HOUSE OF REPRESENTATIVES
FINAL BILL ANALYSIS

BILL #:	CS/CS/HB 321	**FINAL HOUSE FLOOR ACTION:**	
SPONSOR(S):	Government Operations Appropriations Subcommittee; Insurance & Banking Subcommittee; Passidomo; Moraitis and others	116 **Y's**	0 **N's**
COMPANION BILLS:	CS/CS/SB 570	**GOVERNOR'S ACTION:**	Pending

SUMMARY ANALYSIS

CS/CS/HB 321 passed the House on April 1, 2014, and subsequently passed the Senate on April 11, 2014. Part of the bill also passed the House and Senate in CS/CS/HB 805 on May 2, 2014. The bill amends the laws governing title insurance.

For domestic title insurers with at least $50 million in surplus, the bill lowers the statutory premium reserve from 30 cents per $1,000 of net retained liability to 6.5 percent of policy premium plus other earnings and authorizes the release of a greater percentage of funds from reserve each year. The bill also addresses the treatment of the unearned premium reserve of foreign title insurers that transfer domicile to Florida and makes other changes concerning title insurance, including the following:

- Limits liability under title insurance policies (and certain other instruments issued by title insurers) to contract remedies for the breach of a duty which arises solely from the terms of the contract;
- 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 current limitations on names that may be adopted by title insurance agents to title insurance agents and title insurance agencies and 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;
- 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;
- Changes the required annual reporting date for information relating to revenue, loss, and expenditure data that is to be submitted by title insurance agencies and title insurers from March 31 to May 31;
- Removes references to obsolete language;
- Distinguishes title insurance loss reserves from property and casualty loss reserves; and
- Defines the term bulk reserve and requires title insurers to obtain approval from the Office of Insurance Regulation before using or recording a bulk reserve.

The bill has no fiscal impact on state or local government.

Subject to the Governor's veto powers, the effective date of this bill is July 1, 2014, except as otherwise provided.

I. SUBSTANTIVE INFORMATION

A. EFFECT OF CHANGES:

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 evaluating a search of title, would insure against certain covered risks including forgery, fraud, liens and encumbrances on a title. 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. The bill changes the annual reporting date for this information from March 31 to May 31.

Title Insurance Agencies

[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 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 post a surety bond of at least $35,000 to the benefit of appointing title insurers.

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**.** In addition, beginning on this date, title insurance agents or agencies are also precluded from adopting a name that contains the words "title company," unless followed by the word 'agent" or "agency" in the same size and type as the words preceding it. The bill specifies that these limitations on name do not apply to a title insurer acting as an agent for another title insurer when both insurers hold

[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.

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

Title Insurers

Section 625.111, F.S., provides the required statutory premium reserve (also referred to as the unearned premium reserve) for domestic title insurers.[13] For policies written or title liability assumed in reinsurance on or after July 1, 1999, the required reserve is 30 cents per $1,000 of net retained liability.[14, 15] According to the OIR, this is one of the highest statutory premium reserve requirements of all states in which major title insurers are domiciled.[16] As comparative examples, OIR reports the required reserves in Minnesota (6.5 percent of premium and fees); California (4.5 percent of premium and fees); Texas ($.185 per $1,000 of net retained liability); and Nebraska ($.17 per $1,000 of net retained liability). Currently, Florida has no active domestic title insurers.

Beginning January 1, 2014, the bill decreases the statutory reserve requirement for domestic title insurers with at least $50 million in surplus, requiring such insurers to maintain a premium reserve of 6.5 percent of policy premium plus other earnings of the insurer.[17] Domestic title insurers with a statutory surplus of less than $50 million remain subject to the current statutory premium reserve requirement.

Release of the Reserve

With respect to policies written or title liability assumed in reinsurance on or after July 1, 1999, current law provides for the release of the statutory premium reserve to earned premium available for general use by a title insurer over 20 years, as follows: 30 percent of the initial sum during the year next succeeding the year the premium was written or assumed;15 percent during the next succeeding year; 10 percent during each of the next succeeding 2 years; 5 percent during each of the next succeeding 2 years; 3 percent during each of the next succeeding 2 years; 2 percent during each of the next succeeding 7 years; and 1 percent during each of the next succeeding 5 years.[18]

For domestic title insurers with a surplus of at least $50 million, the bill amends the above-presented 20-year schedule to provide for the release of the statutory premium reserve to earned premium, as follows: 35 percent of the initial sum during the year following the year the premium was written or assumed; 15 percent during each year of the next succeeding 2 years; 10 percent during the next succeeding year; 3 percent during each of the next succeeding 3 years; 2 percent during each of the succeeding 3 years; and 1 percent during each of the next succeeding 10 years.

Liabilities Charged Against Assets

The bill amends s. 625.041, F.S., concerning insurer liabilities, to distinguish title insurance loss reserves from loss reserves for property and casualty insurers. Currently, property and casualty loss reserves include unknown losses and claims [also known as Incurred But Not Reported (IBNR) losses]. Domestic title insurers account for IBNR in both their liabilities and statutory premium reserve. The bill eliminates this duplication. It requires domestic title insurers to include in their liabilities the amount necessary to pay all *known* losses and claims. These insurers will continue to account for IBNR through their statutory premium reserve.

Title Insurers that Transfer Domicile to Florida

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[13] Section 624.06, F.S., defines domestic insurer as an insurer formed under the laws of Florida.

[14] Section 625.111(1), F.S., provides that premium reserves cannot be less than an amount equal to the sum of: (a) reserves for title insurance policies or title liability assumed in reinsurance before July 1, 1999, (b) 30 cents for each $1,000 of net retained liability for policies written or title liability assumed in reinsurance on or after July 1, 1999, and (c) any additional amount, if deemed necessary by a qualified actuary (supplemental reserve).

[15] It is commonly understood that the statutes of an insurer's home state take precedence with regard to reserving and other financial matters.

[16] Correspondence from OIR dated February 10, 2014, on file with the Insurance & Banking Subcommittee.

[17] These insurers will also need to set aside an additional amount (supplemental reserve), if deemed necessary by a qualified actuary.

[18] The funds are released on a quarterly basis.

The bill amends s. 625.111, F.S., to address the treatment of unearned premium reserves of foreign title insurers that transfer domicile to Florida. Under the bill, the statutory premium reserve for such insurers is the amount required by the laws of the title insurer's former state of domicile on the date that domicile is transferred to Florida. Additionally, the statutory premium reserve is to be released according to the laws of the former state of domicile in effect at the time of domicile. Beginning January 1, 2014, Florida law applies to the statutory premium reserve for new business written after the move to Florida.

Bulk Reserve

Bulk reserve is a term that is specific to title insurance and is not defined in Florida law. The bill defines bulk reserve to mean "provision for subsequent development on known claims" and addresses the treatment of a separate bulk reserve. Title insurers are not required to set aside a separate bulk reserve. However, if they do, the statutory premium reserve will be reduced by the amount recorded for the bulk reserve. Domestic title insurers must obtain approval from the OIR before using or recording a bulk reserve.

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.[19] 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.[20] Prior to the Florida Supreme Court's (Supreme Court) decision last year in *Tiara Condominium Association v. Marsh & McClennan*,[21,22] 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.

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[19] *See*, Florida *Power and Light Co. v. Westinghouse Elec. Corp*, 510 So.2d 899 (Fla. 1987).
[20] *See Monsanto Agricultural Products v. Edenfeld*, 426 So.2d 574 (Fla. 1st DCA 1982).
[21] 110 So.3d 399 (Fla. 2013).
[22] 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.

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
The bill 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.

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.

Lowering the statutory premium reserve for domestic title insurers with at least $50 million in surplus will not have any immediate fiscal impact, as there are currently no active domestic title insurers.

D. FISCAL COMMENTS:

There is no fiscal impact on state or local government.

Lowering the statutory premium reserve for larger title insurers may encourage foreign title insurers to re-domesticate in Florida. Maintaining the current reserve formula for title insurers with less than $50

million in surplus could protect insureds against the consequences of the failure of a Florida-domiciled title insurer. However, it could discourage the creation of new smaller domestic title insurers or having smaller established title insurers re-domesticate in Florida.