HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 321 Title Insurance
SPONSOR(S): Insurance & Banking Subcommittee; Passidomo and others
TIED BILLS: **IDEN./SIM. BILLS:** SB 570

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	13 Y, 0 N, As CS	Reilly	Cooper
2) Government Operations Appropriations Subcommittee			
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

Title insurance insures owners of real property (owner's policy) or others having an interest in real property against loss by encumbrance, defective title, invalidity, or adverse claim to title. It is a policy issued by a title insurer that, after performing a search of title, represents the state of that title and insures the accuracy of its search against claims of title defects. It is usually taken out by the purchaser of property or an entity that is loaning money on a mortgage.

The bill legislatively addresses a 2013 decision of the Florida Supreme Court (*Tiara Condominium Association v. Marsh & McClennan*) that limits the "economic loss rule" to product liability cases. The economic loss rule limits parties to a contract that suffer only economic damages to recovery under the contract, and precludes recovery under tort law. Prior to *Tiara Condominium*, the economic loss rule had been applicable to title insurance. Thus, although the case did not involve a dispute under a title insurance policy, the decision, in effect, allows insureds under title insurance policies that suffer only economic damages to seek recovery in contract and tort. The bill reinstates application of the economic loss rule to title insurance by providing that only contract remedies are available for the breach of a duty which arises solely from the terms of a contract of title insurance or certain other instruments (e.g., closing protection letters) issued by a title insurer.

The bill also:

- Clarifies that title insurance agents and title insurance agencies must be both licensed [(by the Department of Financial Services (DFS)] and appointed (by each title insurer they represent).
- Specifies that the pre-application work experience by which a person may qualify to take the title insurance agent examination must have been earned for duties performed under the supervision of a licensed title insurance agent, title insurer, or attorney.
- Extends, after October 1, 2014, current limitations on names that may be adopted by title insurance agents to title insurance agents and title insurance agencies. Additionally, prohibits use of the words "title company" in a name unless followed by the word "agent" or "agency" in the same size and type as the words preceding them. Provides the limitations do not apply in certain circumstances.
- Removes the requirement that applications for licensure as a title agent or title insurance agency be submitted on "printed" DFS forms.
- Deletes an obsolete provision requiring title insurance agencies to post a surety bond with the DFS prior to obtaining a license.
- Removes references to "guarantees of title" and "binders." The former have not been authorized in Florida for many years, while the latter are not used by the title insurance industry.

The bill has no fiscal impact on state or local government. As the bill limits losses arising under title insurance policies to policy terms, it is likely that the cost of title insurance to consumers will remain fairly stable. It should also assist title insurers in maintaining reserves sufficient to pay the claims of all policyholders.

The bill is effective July 1, 2014, except as otherwise provided.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Overview of Title Insurance

Title insurance insures owners of real property (owner's policy) or others having an interest in real property against loss by encumbrance, defective title, invalidity, or adverse claim to title.[1] Title insurance is a policy issued by a title insurer that, after performing a search of title, represents the state of that title and insures the accuracy of its search against claims of title defects. It is usually taken out by the purchaser of property or an entity that is loaning money on a mortgage.

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

Regulation in Florida

Historically, a single regulatory entity, the Department of Insurance, promulgated title insurance rates and regulated title insurance agents. Under current law, two entities provide regulatory oversight of the title insurance industry in Florida: the Department of Financial Services (DFS), which regulates title insurance agents, and the Office of Insurance Regulation (OIR), which regulates title insurers, including licensing and promulgation of rates. Title insurance forms must be filed and approved by the OIR prior to usage[3] and premium rates charged by title insurers are specified by rule by the Financial Services Commission (FSC).[4] Title insurers may petition the OIR for an order authorizing a specific deviation from the adopted premium.[5]

In Florida, title insurers operate on a monoline basis, meaning that the insurer can only transact title insurance and cannot transact any other type of insurance.[6] Pursuant to s. 627.782, F.S., the FSC is mandated to adopt a rule specifying the premium to be charged by title insurers for the respective types of title insurance contracts and, for policies issued through agents or agencies, the percentage of such premium required to be retained by the title insurer, which shall not be less than 30 percent. The FSC must review the premium not less than once every three years. Title insurers and title insurance agencies are required to submit to the OIR, on or before March 31 of each year, revenue, loss, and expense data for the most recently concluded year that are determined necessary to assist in the analysis of premium rates, title search costs, and the condition of the Florida title insurance industry.

[1] Section 624.608, F.S. Title insurance is also insurance of owners and secured parties of the existence, attachment, perfection and priority of security interests in personal property under the Uniform Commercial Code.

[2] See, e.g., the website of the American Land Title Association (ALTA), http://www.alta.org (Last accessed: January 6, 2014). ALTA is the national trade association of the abstract and title insurance industry. There are currently six basic ALTA policies of title insurance: Lenders, Lenders Leasehold, Owners, Owners Leasehold, Residential, and Construction Loan Policies.

[3] Section 627.777, F.S.

[4] Section 627.782, F.S.

[5] Section 627.783, F.S.

[6] Section 627.786, F.S.

Title Insurance Agencies
Title insurance agencies must be licensed by the DFS and are separately appointed[7] by each title insurer they represent. Prior to obtaining a license, a title insurance agency is required to deposit with the DFS securities having a market value of at least $35,000 or post a surety bond in a like amount.

Before a title insurance agency can be appointed by a title insurer, the agency must obtain: (1) a fidelity bond of at least $50,000, acceptable to the title insurer; (2) errors and omissions insurance in an amount acceptable to the title insurer, but which must provide coverage of at least $250,000 per claim and an aggregate limit with a deductible no greater than $10,000; and (3) a surety bond of at least $35,000 made payable to the title insurer or title insurers appointing the title insurance agency.[8]

The bill deletes obsolete language requiring that securities be deposited with the DFS (or a surety bond be posted) before a title insurance agency may be licensed, as title insurance agencies are required to obtain a surety bond payable to a title insurer before they can be appointed by the insurer.

Title Insurance Agents
Title insurance agents must be licensed by the DFS and are separately appointed by each title insurer they represent.

The bill clarifies that title insurance may be sold only by a licensed *and* appointed title insurance agent. For title agents employed by a title insurance agency (rather than a title insurer), the bill clarifies that the agency must also be licensed *and* appointed.

To be licensed as a title insurance agent, a person must qualify for and pass a written examination given by the DFS. To be eligible to take the examination,[9] a person must have completed certain educational or work requirements before applying for licensure. Specifically, within 4 years before the date of the application, the person must have completed a 40-hour classroom course in title insurance or have had at least 12 months of experience in responsible title insurance duties while working in the title insurance industry as a substantially full-time employee.[10]

The bill specifies that the title insurance work experience by which an applicant may qualify to take the title insurance agent examination must have been earned for duties performed under the supervision of a licensed title insurance agent, title insurer, or attorney. It also removes language that required applications for licensure as a title insurance agent or title insurance agency to be submitted on "printed" forms.

Prohibitions on Names Adopted by Title Insurance Agents[11]
Under s. 626.8413, F.S., title insurance agents are prohibited[12] from adopting a name that contains the words "title insurance," "title guaranty," or "title guarantee" unless followed by the word "agent" or "agency" in the same size and type as the words preceding them.

Beginning October 2, 2014, the bill makes this section applicable to both title insurance agents and title insurance agencies to enable consumers to readily know whether they are working with a title insurer or an agent. Additionally, the words "title company" may not be used in a name unless followed by the word "agent" or "agency" in the same size and type as the words preceding them. The bill specifies that these limitations on name do not apply to a title insurer acting as an agent for another title insurer when

[7] An appointment is the authority given by an insurer to a licensee to transact insurance on the insurer's behalf.
[8] Section 626.8419, F.S.
[9] The examination must test the applicant's ability, competence, and knowledge of title insurance and real property transactions and the duties and responsibilities of licensees. In addition to title insurance, topics to be covered on the test include abstracting, title searches, examination of title, closing procedures, and escrow handling. *See* s. 626.241, F.S.
[10] Section 626.8417, F.S.
[11] Section 626.841, F.S., defines the term title insurance agent to mean "a person appointed in writing by a title insurer to issue and countersign commitments or policies of title insurance in its behalf."
[12] After October 1, 1985.

both insurers hold active certificates of authority to transact title insurance business in Florida and are acting under the names designated on such certificates of authority.

Title Insurance and the Economic Loss Rule

Traditionally, contract law and tort law (including negligence and malpractice) are separate in their application: contract law enforces expectancy interests created by an agreement between the parties; tort law compensates people for personal injury or property damage caused by tortious conduct, without regard to contract.

The division between the two areas of law matters in the results attainable: contract law limits recovery to expectation damages (damages reasonably expected to flow from the contractual breach); tort law allows all damages proximately resulting from tortious conduct.

The economic loss rule was developed by courts to more accurately draw the distinction between contract and tort law. This common law rule provides that, where there is a contract between parties and a person harmed by wrongful conduct suffers only economic damages (that is, there is no personal injury involved), the lawsuit must proceed under contract law. Where the economic loss rule applies, the person harmed cannot sue in tort law.

The economic loss rule has long been recognized in Florida.[13] It is firmly established in products liability cases, where it is based on the notion that tort law imposes a duty on manufacturers to take reasonable care so that their products will not harm persons or property, but imposes no duty for manufacturers to ensure their products will meet the economic expectations of purchasers.[14] Prior to the Florida Supreme Court's (Supreme Court) decision last year in *Tiara Condominium Association v. Marsh & McClennan*,[15,16] the rule had been expanded beyond products liability and applied in various other areas, including title insurance.

Tiara Condominium concerned a dispute between an insured and its insurance broker regarding coverage under a windstorm insurance policy. In its decision, the Supreme Court reviewed the development of the economic loss rule in Florida. Determining that there had been an unprincipled expansion of the rule beyond products liability, the court returned the economic loss rule to its origins, holding the rule applicable only to products liability cases, and receding from prior case law.

The bill legislatively addresses *Tiara Condominium* with respect to title insurance by providing that only contract remedies are available for the breach of a duty which arises solely from the terms of a contract of title insurance or an instrument issued by a title insurer pursuant to s. 627.786(3), F.S.

Title insurance is unique from other lines of insurance in that insured's pay a one-time premium for a policy that continues to provide coverage and never expires. Title insurance forms, which are filed and approved by the OIR prior to usage, specify insurer responsibilities in the event title defects are not identified in the policy. As the bill limits losses arising from the breach of a duty arising under a title insurance policy (and certain other instruments issued by title insurers) to the terms of the contract, it is likely that the cost of title insurance to consumers will remain fairly stable. It should also assist title insurers in maintaining reserves sufficient to pay the claims of all policyholders, as the insurer's maximum exposure on each policy will be limited by the terms of the policy for which premium was paid.

Miscellaneous

[13] *See*, Florida *Power and Light Co. v. Westinghouse Elec. Corp*, 510 So.2d 899 (Fla. 1987).
[14] *See Monsanto Agricultural Products v. Edenfeld*, 426 So.2d 574 (Fla. 1st DCA 1982).
[15] 110 So.3d 399 (Fla. 2013).
[16] For an overview of the economic loss rule and discussion of *Tiara Condominium, see* Munyon *et al.*, *Tort and Contract Actions: Strange Bedfellows No More in the Wake of Tiara Condominium*, The Florida Bar Journal, December 2013, at pages 41-43.

The bill also removes references to “guarantees of title” and “binders.” The former have not been authorized in Florida for many years, while the latter are not used by the title insurance industry.

B. SECTION DIRECTORY:

Section 1. Amends s. 626.8412, F.S., relating to required licenses and appointments.
Section 2. Amends s. 626.8413, F.S., relating to limitations on title insurance agent names.
Section 3. Amends s. 626.8417, F.S., relating to title insurance agent licensure.
Section 4. Amends s. 626.8418, F.S., relating to application for title insurance agency license.
Section 5. Amends s. 626.8419, F.S., relating to the appointment of title insurance agencies.
Section 6. Amends s. 626.8437, F.S., relating to the denial, suspension, revocation, or refusal to renew the license or appointment of a title insurance agent or title insurance agency by the DFS.
Section 7. Amends s. 627.778, F.S., relating to limits of risk under title insurance policies.
Section 8. Amends s. 627.7845, F.S., relating to the determination of insurability.
Section 9. Provides an effective date.

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 liability under a title insurance policy for the breach of a duty arising under the contract to policy terms will likely help keep the cost of title insurance to consumers fairly stable. It will also assist insurers in maintaining reserves sufficient to pay claims of all policyholders as the maximum exposure on each policy will be limited to that for which premium was paid.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or, reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On January 15, 2014, the Insurance & Banking Subcommittee considered and adopted a strike-all amendment to the bill. The amendment clarified that only contract remedies are available for the breach of a duty which arises solely from the terms of a contract of title insurance or specified other instruments issued by title insurers, and made various technical changes to the bill. The analysis has been updated to reflect these changes.