HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: PCS for HB 305 Insurance
SPONSOR(S): Insurance & Banking Subcommittee
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Insurance & Banking Subcommittee		Fortenberry	Luczynski

SUMMARY ANALYSIS

The bill makes several changes related to insurance:

- **Office of Insurance Regulation (OIR) – Authority to examine managing general agents (MGAs) –** The bill clarifies that OIR has the same authority to examine MGAs, including affiliates of insurers, as it has to examine insurers, even if the MGA represents a single domestic insurer. It requires that each insurer paying an affiliate shall produce information regarding fees paid to the affiliate upon request by OIR. It also requires that all MGAs must execute contracts with the insurers that they do business with even if they control, or are controlled by, an insurer.
- **Collection of property insurance claims litigation data by OIR –** All insurers with a Florida certificate of authority must file quarterly and annual reports with OIR that contain various financial data and actuarial opinions. However, they are not required to collect or report data regarding the litigation of property insurance claims. The bill establishes that each insurer or insurer group doing business in Florida shall file specific data regarding litigation of personal and commercial residential property insurance claims on a quarterly basis.
- **Citizens Property Insurance Corporation (Citizens) –** The bill makes several changes to the operations of, and requirements for, Citizens, the state-run property insurer:
    - Revises the eligibility for residential property owners to obtain coverage from Citizens so that they are not eligible for Citizens' coverage if they can obtain coverage from private insurers that is less than 20 percent greater than the premium for comparable coverage from Citizens
    - Establishes that if Citizens does not buy reinsurance to cover its projected 100-year probable maximum loss, it must still include the cost of such reinsurance in its rate calculations.
    - Establishes that no employees of Citizens may receive salaries in excess of 150 percent of the salary received by the head of OIR, with certain exceptions.
- **Notice of property insurance claims –** Notice of hurricane or windstorm loss must be provided to a property insurer within three years of the date of loss. Notice for all other types of property insurance claims must be provided within five years of the date of loss. The bill changes the notice of claim deadlines in the Insurance Code so that notice of any property insurance claim must be provided to a property insurer within two years of the date of loss.
- **Presuit notice and demand requirements for property insurance claims –** The bill creates new statutory requirements for residential or commercial property suits that are not brought by an assignee, including a ten-day presuit notice and demand, after a determination of coverage, before bringing suit against an insurer. An insurer served with this notice must respond in writing within ten days by either making a settlement offer or requiring participation in an appraisal or alternative dispute resolution proceeding as provided for in the policy.

The bill has no impact on state or local government revenues or expenditures. It may have a positive direct economic impact on the private sector.

The bill has an effective date of July 1, 2021.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Office of Insurance Regulation (OIR) – Authority to examine managing general agents (MGAs)

Background

MGAs

An MGA is a specialized type of insurance agent or broker that has underwriting authority from an insurer.[1] MGAs can perform certain functions that insurers typically handle, including binding coverage, underwriting and pricing, agent appointments, and claims adjusting and settlement.[2] An MGA may be an affiliate of an insurer. Section 624.10(1), F.S., defines an affiliate as an entity that exercises control over or is directly or indirectly controlled by an insurer. Under current law, MGAs must enter into contracts with insurers with which they do business unless the MGA is a controlled or controlling person of the insurer (i.e. an affiliate).[3] These contracts must specify the division of responsibilities between the insurer and the MGA.[4]

Examination of Insurers and MGAs

OIR is responsible for examining the affairs, transactions, accounts, records, and assets of each insurer that holds a certificate of authority to transact insurance business in Florida.[5] Examination authority extends to the examination of MGAs[6] unless the MGA solely represents a single domestic insurer.[7] With certain exceptions, OIR must examine domestic insurers[8] at least once every five years and the exam shall cover the preceding five fiscal years.[9]

As part of the examination process, all persons being examined must make available to OIR the accounts, records, documents, files, information, assets, and matters in their possession or control that relate to the subject of the examination.[10] As part of an examination, OIR reviews contracts between insurers and MGAs, so that it can determine how much an insurer is paying its MGA and what services the insurer is receiving for the fee it pays. However, the lack of contracts between insurers and their affiliate MGAs sometimes makes it difficult to determine how much the insurer is paying and what services it is receiving from the MGA.

Effect of the Bill

The bill clarifies that OIR has the same authority to examine MGAs as it has to examine insurers, whether or not an MGA is an affiliate of an insurer. This authority applies even if the MGA solely represents a single domestic insurer. It establishes that each insurer paying an affiliate shall produce information regarding the fee paid to the affiliate upon request by OIR. OIR may determine whether the fee an insurer pays to an affiliate is fair and reasonable and, in so doing, may consider the actual cost of the services being provided in exchange for the fee. Further, the bill establishes that all MGAs must

[1] IRMI, https://www.irmi.com/term/insurance-definitions/managing-general-agent (last visited Mar. 19, 2021).
[2] *Id.*
[3] S. 626.7451, F.S.
[4] *Id.*
[5] S. 624.316(1)(a), F.S.
[6] *Id.*
[7] S. 626.7452, F.S.
[8] A domestic insurer is one formed under the laws of Florida. S. 624.06(1), F.S.
[9] S. 624.316(2)(a), F.S. While s. 624.316(1)(a), F.S., clearly states that OIR may examine MGAs, because some MGAs are considered affiliates of insurers, and 624.316(2)(a), F.S., does not specify that OIR may examine affiliates in the same way as insurers, OIR has indicated that some MGAs have not been completely cooperative with the examination process.
[10] S. 624.318(2), F.S.

execute contracts with the insurers that they do business with, even if they are MGAs that control, or are controlled by, an insurer.

Collection of property insurance claims litigation data by OIR

Background

All insurers with a Florida certificate of authority to transact insurance business must file quarterly and annual reports with OIR that contain various financial data and actuarial opinions.[11] However, the law does not currently specify that insurers must report data regarding the litigation of claims.

OIR recently conducted a data survey of property insurers to gather information regarding the litigation of personal or commercial residential property insurance claims.[12] In response to this survey, several insurers indicated that they could not provide OIR with answers to questions related to litigation trends because they did not collect the requested data as part of their claims evaluation and adjusting process.[13]

Effect of the Bill

The bill establishes that each insurer or insurer group doing business in Florida must provide specific pieces of data regarding litigation of personal and commercial residential property insurance claims to OIR on a quarterly basis. This data includes, but is not limited to, the following information on a per claim basis:

- Type of policy;
- Date, location, and type of loss;
- Dates on which the claim was reported to the insurer, closed by the insurer, and reopened by the insurer;
- Whether the claimant had a public adjuster or an attorney;
- Total amounts that the insurer paid for indemnity, loss adjustment expenses,[14] and insured's attorney fees;
- Whether the insured's attorney requested that a contingency risk multiplier (CRM)[15] be applied to the attorney fees calculation and, if so, what CRM was applied.

If insurers collect and report this data, OIR and the Legislature should be able to more effectively identify current and emerging property insurance litigation trends that may be affecting insureds' rates.[16]

Citizens Property Insurance Corporation (Citizens)

Citizens is a state-created, not-for-profit, tax-exempt government entity that is an integral part of the state, whose public purpose is to provide property insurance to those unable to find affordable coverage in the private market.[17]

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[11] S. 624.424, F.S.
[12] Report from David Altmaier, Florida Insurance Commissioner, to Chair Blaise Ingoglia, Commerce Committee, regarding cost drivers affecting Florida's insurance rates, p. 12 (Feb. 24, 2021).
[13] *Id.*
[14] Loss adjustment expenses are the costs associated with investigating and adjusting losses or insurance claims. IRMI, https://www.irmi.com/term/insurance-definitions/loss-adjustment-expense (last visited Mar. 19, 2021).
[15] A CRM is a multiplier applied to attorney fees that reflects the risk of attorneys accepting, on a contingency fee basis, cases that may be difficult to win. *See e.g., Joyce v. Federated Nat'l Ins. Co.*, 228 So. 3d 1122 (Fla. 2017).
[16] Altmaier, *supra*, note 12, at 12.
[17] S. 627.351(6)(a)1., F.S.

Eligibility and Rates

Background

New applicants are eligible for coverage from Citizens if no private carrier will write them a policy for premium that is less than 15 percent greater than what Citizens would offer them for comparable coverage.[18] The rate cap, also known as the "glide path," is not closing the gap between Citizens rates and private market rates. Instead, because of the rate cap and the increasing rates of private property insurance, the gap is growing and making Citizens more like a competitor to private insurers than an insurer of last resort. Annual rate increases for existing Citizens' policyholders are capped at no more than 10 percent for any single policy.[19] It is unclear if, or how, the law allows OIR to approve a rate reduction for Citizens.

Because Citizens' rates are often well below those of private carriers, Citizens may be more competitive than otherwise intended. Due to Citizens' structure, its rates do not contain certain elements that the rates of private insurers contain. Citizens does not pay taxes like private carriers do and does not have the need to purchase as much reinsurance as private carriers due to higher levels of capital and surplus.

Current law requires that Citizens make its best efforts to procure catastrophe reinsurance at reasonable rates to cover its projected 100-year probable maximum loss.[20] Due to the high cost of reinsurance over the recent years, Citizens has determined that it is not available at reasonable rates and has not purchased it. This lack of purchase has contributed to its rates remaining more competitive and more consumers being eligible for coverage from Citizens.

Effect of the Bill

The bill establishes that residential property owners are not eligible for coverage from Citizens if they can obtain coverage from private insurers that is less than 20 percent greater than the premium for comparable coverage from Citizens.

The bill also establishes that on or after January 1, 2022, Citizens shall implement rate increases that do not exceed the following percentages for any single policy that it issues:

- Eleven percent for 2022;
- Twelve percent for 2023;
- Thirteen percent for 2024;
- Fourteen percent for 2025;
- Fifteen percent for 2026 and all subsequent years.

Additionally, the bill prohibits Citizens from filing with OIR a request for the approval of a rate reduction at any time.

The bill clarifies that Citizens need not purchase catastrophe reinsurance to cover its projected 100-year probable maximum loss if it is not available at reasonable rates. However, Citizens must include the cost of this reinsurance in its rate calculations even if it does not purchase the reinsurance.

[18] S. 627.351(6)(c)5.a., F.S.
[19] S. 627.351(6)(n)6., F.S.
[20] S. 627.351(6)(c)9., F.S. Probable maximum loss refers to the value that may be reasonably expected to be lost in a single casualty. IRMI, https://www.irmi.com/term/insurance-definitions/probable-maximum-loss (last visited Mar. 19, 2021). If an insurer is buying reinsurance to cover its 100-year probable maximum loss, it is purchasing reinsurance to cover the maximum loss that has a chance of occurring once in 100 years.

Salaries of Citizens' Personnel

Background

Citizens operates pursuant to a plan of operation (plan) that is approved by the Financial Services Commission (FSC).[21] Pursuant to the applicable statute, the plan may contain certain criteria regarding Citizens' employees.[22] Additionally, the applicable statute specifies that candidates for senior management positions with Citizens must undergo background checks, that employees must attest annually that they do not have any conflicts of interests with their employment, and that certain employees of Citizens are subject to ethics disclosures.[23] However, neither the statute nor the plan provide any parameters for the salaries that Citizens may pay its employees.

Effect of the Bill

The bill provides statutory guidance that Citizens can utilize in its plan to set parameters for employee compensation. The bill establishes that no employees of Citizens may receive salaries in excess of 150 percent of the salary received by the Florida Insurance Commissioner, with certain exceptions. Anyone employed by Citizens as of June 30, 2021, whose salary exceeds this cap may keep his or her salary, but may not receive a raise. Anyone employed by Citizens whose salary does not exceed this cap as of June 30, 2021, may receive a raise as long as that raise does not cause his or her salary to exceed this cap.

Notice of Property Insurance Claims

Background

Until 2011, the Florida Insurance Code (Code)[24] did not contain a time limit for giving notice of any type of property insurance claim. Section 95.11, F.S., requires that actions on contracts be brought within five years. Because an insurance policy is a contract, the five year statute of limitations for contract actions generally applied to claims under insurance policies. Since a claim must have been made before a policyholder could sue for breach of contract, and a policyholder had five years to sue for breach of contract, the claim must have been made within five years of the date of loss.

Section 627.70132, F.S., enacted in 2011, established that notice of any hurricane or windstorm claim, supplemental claim, or reopened claim[25] under a property insurance policy must be provided to an insurer within three years after the hurricane made landfall or the windstorm caused the covered damage. Any claim for which notice is not given within the three-year timeframe is barred.[26] The three-year time limit for providing notice of a hurricane or windstorm claim does not affect the five-year statute of limitations for bringing suit under s. 95.11, F.S.[27] This means that while notice of a windstorm or hurricane claim must be provided to an insurer within three years of the date of loss, suit may still be brought for an additional two years past the notice deadline.[28] The time limit for notice of all other property insurance claims besides hurricane and windstorm claims has remained equal to the five-year statute of limitations because statutes do not specify otherwise.

Effect of the Bill

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[21] S 627.351(6)(a)2., F.S. The FSC is composed of the Governor, Attorney General, Chief Financial Officer, and Commissioner of Agriculture. S. 20.121(3), F.S.
[22] S. 627.351(6)(c)3., F.S.
[23] S. 627.351(6)(d), F.S.
[24] The Florida Insurance Code is comprised of chapters 624-632, 634-636, 641, 642, 648, and 651, F.S.
[25] S. 627.70132, F.S., defines both "supplemental claim" and "reopened claim" as "any additional claim for recovery from the insurer for losses from the same hurricane or windstorm which the insurer has previously adjusted pursuant to the initial claim." Because these terms have the same definition, it is unclear why the statute uses both of them.
[26] S. 627.70132, F.S.
[27] *Id.*
[28] Often, the type of suit that an insured brings against an insurer is a breach of contract suit based upon a denial of a claim.

The bill changes the notice of claim deadlines in the Code so that notice of any property insurance claim, including a claim made under a property insurance policy issued by an eligible surplus lines insusrer, must be provided to a property insurer within two years of the date of loss. It also makes technical changes to the statute regarding alternative dispute resolution of property insurance claims so that the changes to the notice of claim statute do not conflict with that statute.[29]

Presuit notice and demand requirements for property insurance claims

Background

Under existing law, within 90 days after a residential property insurer receives a notice of an initial, reopened, or supplemental property insurance claim from a policyholder, the insurer must pay or deny the claim or a portion of the claim, unless the failure to pay is due to circumstances beyond the insurer's control which reasonably prevent payment.[30] In some circumstances, a claimant will hire an attorney and file suit against an insurer before the expiration of the allotted time for the insurer to pay or deny a claim. In contrast, as a condition precedent to bringing a third-party cause of action to enforcement an assignment agreement against an insurer, the assignee must provide the name insured and the assignor a written notice of intent to initiate litigation, delivered at least 10 business days before filing suit, but not before the insurer has made a determination of coverage.[31]

Effect of the Bill

The bill creates a new statutory section which applies to all residential and commercial property suits not brought by an assignee. Under that section, a claimant or claimant's attorney must give presuit notice of intent to initiate litigation at least ten business days prior to filing suit, but not before the insurer has made a determination of coverage as provided for under existing law.[32] The notice must include the following information:

- Insurer's acts or omissions that give rise to the suit;
- Damages in dispute;
- Demand;[33]
- Amount of reasonable and necessary attorney fees and costs incurred by the claimant.

An insurer served with a presuit notice must respond to the notice in writing within 10 business days after receiving the notice by making a settlement offer or by requiring the claimant to participate in appraisal or another form of alternative dispute resolution as provided for under the insurance policy. The bill establishes that time limits for filing a suit under s. 95.11, F.S., are tolled during the ten-day period for the insurer to respond to the presuit notice and while appraisal or alternative dispute resolution is ongoing.

The bill requires that a court must dismiss without prejudice any claimant's suit relating to a claim for which presuit notice is given if the suit is commenced before the expiration of the ten-day period for the insurer to respond. If a court dismissed a claimant's suit under these circumstances, the claimant's attorney is not entitled to an award of attorney fees for services rendered before the dismissal of the suit.

Finally, the bill establishes that presuit notice is admissible as evidence in a civil suit or an alternative dispute resolution proceeding, does not limit the evidence of attorney fees or costs, damages, or loss,

[29] S. 627.7015, F.S.
[30] S. 627.70131, F.S. This statute is sometimes referred to as the "prompt pay" statute for property insurance claims.
[31] An assignee is someone who receives policy rights through an assignment by a policyholder (assignor). IRMI, https://www.irmi.com/term/insurance-definitions/assignee (last visited Mar. 19, 2021). *See* s. 627.7152, F.S., for presuit requirements placed on assignees.
[32] S. 627.70131, F.S.
[33] The statute created by the bill defines demand as "the specific amount alleged to be owed by the insurer to the claimant under the residential or commercial property insurance policy."

which may be offered at trial, and does not relieve the insured or an assignee of any other notice required by law.

B. SECTION DIRECTORY:

Section 1. Amends s. 624.316, F.S., relating to examination of insurers.

Section 2. Amends s. 624.318, F.S., relating to conduct of examination or investigation; access to records; correction of accounts; appraisals.

Section 3. Amends s. 624.424, F.S., relating to annual statement and other information.

Section 4. Amends s. 626.7451, F.S., relating to managing general agents; required contract provisions.

Section 5. Amends s. 626.7452, F.S., relating to managing general agents; examination authority.

Section 6. Amends s. 627.351, F.S., relating to insurance risk reapportionment plans.

Section 7. Amends s. 627.3518, F.S., relating to Citizens Property Insurance Corporation policyholder eligibility clearinghouse program.

Section 8. Amends s. 627.70132, F.S., relating to notice of windstorm or hurricane claim.

Section 9. Amends s. 627.7015, F.S., relating to alternative procedure for resolution for disputed property insurance claims.

Section 10. Creates s. 627.70152, F.S., relating to suits arising under a property insurance policy.

Section 11. Provides an effective date of July 1, 2021.

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:

None

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill requires no additional rulemaking authority for OIR. While the bill requires the adoption of a form prescribed by the FSC on which insurers will report their property insurance claims litigation data, the Florida Insurance Code contains existing authority for the promulgation of such forms by the FSC.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES