

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

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

Prepared By: Judiciary Committee

BILL: CS/SB 1662

SPONSOR: Judiciary Committee and Senators Fasano and Atwater

SUBJECT: Insurance/Unauthorized Insurers

DATE: April 1, 2005

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Emrich</u>	<u>Deffenbaugh</u>	<u>BI</u>	<u>Fav/1 amendment</u>
2.	<u>Maclure</u>	<u>Maclure</u>	<u>JU</u>	<u>Fav/CS</u>
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

## I. Summary:

Under current law, insurance companies transacting insurance in Florida or from offices located in the state are required to obtain a certificate of authority (COA) issued by the Office of Insurance Regulation. An unauthorized insurer is an insuring entity that does not have a COA to transact insurance business in Florida, and the law provides specific penalties for entities, or their representatives, that engage in such activity.

Committee Substitute for Senate Bill 1662 amends various provisions of the unauthorized insurance law to:

- Authorize the Office of Insurance Regulation (OIR) and the Department of Financial Services (DFS) to issue an immediate final order against an unauthorized insurer to cease and desist activity that violates the unauthorized entities section;
- Provide legislative findings that a violation of prohibitions against unauthorized insurance activity constitutes an imminent threat to the health, safety, and welfare of the residents of this state;
- Authorize the OIR to investigate the accounts, records, documents, and transactions pertaining to activities of any unauthorized insurer or person aiding such insurer;
- Clarify what is meant by independent procurement of coverage (IPC), for the purposes of an exception to the prohibition against aiding unauthorized insurers, to specify that IPC is coverage which is not solicited, marketed, negotiated, or sold in Florida;
- Require that unauthorized insurers must initially obtain a COA or a bond when such insurers seek to defend against an enforcement action filed in circuit court by the OIR or DFS; and
- Place a time limit of 30 days (after service of process) in which unauthorized insurers or their representatives may file a motion to challenge service of process.

This committee substitute substantially amends the following sections of the Florida Statutes: 626.901, 626.902, and 626.908.

## II. Present Situation:

### Unauthorized Insurers

Insurance companies transacting insurance in Florida or from offices located in the state are required to obtain a certificate of authority (COA) issued by the Office of Insurance Regulation (OIR) pursuant to s. 624.401, F.S.<sup>1</sup> An unauthorized insurer is an insuring entity that does not have a COA to transact insurance business in Florida, and is not an eligible surplus lines insurer.<sup>2</sup> Specifically, Part VIII of ch. 626, F.S., provides that no person shall act, from Florida, or from another state or country, as an agent for or represent or aid on behalf of another, any insurer not authorized to transact insurance in this state. Acting as an agent or representing an unauthorized insurer involves a broad range of activities, including soliciting or negotiating insurance or annuity contracts; forwarding applications; inspecting risks; fixing rates; and collecting premiums. If an unauthorized insurer fails to pay a claim within the provisions of a contract entered into in violation of the unauthorized insurer law, then any person who knew or reasonably should have known that the contract was entered into in violation of that law, and who solicited or negotiated such contract, is liable to the insured for the full amount of the claim or loss not paid.

Any insurance agent or other person who knowingly represents an unauthorized insurer, commits a third-degree felony, and a person who commits subsequent violations of this section commits a felony of the second degree.<sup>3</sup> Also, any person who acts as an insurer, transacts insurance, or otherwise engages in insurance activities without a COA commits insurance fraud, which constitutes a felony, the degree of which depends on the amount of premium collected.<sup>4</sup> If the amount of insurance premium collected is less than \$20,000, it is a third-degree felony with a minimum term of imprisonment of one year. If the amount is \$20,000 or more, but less than \$100,000, it is a second-degree felony with a minimum term of imprisonment of 18 months, and if the amount is \$100,000 or more, it is a first-degree felony with a minimum term of imprisonment of two years.

The law provides four exceptions to the definition of unauthorized insurance for the following:

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<sup>1</sup> Under current law, there are several exceptions to the requirement to obtain a COA which apply to insurers with respect to specified transactions ranging from surplus lines coverages and reinsurance to captive insurers. Specifically, these exceptions pertain to transactions involving surplus lines coverages; specified reinsurance; captive insurance companies; investments by foreign insurers; servicing life or health insurance policies or annuity contracts pertaining to insurers that have withdrawn from Florida; policies covering only subjects of insurance not resident or expressly performed in this state at the time of issuance and lawfully solicited or delivered outside this state; and investigation or litigation of specified claims under policies written in this state, or liquidation of assets and liabilities of the insurer, all as resulting from its former authorized operations in Florida. (See s. 624.402, F.S.) “Captive insurers” are created and owned by one or more non-insurers, for the primary purpose of providing their owners with coverage, usually at rates lower than those of other insurers.

<sup>2</sup> Surplus lines insurance is regulated under Part VIII of ch. 626, F.S.

<sup>3</sup> Section 626.902, F.S.

<sup>4</sup> Section 624.401, F.S.

- Matters authorized to be done by the OIR under the Unauthorized Insurers Process law, ss. 626.904-626.912, F.S.;
- Surplus lines insurance when written pursuant to the Surplus Lines Law, ss. 626.913-626.937, F.S.;
- Transactions as to which a COA is not required of an insurer under s. 624.402, F.S.; and
- Independently procured coverage written pursuant to s. 626.938, F.S.<sup>5</sup>

According to representatives with the Department of Financial Services (DFS), the typical unauthorized insurance company is often a criminal enterprise disguised as an insurance company.<sup>6</sup> Their operations are usually national and sometimes international in scope, and they may claim to be licensed in a foreign country. These companies write policies and collect premiums, but do not pay claims. Instead, such enterprises typically take the premiums and other assets of the company and move them offshore where they are difficult to find and even more difficult to retrieve, and ultimately prosecute. These unauthorized insurers defraud thousands of insurance consumers in Florida.

Officials with the OIR state that over the past few years (as of September, 2003)<sup>7</sup> more than 4,423 Floridians have reported being left with \$17,785,463 in unpaid claims from unauthorized insurers. Cases of fraud involving unauthorized entities operating in Florida have involved health care claims as well as property damage, workers' compensation, watercraft damage, and liability claims.

When the OIR receives complaints as to unauthorized activity, the complaint is given to the Market Investigations Unit to investigate potential administrative violations, while the same complaint is referred to both the Division of Agent and Agency Services within the DFS if the case involves a licensed insurance agent, and to the Division of Insurance Fraud within the DFS for determination as to criminal violations. During the period from January 1, 2002, to the present, the Market Investigations Unit has opened 389 cases, of which 214 have resulted in the issuance of orders to cease and desist such activity. Cases referred to the Division of Insurance Fraud are confidential since the division is a law enforcement agency.

Representatives with OIR and DFS assert that, while the unauthorized-entity sanctions were strengthened in past years, subsequent compliance and enforcement actions have exposed certain weaknesses in OIR and DFS authority to protect consumers. Therefore, legislation is needed to strengthen certain provisions of the unauthorized entities law.

### **Immediate Final Order Authority of OIR and DFS**

Currently under s. 120.569(2)(n), F.S., the OIR and DFS may issue an immediate final order (IFO) if there is a finding of immediate danger to the public's health, safety, or welfare. The IFO may be issued by an agency in its discretion, without advance notice or hearing. The order must

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<sup>5</sup> Section 626.901(4), F.S.

<sup>6</sup> The DFS licenses insurance agents and investigates criminal activities of unauthorized insurers and agents representing unauthorized insurers. The OIR issues certificates of authority (COA) to insurers. Both the OIR and DFS exercise powers relating to unauthorized entities within their respective jurisdictions.

<sup>7</sup> This is the most recent information available according to OIR representatives.

contain a factual recitation demonstrating the existence of an immediate danger to the public which shall be appealable or enjoicable from the date rendered. A party challenging the sufficiency of the IFO may file an appeal before the First District Court of Appeal and the Court may stay the final order or, if a party contests the facts contained in the IFO, the party may either file a Motion to Quash or file a Petition for Injunctive Relief in Circuit Court.

In a recent case involving an immediate final order issued by the OIR against an unauthorized insurer to cease and desist from transacting any new or renewal insurance business in Florida, the defendant appealed the order directly to the First District Court of Appeal. The Court struck down the final order, ruling that the order lacked any factual basis demonstrating the existence of an immediate danger to the public health, safety, or welfare, as required under s. 120.569(2)(n), F.S.<sup>8</sup> The Court found that the OIR order was based solely on conclusory allegations implying that the defendant's failure to be licensed in Florida constituted an immediate danger to the public health, safety, and welfare.

### **Unauthorized Insurers Process Law**

Under ss. 626.904-626.912, F.S., unauthorized insurers and persons representing or aiding such insurers are subject to the jurisdiction of the Florida courts in suits by or on behalf of insureds or beneficiaries under such insurance contracts. Also, service of process upon unauthorized insurers or their representatives must be made by delivering such process upon the Florida Chief Financial Officer (CFO), who must mail copies of such process to the defendant at the defendant's last known principal place of business. This provision is due to the fact that prior to this law, Florida residents who had insurance policies obtained from unauthorized entities had to assert their legal rights in forums in other states. Therefore, legislation was enacted creating a method of substituted service of process upon unauthorized insurers, which is made by serving such process upon the CFO. Such unauthorized insurers are subject to the jurisdiction of the OIR and the DFS.<sup>9</sup>

Before an unauthorized insurer or person representing or aiding such insurer files any pleading in an action instituted against it in Florida, such insurer or person must obtain a COA to transact insurance in Florida or deposit with the clerk of the court in which such action is pending cash, securities, or a bond in an amount fixed by the court which is sufficient to secure the payment of any final judgment.<sup>10</sup>

### **Surplus lines Requirements**

The Florida Insurance Code contains specific financial and other requirements that unauthorized insurers must comply with in order to become eligible surplus lines insurers.<sup>11</sup> Generally, surplus lines insurance is insurance coverage provided by a company that is not licensed in Florida, but that is allowed to do business in the state, as an "eligible" insurer, because the particular coverage offered is not available from insurers authorized to sell insurance in Florida.

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<sup>8</sup> *UNIMED, Professional Liability Insurance Company, Ltd. (PLIC) v. State of Florida, Office of Insurance Regulation*, 884 So. 2d 963, 964 (Fla. 1<sup>st</sup> DCA 2004).

<sup>9</sup> Section 626.909, F.S.

<sup>10</sup> Section 626.908(1), F.S.

<sup>11</sup> Section 626.918, F.S.

The law establishes requirements for approval of eligible surplus lines insurers and licensure of surplus lines agents by the OIR, including the provision that the surplus lines insurer maintain a surplus as to policyholders of not less than \$15 million, have been licensed in its state or country of domicile for a least three years, and furnish annual and quarterly financial statements to the OIR.<sup>12</sup> The law also specifies the conditions that must be met before insurance coverage may be exported to an eligible surplus lines insurer, also referred to as a nonadmitted insurer. Surplus lines insurance is not subject to Florida regulation of rates or forms, and there is no insurance guaranty fund protection if the insurer becomes insolvent.

### **Independently Procured Insurance Coverage**

Independently procured coverage (IPC) is insurance coverage that an insured in Florida, typically a business, obtains by directly contacting an unauthorized foreign or alien<sup>13</sup> insurer, or self insurer.<sup>14</sup> The insured must file specific information about the policy with the Florida Surplus Lines Service Office (Office) and must pay five percent of the gross amount of the premium and a 0.3-percent service fee to the Office.<sup>15</sup>

### **Division of Insurance Fraud**

Currently, the Division of Insurance Fraud within the DFS employs sworn law enforcement officers who investigate allegations of unauthorized insurance activities, fraudulent insurance acts, unfair methods of insurance competition, or unfair or deceptive insurance acts or practices.<sup>16</sup> These officers may make warrantless arrests upon probable cause for criminal violations established as a result of an investigation.<sup>17</sup> The general laws applicable to arrests by state law enforcement officers apply to Division investigators.

## **III. Effect of Proposed Changes:**

**Section 1.** Amends s. 626.901, F.S., which applies to prohibitions against representing or aiding unauthorized insurers. Currently, subsection (4) of s. 626.901, F.S., exempts independently procured coverage (IPC) from being included within the definition of unauthorized insurance. This committee substitute clarifies that the exemption applies to IPC coverage *which is not solicited, marketed, negotiated, or sold* in Florida. This clarification is necessary, according to Office of Insurance Regulation (OIR) officials, because some unauthorized insurers have asserted the defense that they are soliciting or selling IPC and, therefore, are not in violation of the unauthorized entities provisions.

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<sup>12</sup> *Id.*

<sup>13</sup> Insurers are divided into three categories under the Insurance Code: *domestic insurers* are formed under the laws of Florida; *foreign insurers* are formed under the laws of any state, district, or territory or commonwealth of the United States, other than Florida; and *alien insurers* are defined as insurers other than domestic or foreign insurers. Foreign and alien insurers must meet certain capital, surplus, and operational requirements.

<sup>14</sup> Section 626.938, F.S.

<sup>15</sup> Section 626.938(3), F.S.

<sup>16</sup> Section 626.989(2), F.S.

<sup>17</sup> Section 626.989(7), F.S.

The committee substitute authorizes the OIR and DFS to issue an immediate final order under s. 120.569, F.S. (Administrative Procedure Act), in its discretion and without advance notice or hearing, to cease and desist to any person or entity that violates the unauthorized entities section. The committee substitute makes legislative findings that a violation of this section constitutes an imminent and immediate threat to the health, safety, and welfare of the residents of this state. This provision would thus allow the OIR or DFS to issue an immediate final order against a person or entity conducting insurance business in and from the state of Florida without a valid COA or other authority, without the express recitation of specific incidents of irreparable harm – because such harm will now be presumed from violating the unauthorized entities sanctions under s. 626.901, F.S.

The legislation also provides that the OIR may investigate the accounts, records, documents, and transactions pertaining to the activities of any unauthorized insurer or person as defined in s. 624.04, F.S.,<sup>18</sup> which is or may be aiding or representing an unauthorized insurer.

**Section 2.** Amends s. 626.902, F.S., which pertains to penalties for representing an unauthorized insurer, to provide that this section does *not* apply to actions of persons who assist the Office of Insurance Regulation<sup>19</sup> at its direction in the administration of its responsibilities under the Unauthorized Insurers Process Law, ss. 626.904-626.912, F.S.

**Section 3.** Amends s. 626.908, F.S., which pertains to defenses of actions by unauthorized insurers. This legislation adds a reference to s. 626.909, F.S., (jurisdiction of the OIR and DFS relating to unauthorized insurers) and a reference to suits instituted by the OIR or DFS in enforcing agency actions against unauthorized insurers under s. 120.69, F.S. (administrative actions pertaining to enforcement of agency actions). The legislation extends the requirement that unauthorized insurers or their representatives must initially obtain a COA or a bond when such insurers or representatives seek to defend against an enforcement action filed in circuit court by the OIR or DFS. The legislation also places a time limit of 30 days (after service of process) in which unauthorized insurers or their representatives can file a motion to challenge service of process.

**Section 4.** Provides that the act shall take effect July 1, 2005.

#### IV. Constitutional Issues:

##### A. Municipality/County Mandates Restrictions:

None.

##### B. Public Records/Open Meetings Issues:

None.

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<sup>18</sup> Section 624.04, F.S., defines “person” to include “an individual, insurer, company, association, organization, Lloyds, society, reciprocal insurer or interinsurance exchange, partnership, syndicate, business trust, corporation, agent, general agent, broker, service representative, adjuster, and every legal entity.”

<sup>19</sup> The committee substitute refers to “the office,” which appears to mean the Office of Insurance Regulation.

C. Trust Funds Restrictions:

None.

**V. Economic Impact and Fiscal Note:**

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Unauthorized insurers or persons representing such insurers will now be subject to having their accounts, records, documents, and transactions investigated by the Office of Insurance Regulation (OIR).

C. Government Sector Impact:

This legislation authorizes the OIR to investigate the accounts and records of unauthorized insurers or persons aiding such insurers. Additionally, the OIR and the Department of Financial Services may now issue immediate final orders against persons or entities conducting insurance business in and from Florida without a valid COA or other authority, without the express recitation of specific incidents of irreparable harm, because such harm will now be presumed for violation of prohibited unauthorized acts.

**VI. Technical Deficiencies:**

The statutory provisions amended by this committee substitute are codified in part VIII of ch. 626, F.S. (Unauthorized Insurers and Surplus Lines). There are references in existing law and in the committee substitute to “the office” and “the department.” Although it is not always immediately clear, it appears that these references are to the Office of Insurance Regulation and the Department of Financial Services. The Legislature may wish to more clearly identify to which agencies particular provisions apply.

**VII. Related Issues:**

None.



## **VIII. Summary of Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's sponsor or the Florida Senate.

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