit into the Unclaimed Property Trust Fund. Money held in the Closed Estate Trust Fund would be used to support the administration of other receiverships. This provision would also codify the Department's authority to petition the receivership court to reopen the estate, upon a showing of good cause.

**Section 13:** Amends subsection (3) of s. 631.54, F.S. The definition of "covered claim," for the purposes of the Florida Insurance Guaranty Association Act, would be amended specifically to exclude claims for contribution or indemnification, in addition to the current exclusion of claims for subrogation, by reinsurers, insurers, insurance pools, or underwriting associations. Florida case

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<sup>28</sup> The Department, as the insurance regulator rather than Receiver, does have the authority pursuant to s. 631.316, F.S., to "examine the affairs, transactions, accounts, records, and assets of each authorized insurer . . . as often as it deems advisable."

law has established that subrogation in the context of this section of statute does not include contribution and indemnity.<sup>29</sup>

**Section 14:** Amends subsection (1) of s. 631.57, F.S. This section, along with sections 11 and 15 of the bill, would limit the liability of Florida Insurance Guaranty Association to the liability held by the insurer and Receiver. This would prevent claims that are within the Association's statutory limitation of liability but exceed the liability of the insurer or Receiver for the particular claim. Also, the Association would be specifically granted the same defenses to a claim that the insurer would have enjoyed and the Association's liabilities on a claim would be limited to the amounts set forth in ch. 631, F.S.

**Section 15:** Amends subsection (1) of s. 631.60, F.S. This section, along with sections 11 and 14 of the bill, would limit the liability of guaranty associations to the liability held by the insurer and Receiver. This section would expressly limit a claimant's causes of action and rights against the Florida Insurance Guaranty Association to those causes of action and rights that would have been available against the insurer.

**Section 16:** Creates s. 817.2341, F.S., to establish additional criminal penalties for the fraudulent reporting of information.

**Section 17:** Provides that the bill would take effect on July 1, 2002.

### III. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT:

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

1. Revenues:

N/A

2. Expenditures:

See fiscal comments.

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

1. Revenues:

N/A

2. Expenditures:

N/A

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

Insurers

To the extent that this bill could increase the value of insolvent estates, the financial impact on insurer members of the guaranty associations and their policyholders, will be lessened through a reduced need for assessments on premium.

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<sup>29</sup> See McKenzie Tank Lines v. Empire Gas Corp., 538 So.2d 482 (Fla. 1<sup>st</sup> DCA 1989).

Private Individuals

Claimants may see an increase in benefits to the extent the value of the insolvent estate is increased.

Third parties opposing the efforts of the Receiver to recover funds, assets, and property of the insolvent insurer could bear greater costs since the Receiver would be able to recover the costs "expended in" the recovery action, not just those "necessary to" the recovery action. This would specifically include the cost and expense of department in-house staff, in addition to outside counsel.

D. FISCAL COMMENTS:

The bill may decrease state government expenditures by allowing the Receiver to recover the costs of recovering funds, assets, and property of the insolvent insurer, including department staff salaries and expenses. While s. 631.271, F.S., allows the costs and expenses of the Receiver to be recovered from the estate prior to all other claimants, the costs and expenses of the Receiver are borne by state government to the extent that the estate is insufficient to fund this obligation.

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

A. APPLICABILITY OF THE MANDATES PROVISION:

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

B. REDUCTION OF REVENUE RAISING AUTHORITY:

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

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

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

V. COMMENTS:

A. CONSTITUTIONAL ISSUES:

None identified.

B. RULE-MAKING AUTHORITY:

The bill does not create specific rulemaking authority; however, it is not apparent whether the Department will require rulemaking authority to implement the provisions of the bill.

C. OTHER COMMENTS:

The bill contains technical and grammatical inconsistencies. At the request of the bill's sponsor, staff of the Committee on Insurance has drafted a "remove everything" amendment. See Section VI., Amendments or Committee Substitute Changes.

VI. AMENDMENTS OR COMMITTEE SUBSTITUTE CHANGES:

**Amendment 1 by Reps. Gannon and Kallinger (remove everything):** The amendment corrects technical and grammatical inconsistencies; creates a definition for the term “receivership,” an undefined term used in current and proposed language; and removes provisions that would be superfluous to current statutory authority of the Department of Insurance. The only substantive change intended by the amendment is the removal of section 12 of the bill, which would redirect property of the estate that cannot be disposed of in a cost effective manner from the Unclaimed Property Trust Fund to the Closed Estate Trust Fund.

Therefore, the amendment (and the bill) include the following changes related to the insurer rehabilitation and liquidation process:

- specifically granting the receivership court (i.e., the Circuit Court in Leon County) jurisdiction over third parties (e.g., insurers other than the one in receivership, policyholders, agents, brokers, current or former officers), for the purposes of delinquency proceedings, in lieu of collateral actions in other venues;
- tolling the statutes of limitation for actions by or against the insurer to benefit the estate or others;
- authorizing the Department, as Receiver, to exercise rights of certain third parties to maximize the value of the estate;
- allowing the Department, as Receiver, to recover additional costs from third parties in certain circumstances;
- authorizing the Department, as regulator and Receiver, to investigate the causes of an insurer insolvency;
- expanding the scope of the Department’s examination authority to include certain third parties currently or formerly associated with the insurer, such as agents, brokers, and officers;
- delegating from the court to the Department, as court-appointed receiver, the authority to determine the scope of discovery; and
- creating a civil cause of action, including treble damages, and additional criminal penalties, for certain fraudulent acts.

VII. SIGNATURES:

COMMITTEE ON INSURANCE:

Prepared by:

Staff Director:

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Eric Lloyd

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Stephen T. Hogge