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# **Government Operations Appropriations Subcommittee Meeting Packet**

**February 2, 2016  
10:30 a.m. – 12:30 p.m.  
Morris Hall**



## **AGENDA**

Government Operations Appropriations Subcommittee

February 2, 2016

10:30 a.m. – 12:30 p.m.

Morris Hall

### **I. Call to Order/Roll Call**

### **II. Consideration of Bills**

HB 1021 Award of Attorney Fees in Public Records Enforcement Actions by Steube

HB 1041 Unclaimed Property by Hager

HB 7073 Ratification of Rules/Florida Workers' Compensation Health Care Provider Reimbursement Manual/DFS by Rulemaking Oversight & Repeal Subcommittee, Ray

### **III. Closing Remarks/Adjourn**



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 1021 Award of Attorney Fees in Public Records Enforcement Actions

**SPONSOR(S):** Steube

**TIED BILLS:** IDEN./SIM. BILLS: SB 1220

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Government Operations Subcommittee	12 Y, 0 N	Moore	Williamson
2) Government Operations Appropriations Subcommittee		White <i>CCW</i>	Topp <i>BST</i>
3) State Affairs Committee			

### SUMMARY ANALYSIS

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The State Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

If an agency unlawfully fails to provide a public record, the person making the public records request may sue to have the request enforced. Enforcement lawsuits are composed of two parts: the request for production of a record and the assessment of fees. The assessment of attorney fees is considered a legal consequence that is independent of the public records request.

Once an enforcement action has been filed, an agency, or a contractor acting on behalf of an agency, can be held liable for attorney fees even after the agency has produced the requested records. The public policy behind awarding attorney fees is to encourage people to pursue their right to access government records after an initial denial. Granting attorney fees also makes it more likely that public agencies will comply with public records laws and deter improper denials of requests. If the court finds that the agency unlawfully refused access to a public record, the court must order the agency to pay for the requestor's reasonable costs of enforcement, including reasonable attorney fees.

The bill amends current law to provide that in a public records enforcement lawsuit, a court may, but is not required to, award reasonable enforcement costs, including attorney fees, to the complainant if the court determines the agency unlawfully refused to provide a public record. To be awarded such costs, the bill also requires a complainant to provide written notice of the public records request to the agency's records custodian at least five business days before filing the lawsuit.

The bill may have a negative fiscal impact on the private sector and a positive fiscal impact on the state and local governments.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### **Background**

##### Public Records Law

Article I, s. 24(a) of the State Constitution sets forth the state's public policy regarding access to government records. The State Constitution guarantees every person a right to inspect or copy any public record of the legislative, executive, and judicial branches of government.

Public policy regarding access to government records is addressed further in the Florida Statutes. Section 119.01, F.S., provides that it is the policy of the state that all state, county, and municipal records are open for personal inspection and copying by any person, and that it is the responsibility of each agency<sup>1</sup> to provide access to public records.<sup>2</sup> Section 119.07(1), F.S., guarantees every person a right to inspect and copy any public record unless an exemption applies. The state's public records laws are construed liberally in favor of granting public access to public records.

##### Inspection and Copying of Public Records

Current law describes the duties and responsibilities of a custodian of public records<sup>3</sup> (records custodian). Section 119.07(1), F.S., requires a records custodian to permit records to be inspected and copied by any person, at any reasonable time,<sup>4</sup> under reasonable conditions, and under supervision by the records custodian. Generally, a records custodian may not require that a request for public records be submitted in a specific fashion.<sup>5</sup>

An agency is permitted to charge fees for inspection or copying of records. Those fees are prescribed by law and are based upon the nature or volume of the public records requested. Section 119.07(4), F.S., provides that if the nature or volume of the request requires extensive use of information technology or extensive clerical or supervisory assistance, the agency may charge, in addition to the actual cost of duplication, a reasonable service charge based on the cost incurred for the use of information technology and the labor cost that is actually incurred by the agency in responding to the request. The term "labor cost" includes the entire labor cost, including benefits in addition to wages or salary.<sup>6</sup> Such service charge may be assessed, and payment may be required, by an agency prior to providing a response to the request.<sup>7</sup>

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<sup>1</sup> Section 119.011(2), F.S., defines the term "agency" to mean any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law including, for the purposes of chapter 119, F.S., the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any agency.

<sup>2</sup> Section 119.011(12), F.S., defines the term "public records" to mean all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.

<sup>3</sup> Section 119.011(5), F.S., defines the term "custodian of public records" to mean the elected or appointed state, county, or municipal officer charged with the responsibility of maintaining the office having public records, or his or her designee.

<sup>4</sup> There is no specific time limit established for compliance with public records requests. A response must be prepared within a reasonable time of the request. *Tribune Co. v. Cannella*, 458 So. 2d 1075 (Fla. 1984). What constitutes a reasonable time for a response will depend on such factors as the volume of records that are responsive to a request, as well as the amount of confidential or exempt information contained within the request.

<sup>5</sup> See *Dade Aviation Consultants v. Knight Ridder, Inc.*, 800 So. 2d 302 (Fla. 3d DCA 2001) (holding that public records requests need not be made in writing).

<sup>6</sup> *Board of County Commissioners of Highlands County v. Colby*, 976 So. 2d 31 (Fla. 2d DCA 2008).

<sup>7</sup> Section 119.07(4), F.S.; see also *Wootton v. Cook*, 590 So. 2d 1039, 1040 (Fla. 1st DCA 1991) (stating if a requestor identifies a record with sufficient specificity to permit [an agency] to identify it and forwards the appropriate fee, [the agency] must furnish by mail a copy of the record).

## Enforcing Public Records Laws and Attorney Fees

If an agency unlawfully fails to provide a public record, the person making the public records request may sue to have the request enforced.<sup>8</sup> Whenever such an action is filed, the court must give the case priority over other pending cases and must set an immediate hearing date.<sup>9</sup>

Enforcement lawsuits are composed of two parts: the request for production of a record and the assessment of fees. The assessment of attorney fees is considered a legal consequence that is independent of the public records request.<sup>10</sup> Once an enforcement action has been filed, an agency can be held liable for attorney fees even after the agency has produced the requested records.<sup>11</sup> The public policy behind awarding attorney fees is to encourage people to pursue their right to access government records after an initial denial.<sup>12</sup> Granting attorney fees also makes it more likely that agencies will comply with public records laws and deter improper denials of requests.<sup>13</sup>

If the court finds that the agency unlawfully refused access to a public record, the court must order the agency to pay for the requestor's reasonable costs of enforcement, including reasonable attorney fees.<sup>14</sup> If a contractor acting on behalf of the agency fails to comply with a public records request, the requestor may sue the contractor to enforce his or her rights to have access to records.<sup>15</sup> If a court determines that the contractor unlawfully withheld public records, the court must order the contractor to pay for the cost of the enforcement lawsuit and the requestor's attorney fees in the same manner that an agency would be liable.<sup>16</sup> Attorney fees for efforts expended to obtain attorney fees are not currently permitted.<sup>17</sup>

A court will not take into consideration whether a records custodian intended to violate public records laws or was simply inept,<sup>18</sup> and it is immaterial if a records custodian did not willfully refuse to provide a public record.<sup>19</sup> In addition, to be entitled to attorney fees against the state or any of its agencies, the plaintiff must serve a copy of the pleading claiming the fees on the Department of Financial Services (DFS). DFS is then entitled to participate with the agency in the defense of the suit and any appeal thereof with respect to such fees.<sup>20</sup>

## Recent Litigation

In recent years, allegations have arisen that some individuals and entities have used public records enforcement lawsuits as a way to generate fees rather than to make lawful public records requests.<sup>21</sup>

On December 1, 2014, a circuit court judge in Duval County denied relief to a plaintiff in a lawsuit to enforce a public records request and for assessment of attorney fees.<sup>22</sup> According to the court order, the plaintiff made two separate requests for public records to a nonprofit organization under contract to provide social services for the Department of Children and Families. The contract manager refused to provide the documents because the contract manager believed the documents were not public records.

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<sup>8</sup> Section 119.11, F.S.

<sup>9</sup> Section 119.11(1), F.S.

<sup>10</sup> Section 119.12, F.S.

<sup>11</sup> *Mazer v. Orange County*, 811 So. 2d 857, 860 (Fla. 5th DCA 2002); *Barfield v. Town of Eatonville*, 675 So. 2d 223 (Fla. 5th DCA 1996); *Althouse v. Palm Beach County Sheriff's Office*, 92 So. 3d 899, 902 (Fla. 4th DCA 2012).

<sup>12</sup> *New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So. 2d 27, 29 (Fla. 1993).

<sup>13</sup> *Id.*

<sup>14</sup> Section 119.12, F.S.

<sup>15</sup> *See New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So. 2d 27 (Fla. 1993).

<sup>16</sup> *See s. 119.12, F.S.; see also New York Times Co. v. PHH Mental Health Services, Inc.*, 616 So. 2d 27, 29 (Fla. 1993).

<sup>17</sup> *Downs v. Austin*, 559 So. 2d 246, 248 (Fla. 1st DCA 1990).

<sup>18</sup> *Barfield v. Town of Eatonville*, 675 So. 2d 223, 225 (Fla. 5th DCA 1996).

<sup>19</sup> *Lilker v. Suwannee Valley Transit Authority*, 133 So. 3d 654 (Fla. 1st DCA 2014).

<sup>20</sup> Section 284.30, F.S.

<sup>21</sup> *See* Tristram Korten and Trevor Aaronson, *Florida nonprofit's ties to law firm questioned after dozens of lawsuits filed*, NAPLES DAILY NEWS, Dec. 6, 2014; Jan Pudlow, *A new scam: Public records shakedown*, THE FLORIDA BAR NEWS, Feb. 1, 2015, at 1.

<sup>22</sup> *Gray v. Lutheran Social Services of Northeast Florida, Inc.*, Final Order Denying Relief Under Public Records Act, No. 2014-CA-4647 (Fla. 4th Cir. Ct. Dec. 2, 2014).

The court found that the manner in which the plaintiff (and his companions) made the request ensured that “they obtained exactly what they wanted, namely an initial denial of an unreasonable and bogus request.”<sup>23</sup>

The court found that the plaintiff’s method of requesting public records was an abuse of the public records laws noting that the actions of the requester amounted to “nothing more than a scam.”<sup>24</sup> The Final Order stated that the plaintiff and his attorney, who had an arrangement to split his attorney fees with the plaintiff, had “a financial interest in assuring that his requests for public records [were] refused.”<sup>25</sup> The court noted that in 2014, the plaintiff filed 18 public records lawsuits in Duval County, and that the attorney represented the plaintiff on approximately 13 of those cases; the court noted that all of the cases followed a similar pattern.

The court opined that:

If a private entity must pay an attorney’s fee every time an agent denies a needless request, the cost to the state to provide important services by contracting with private entities will increase; or private entities might discontinue bidding on these contracts. The chilling effect could be disastrous to the State. Further the [Public Records] Act was not designed to create a cottage industry for so-called “civil rights activists” or others who seek to abuse the [Public Records] Act for financial gain.<sup>26</sup>

The case was affirmed by the First District Court of Appeal on December 16, 2015.<sup>27</sup>

### **Effect of Proposed Changes**

The bill amends current law to provide that in a public records enforcement lawsuit, a court may, but is not required to, award reasonable enforcement costs, including attorney fees, to the complainant if the court determines the agency unlawfully refused to provide a public record. To be awarded such costs, the bill also requires a complainant to provide written notice of the public records request to the agency’s records custodian at least five business days before filing the lawsuit.

#### **B. SECTION DIRECTORY:**

Section 1 amends s. 119.12, F.S., relating to attorney fees in public records enforcement actions.

Section 2 provides an effective date of July 1, 2016.

## **II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

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

##### **1. Revenues:**

The bill may have a positive fiscal impact on the state if there are fewer instances when a court assesses against an agency the reasonable costs of enforcement in a public records lawsuit.

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Gray v. Lutheran Social Services of Northeast Florida, Inc.*, 2015 WL 9091680 (Fla. 1st DCA 2015).

2. Expenditures:

The bill does not appear to have an impact on state expenditures.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill may have a positive fiscal impact on local governments if there are fewer instances when a court assesses against a local government the reasonable costs of enforcement in a public records lawsuit.

2. Expenditures:

The bill does not appear to have an impact on local government expenditures.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill may have a negative fiscal impact on the private sector if there are fewer instances when a court awards to a prevailing complainant in a public records lawsuit the reasonable costs of enforcement.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

The bill does not appear to require counties or municipalities to take an action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

The bill does not appear to create a need for rulemaking or rulemaking authority.

C. DRAFTING ISSUES OR OTHER COMMENTS:

Other Comments: Written Notice

The bill does not specify how the written notice required before filing a public records enforcement action must be provided. It is unclear whether the notice must be hand-delivered or mailed and whether the five-day period begins when the notice is submitted by the complainant or when it is received by the agency's records custodian.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

None.

HB 1021

2016

1                   A bill to be entitled  
 2           An act relating to public records; amending s. 119.12,  
 3           F.S.; revising conditions under which the award of  
 4           attorney fees is authorized in certain civil actions  
 5           for enforcement of chapter 119, F.S.; providing that  
 6           the award of such attorney fees is within the  
 7           discretion of the court; providing an effective date.

8  
 9   Be It Enacted by the Legislature of the State of Florida:

10  
 11           Section 1. Section 119.12, Florida Statutes, is amended to  
 12   read:

13           119.12 Attorney ~~Attorney's~~ fees.—If a civil action is  
 14   filed against an agency to enforce ~~the provisions of this~~  
 15   chapter and ~~if~~ the court determines that the complainant  
 16   provided written notice of the public records request to the  
 17   agency's custodian of public records at least 5 business days  
 18   before filing the civil action and the such agency unlawfully  
 19   refused to permit a public record listed in the notice to be  
 20   inspected or copied, the court may ~~shall~~ assess and award,  
 21   against the responsible agency ~~responsible~~, the reasonable costs  
 22   of enforcement, including reasonable attorney ~~attorneys'~~ fees.

23           Section 2. This act shall take effect July 1, 2016.



HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: HB 1041 Unclaimed Property
SPONSOR(S): Hager
TIED BILLS: IDEN./SIM. BILLS: SB 966

Table with 4 columns: REFERENCE, ACTION, ANALYST, STAFF DIRECTOR or BUDGET/POLICY CHIEF. Row 1: Insurance & Banking Subcommittee, 12 Y, 0 N, Bauer, Luczynski. Row 2: Government Operations Appropriations Subcommittee, Keith, Topp. Row 3: Regulatory Affairs Committee.

SUMMARY ANALYSIS

Unclaimed property consists of any funds or other property, including insurance proceeds, that has remained unclaimed by the owner for a certain period of time. The Florida Disposition of Unclaimed Property Act ("the Act") requires holders of unclaimed property to exercise due diligence to locate missing owners and pay them the funds.

In 2008-2009, Florida and a number of other state insurance regulators and unclaimed property administrators began investigating large life insurers for their claims settlement practices, and learned that certain insurers selectively used the Social Security Administration's Death Master File (DMF) to verify the death of an insured or an annuitant, which enabled the insurer to stop making annuity payments, but were not using the same information to ascertain the death of a life insurance policyholder for making payment to a beneficiary or remittance of the proceeds to a state unclaimed property office.

The bill amends the Act to codify the RSAs to retroactively require life insurers, for all life policies, annuity contracts and retained asset accounts that were in-force during or after 1992, to conduct a match of all such policies against the DMF. For any person who is revealed to have died while covered, unless the presumed death is rebutted by evidence, the insurer must within four months of gaining knowledge of death, pay the unclaimed benefits to the beneficiary or heir - a process known as "due diligence."

The bill has an indeterminate impact on state government revenues and expenditures. However, the DFS indicates that any expenditure increase due to additional workload created by provisions in the bill will be absorbed within existing resources. The bill has no fiscal impact on local government. The bill may impose indeterminate costs to insurers to comply with the search requirements, but may increase the likelihood that Florida beneficiaries will obtain intended death benefits.

The bill takes effect upon becoming a law.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### **Current Law**

##### **Florida Disposition of Unclaimed Property Act**

Unclaimed property constitutes any funds or other property, tangible or intangible, that has remained unclaimed by the owner for a certain number of years. Unclaimed property may include: savings and checking accounts; money orders; travelers' checks; uncashed payroll or cashiers' checks; stocks; bonds; other securities; insurance policy payments; refunds; security and utility deposits; and contents of safe deposit boxes.<sup>1</sup>

In 1987, Florida adopted the Uniform Unclaimed Property Act and enacted the Florida Disposition of Unclaimed Property Act (ch. 717, F.S., "the Act").<sup>2</sup> The Act serves to protect the interests of missing owners of property, while the state derives a benefit from the unclaimed and abandoned property until the property is claimed, if ever. Under the Act, the Department of Financial Services (DFS) Bureau of Unclaimed Property is responsible for receiving property, attempting to locate the rightful owners, and returning the property or proceeds to them. There is no statute of limitations in the Act, and citizens may claim their property at any time and at no cost.

Generally, all intangible property, including any income less any lawful charges, which is held in the ordinary course of the holder's business, is presumed to be unclaimed when the owner fails to claim the property for more than five years after the property becomes payable or distributable, unless otherwise provided in the Act.<sup>3</sup> Holders of unclaimed property (which typically include banks and insurance companies) of \$50 or more are required to use due diligence to locate and notify apparent owners of inactive accounts, at least 60 days but not more than 120 days prior to filing a report with the DFS.<sup>4</sup> If the owners cannot be located, holders must file an annual report with the DFS for all property, valued at \$50 or more, that is presumed unclaimed for the preceding year.<sup>5</sup> The report must contain certain identifying information, such as the apparent owner's name, social security number or federal employer identification number, and last known address of apparent owners.<sup>6</sup> The holder must deliver all reportable unclaimed property to the DFS when it submits its annual report.<sup>7</sup>

Upon the payment or delivery of unclaimed property to DFS, the state assumes custody and responsibility for the safekeeping of the property.<sup>8</sup> The original property owner retains the right to recover the proceeds of the property, and any person claiming an interest in the property delivered to the DFS may file a claim for the property, subject to certain requirements.<sup>9</sup> The DFS is required to make a determination on a claim within 90 days. If a claim is determined in favor of the claimant, the department is to deliver or pay over to the claimant the property or the amount the department actually received or the proceeds, if it has been sold by the DFS.<sup>10</sup>

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<sup>1</sup> ss. 717.104 – 717.116, F.S.

<sup>2</sup> Ch. 87-105, Laws of Fla. See also UNIFORM LAW COMMISSION, *Unclaimed Property Act Summary*, <http://www.uniformlaws.org/ActSummary.aspx?title=Unclaimed%20Property%20Act> (last visited Jan. 19, 2016).

<sup>3</sup> s. 717.102(1), F.S.

<sup>4</sup> s. 717.117(4), F.S.

<sup>5</sup> s. 717.117, F.S.

<sup>6</sup> For unclaimed funds owing under any life or endowment insurance policy or annuity contract, the report must also include the last known address of the insured or annuitant and of the beneficiary according to records of the insurance company holding or owing the funds. s. 717.117(1)(b), F.S.

<sup>7</sup> s. 717.119, F.S.

<sup>8</sup> s. 717.1201, F.S. Like many other states' unclaimed property acts, the Act is based on the common-law doctrine of escheat and is a "custody" statute, rather than a "title" statute, in that the DFS does not take title to abandoned property, but instead obtains its custody and beneficial use pending identification of the property owner.

<sup>9</sup> ss. 717.117 and 717.124, F.S.

<sup>10</sup> s. 717.124, F.S.

If the property remains unclaimed, all proceeds from abandoned property are then deposited by the DFS into the Unclaimed Property Trust Fund.<sup>11</sup> The DFS is allowed to retain up to \$15 million to make prompt payment of verified claims and to cover costs incurred by the DFS in administering and enforcing the Act. All remaining funds received must be deposited into the State School Trust Fund to be utilized for public education.<sup>12</sup>

### Life or Endowment Insurance Policies or Annuity Contracts

The primary purpose of life insurance (the insurance of human lives) is to provide a financial benefit (death benefit) to dependents (beneficiaries) upon the premature death of an insured person. Life insurance also includes *annuity contracts* and *endowment benefits*.<sup>13</sup>

- An *annuity* is a series of payments that acts similarly to a savings plan to provide primary or supplementary retirement income over a period of time. It is a contract where the consumer (annuitant) makes a lump sum payment or a series of payments to an insurer; in return, the insurer agrees to make periodic payments back to the annuitant at a future date for varying periods and amounts. An annuity may or may not have a death benefit upon the annuitant's death, depending on the annuity's payment plan.
- *Endowment policies* offer insurance protection for a fixed period of time, with emphasis on the rapid accumulation of premiums. The policy "endows" if the insured lives to the end of the policy period (such as the 10<sup>th</sup> or 20<sup>th</sup> anniversary, or with a stated age, such as 65), triggering a payment to the owner that is equal to the policy's face amount.<sup>14</sup>

Section 627.461, F.S., requires that every contract of insurance provide that, when a policy becomes a claim upon the death of the insured, settlement of the policy shall be made upon *receipt of due proof of death* and surrender of the policy. Accordingly, life insurance policies and annuities contracts with death benefits issued under Florida law have contractual terms that provide that the policy matures upon the insurer receiving actual proof of death, generally in the form of a certified copy of the death certificate.

Until an insurer receives proof of the insured's death, it uses *retained asset accounts* to hold beneficiaries' proceeds until the beneficiaries withdraw the cash using checks or drafts, payment cards, or other means. Current law does not restrict the use of a retained asset account by an insurer. The beneficiary may move funds from the retained asset account into their own account (whether in a single lump sum payment, in installments, or in interest-only payments until the insured's death).<sup>15</sup>

### *Verification of Death Through the Social Security Death Master File*

The U.S. Social Security System (SSA) collects death information from many sources (including family members, funeral homes, financial institutions, postal authorities, states, and other federal agencies) in order to administer its programs. This death information is compiled into the Death Master File (DMF) is an extract of death information on the SSA's Numerical Identification System (also known as NUMIDENT), the electronic database that contains records of Social Security Numbers (SSN) assigned to individuals since 1936, and includes, if available, the deceased individual's SSN, first name, middle name, surname, date of birth, and date of death. The SSA prepares two versions of the DMF – a *full file* which is shared only with certain state and federal agencies pursuant to federal law, and a *public file* which does not include death data received from the states. The public file is provided to the Department of Commerce's National Technical Information Service, a clearinghouse for government information, which sells it to the public (other agencies and private organizations such as banks and

<sup>11</sup> s. 717.123, F.S.

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

<sup>13</sup> s. 624.602, F.S.

<sup>14</sup> DEPARTMENT OF FINANCIAL SERVICES, *Life Insurance & Annuities: A Guide to Consumers* (p. 7), at

[http://www.myfloridacfo.com/Division/Consumers/understandingCoverage/Guides/documents/life\\_annuities.pdf](http://www.myfloridacfo.com/Division/Consumers/understandingCoverage/Guides/documents/life_annuities.pdf)

<sup>15</sup> DEPARTMENT OF FINANCIAL SERVICES, *Life Insurance: Overview – Common Terms*, at

<http://www.myfloridacfo.com/Division/Consumers/UnderstandingCoverage/LifeInsuranceOverview.htm> (last visited Jan. 19, 2016).

credit companies).<sup>16</sup> Access to the DMF is restricted and requires users to have a legitimate fraud prevention interest or a legitimate business purpose pursuant to a law, governmental rule, regulation, or fiduciary duty, in addition to compliance with strict user agreements.

A variety of individuals and professions, such as medical researchers, hospitals, oncology programs, investigative firms, individuals searching for loved ones, and genealogists, use the DMF to verify death. Additionally, pension funds, insurance organizations, and government entities of all levels responsible for making benefits and payments to recipients use the DMF to make sure they are not sending checks to deceased persons.<sup>17</sup>

As discussed further below, the Act does not currently require insurers to use the DMF to verify the insured's death for the purposes of its payment obligations to beneficiaries or remittance and reporting obligations to the DFS.

#### *Unclaimed Property Treatment of Life Insurance or Endowment Policies or Annuity Contracts*

In some instances, life insurance or endowment policies or annuity contracts reach maturity or are terminated, but are unclaimed by the beneficiary, sometimes due to the beneficiary's lack of knowledge that he or she is a named beneficiary. Historically, many life insurance companies have held policy benefits until contacted by a beneficiary, rather than research whether the policyholder is still living. If never contacted, the company never paid the benefit. For unclaimed property purposes, s. 717.107(1), F.S., provides that funds held or owing under a life or endowment insurance policy or an annuity contract that has matured or terminated are presumed unclaimed if unclaimed for more than 5 years<sup>18</sup> (the dormancy period) after the funds became *due and payable* as established by records of the insurance company owing the funds.<sup>19</sup>

In 2014, a Florida appeals court reviewed a declaratory statement<sup>20</sup> by the DFS that interpreted s. 717.107(1), F.S., to require life insurance funds "due and payable" upon the death of the insured, at which time the 5-year dormancy period for unclaimed property purposes is triggered.<sup>21</sup> The DFS declaratory statement, issued to petitioner Thrivent Financial for Lutherans, also asserted that the statute creates an affirmative duty on insurers to use due diligence in searching databases (such as the Google, LexisNexis, or the SSA's DMF), in order to determine if any of its insureds had died. The First DCA reversed the declaratory statement, finding DFS's interpretation to be clearly erroneous and contrary to the plain language of s. 717.107, F.S. In reading the statute in conjunction with s. 627.461, F.S., which requires insurance contracts to state that the policy will be settled upon "receipt of due proof of death and surrender of the policy," the court concluded that the records of the insurance company do not establish insurance funds as "due and payable" under the Act until the insurer receives proof of death and surrender of the policy. Additionally, the court also refused to impose an affirmative duty on insurers to search death records in order to determine whether any insureds have died, noting that the plain language of s. 717.107, F.S., does not impose such a duty. In declining to rewrite the statute contrary to its plain language, it noted that policy considerations such as these must be addressed by the Legislature.<sup>22</sup>

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<sup>16</sup> SOCIAL SECURITY ADMINISTRATION, *Requesting the Full Death Master File: Our Death Data*, at [https://www.ssa.gov/dataexchange/request\\_dmfm.html](https://www.ssa.gov/dataexchange/request_dmfm.html) (last visited Jan. 19, 2016).

<sup>17</sup> Social Security Death Master File, *SSDMF Database Uses*, at <https://www.ssdmf.com/FolderID/1/SessionID/%7B7B22D106-D899-4C11-B93A-1E389C169B9C%7D/PageVars/Library/InfoManage/Guide.htm> (last visited Jan. 19, 2016).

<sup>18</sup> If the insured attains the limiting age under an in-force policy or would have done so if alive, the funds are deemed unclaimed, if unclaimed for 2 years. s. 717.107, F.S.

<sup>19</sup> s. 717.107(1), F.S. The statute also sets forth grounds for deeming an (otherwise unmatured) policy matured and the proceeds as due and payable, such as if the company knows that the insured or annuitant has died.

<sup>20</sup> Under the Administrative Procedure Act, a declaratory statement may be requested by "any substantially affected person," and is a binding opinion of a state agency as to the applicability of a statutory provision or any rule or order of the agency, as it applies to a petitioner's particular set of circumstances. A declaratory statement is final agency action appealable to the district courts of appeal. See ss. 120.565 and 120.68, F.S.

<sup>21</sup> *Thrivent Financial for Lutherans v. Dep't of Financial Services*, 145 So.3d 178 (Fla. 1st DCA 2014).

<sup>22</sup> *Id.* at 182.

## Regulatory Examinations of Life Insurance Claims Practices

Between 2004 and 2006, Florida received nearly 200,000 unclaimed demutualization accounts (totaling more than \$184 million) from life insurers that demutualized between 1998 and 2001.<sup>23</sup> These accounts were not death benefits, but rather ownership interests in the company by policyholders, and were remitted as unclaimed property to the DFS. Due to the large amount of demutualization proceeds, Florida and many other states questioned the whereabouts of the underlying life policies.

Beginning in 2008, Florida and 43 other states began auditing life insurance companies for compliance with state unclaimed property laws. The auditors' strategy involved comparing policy information to data maintained by the DMF. Between 2009 and 2011, during the course of the initial exams, Florida learned that certain life insurance companies selectively utilized the DMF to verify the death of an annuitant, which then enabled the insurance company to stop making annuity payments. However, the insurance companies were not using the DMF to research the death of a policyholder of a life insurance policy, which would have resulted in payment to a beneficiary or remittance of the policy benefits to a state unclaimed property office.<sup>24</sup>

In 2009, the Office of Insurance Regulation (OIR) conducted market conduct investigations which confirmed the industry's asymmetrical use of the DMF. Because insurers were not using information to find beneficiaries, the practice sometimes resulted in continued payment deductions from the accounts of deceased policyholders for the payment of premiums. Often, claims are not made by the beneficiaries of life insurance policies because the beneficiary is unaware of the policy. Additionally, insurers generally did not remit the benefits under life insurance policies and annuities with a death benefit to the Bureau of Unclaimed Property unless the insured attained, or would have attained, the limiting age on an at-force policy, which for most policies is 100 years of age or greater.

In May 2011, insurance regulators from a number of states, including Florida, established a special task force to coordinate regulatory investigations of the claim settlement practices of life insurance companies. In particular, the task force focused on the allegations that many of the insurers were using the DMF to terminate payments under annuity contracts, but failed to use this information to facilitate claims payments on life insurance policies. Kevin McCarty, the OIR Commissioner, has served as the chair of the task force since its inception. Florida, California, Illinois, New Hampshire, North Dakota, and Pennsylvania, are the lead states for these examinations of the 40 largest insurance groups, which comprise more than 92 percent of the market of life and annuity products nationwide. Currently, an examination has been concluded or a settlement has been reached for 22 of the 40 largest insurers.<sup>25</sup>

## Regulatory Settlement Agreements (RSAs)

From 2011 to the present, Florida entered into a number of settlement agreements with over 20 large life insurers, often as part of multi-state regulatory settlement agreements (RSAs). Participants in the examination and settlement process have included Chief Financial Officer Jeff Atwater through the Bureau of Unclaimed Property at the DFS, Attorney General Pam Bondi through the Office of the Attorney General, and the OIR. According to the OIR, these life claim settlement agreements have resulted in the return of over \$5 billion to beneficiaries directly by the companies and over \$2.4 billion being delivered to the states, which also attempt to locate and pay beneficiaries.

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<sup>23</sup> Demutualization refers to a process whereby a *mutual insurer* (which does not have permanent capital stock and whose policyholders hold certain membership interests) seeks to convert to a *stock insurer* (whose capital is divided into shares and is owned by its stockholders), subject to regulatory approval by the Office of Insurance Regulation pursuant to pt. I, ch. 628, F.S.

<sup>24</sup> DEPARTMENT OF FINANCIAL SERVICES, *Life Insurance/Unclaimed Property/Death Master File Proposed Legislation: Historical Background*, on file with the Insurance & Banking Subcommittee staff.

<sup>25</sup> OFFICE OF INSURANCE REGULATION, *Life Claim Settlement Practices*, at [http://www.floir.com/Sections/LandH/life\\_claims\\_settlement\\_practices\\_hearing05192011.aspx](http://www.floir.com/Sections/LandH/life_claims_settlement_practices_hearing05192011.aspx) (last visited Jan. 19, 2016).

The RSAs generally require the life insurer to compare all the life insureds listed in company records against the DMF.<sup>26</sup> For all policies the company obtains notice of the death of the insured through the DMF search or company records, it must conduct a thorough search for the beneficiaries. If a life insurance beneficiary contacts the insurer, the company must provide claims forms and instructions for the making of a claim. The insurers retain the right to require a death certificate as proof of death before paying proceeds to a beneficiary. If the company cannot locate the beneficiary, the insurer must remit the proceeds as unclaimed property within 5 years of the date of the death of the life insurance policyholder. The settlement agreements also establish business practices to facilitate payments to owners of assets under annuity contracts and retained asset accounts.

### **Effect of the Bill**

The bill codifies the RSAs to require life insurers, for all life policies, annuity contracts and retained asset accounts that were in-force during or after 1992, to conduct a match of all such policies against the SSA's DMF. For any person who is revealed to have died while covered, unless the presumed death is rebutted by evidence, the insurer must within four months of gaining knowledge of death, pay the unclaimed benefits to the beneficiary or heir – a process known as “due diligence.” If not accordingly paid within four months, the unclaimed benefits become unclaimed property. The bill requires companies, in future years, to conduct a similar match of all in-force policies and contracts on at least an annual basis. The bill establishes the date of death as the five-year dormancy trigger for unclaimed policy benefits. It prohibits insurers from charging fees associated with the “due diligence” process or to recipients in the course of obtaining funds they are owed. The legislation clarifies that life insurance proceeds may become unclaimed property even if the beneficiary of the policy has not yet filed a claim for the death benefits with the insurer and that the dormancy period for life insurance commences upon the date of death of the insured.

Section 1 amends s. 717.107, F.S., of the Act to establish that funds held or owing under any life or endowment insurance policy or annuity contract which has matured or terminated are presumed unclaimed if unclaimed for more than 5 years after the date of death of the insured, annuitant, or retained asset account holder.

The bill requires insurers to at least annually perform a comparison of its insureds against the SSA's DMF. The comparison must be performed for all the insurer's policyholders under life or endowment insurance policies, annuity contracts that provide a death benefit, and retained asset accounts that were in force at any time on or after January 1, 1992. The annual comparison must be made before August 31 of each year. Additionally, if the insurer makes a comparison of its annuity policyholders against the DMF more frequently than once a year, the insurer must perform the DMF comparison required by this bill as frequently. Consequently, the bill will require insurers to perform the searches that the *Thrivent* decision held that the DFS did not have the authority to require under current s. 717.107, F.S.

The bill establishes a rebuttable presumption that an insured, annuitant, or retained asset account holder is deceased if that person's date of death is indicated on the DMF. The insurer is required to account for common variations in data and for partial names, social security numbers, dates of birth, and addresses which would otherwise preclude an exact match.

The bill exempts any annuity contract issued in connection with an employment-based plan subject to the Employee Retirement Income Security Act of 1974 (ERISA) or an annuity contract issued to fund an employment-based retirement plan, including any deferred compensation plans. An insurer is not required to confirm the possible death of an insured for accidental death plans or when the insurer does not perform recordkeeping functions. The provision related to record keeping functions will exempt a policy issued to a group policy owner for which the insurer does not provide record keeping services. The bill defines record keeping services as maintaining the information necessary to process a claim or having access to such information.

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<sup>26</sup> OFFICE OF INSURANCE REGULATION, *Florida's Regulatory Life Claim Settlement Agreements*, <http://www.flor.com/siteDocuments/LifeClaimsSettlements.pdf> (follow hyperlinks to RSAs)(last visited Jan.19, 2016).

Insurers and their agents or third parties may not charge insureds, annuity owners, retained asset account holders, and beneficiaries any fees or costs associated with any search, verification, claim or delivery of funds pursuant to the requirements of s. 717.107, F.S.

Section 2 of the bill states that the bill is remedial and applies retroactively. The retroactive application of the bill evidences legislative intent to apply the bill to policies, contracts and accounts entered into, prior to the effective date of the bill. Fines, penalties, or additional interest may not be imposed on the insurer for failure to report and remit property under the bill if such proceeds are reported and remitted to the DFS no later than May 1, 2021. The prohibition against fines, penalties and additional interest is designed to provide insurers approximately 5 years to comply with the requirements of the bill before being subject to such sanctions.

Section 3 provides that the act is effective upon becoming law.

**B. SECTION DIRECTORY:**

**Section 1.** Amends 717.107, F.S., relating to funds owing under life insurance policies.

**Section 2.** Provides a statement of retroactive applicability.

**Section 3.** Provides that the bill takes effect upon becoming a law.

**II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT**

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

**1. Revenues:**

The bill has an indeterminate, but likely positive impact to state revenues. The bill requires life insurance companies to review the DMF at least annually to determine if the death of an insured is indicated so that Florida beneficiaries will receive death benefits as intended.

The bill also provides that fines, penalties, or additional interest shall not be imposed on insurance companies that run the DMF search and report and remit any unclaimed life insurance proceeds, annuities, and retained asset accounts before May 1, 2021. Accordingly, while there may be no revenues for FY 16-17, FY 17-18 or FY 18-19 based on the DMF search required by the bill, the bill will result in insurance companies conducting DMF searches and reporting and remitting the unclaimed property to the DFS soon after the bill becoming law.

According to the DFS, it is anticipated that the first time an insurance company runs the DMF, the amount of unclaimed life insurance proceeds owed to missing beneficiaries that are reported and remitted to the DFS will be greater than the amount of unclaimed life insurance proceeds reported and remitted to the DFS each subsequent year. However, the DFS expects to receive reports and remittances far exceeding \$100 million, from unknown and unclaimed life insurance benefits not returned via "due diligence."<sup>27</sup>

**2. Expenditures:**

The bill is likely to have an indeterminate impact on DFS expenditures. The DFS has noted that they may incur litigation expenses if the bill is challenged by life insurers.<sup>28</sup> In addition, the DFS could potentially see an increased workload to the Bureau of Unclaimed Property as a result of provisions in the bill. However, the DFS indicates that any additional workload will be absorbed within existing resources.

<sup>27</sup> Department of Financial Services, Agency Analysis of 2016 House Bill 1041, p. 2 (Jan. 8, 2016).

<sup>28</sup> *Id.*

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

1. Revenues:

None.

2. Expenditures:

None.

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

Life insurers may incur a cost to use the DMF to comply with this bill, if they are not currently using it to determine whether a death of an insured has occurred. On the other hand, many beneficiaries of life or endowment insurance policies and annuities contracts, who are unaware of such policies, will benefit by claiming benefits after being contacted by a life insurer. If the life insurer remits the funds held or owing under the policy or contract to the Bureau of Unclaimed Property, beneficiaries will benefit by having a central location with which to search for possible life insurance proceeds.

**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:

Section 2 of the bill provides a statement of retroactive application and that the amendments are remedial in nature. The bill applies to life or endowment insurance policies, annuity contracts that provide a death benefit, and retained asset accounts that were in force at any time on or after January 1, 1992.

Section 624.21, F.S., provides that each amendment to the Insurance Code<sup>29</sup> (which includes the Act) shall be construed to operate prospectively, unless a contrary legislative intent is specified. This is consistent with the constitutional principle that unless the Legislature states otherwise, legislation is presumed only to operate prospectively. However, even where the Legislature expressly states an intent for a statute to apply retroactively, courts will reject such an application if the statute impairs a vested right, creates a new obligation, or imposes a new penalty.<sup>30</sup> The Contract Clause of article I, section 10 of the U.S. Constitution prohibits states from passing laws which substantially impair contract rights. Courts use a balancing test to determine whether a particular regulation violates the contract clause. The courts measure the severity of contractual impairment against the importance of the interest advanced by the regulation. Also, courts look at whether the regulation is a reasonable and narrowly tailored means of promoting the state's interest.<sup>31</sup> Generally, courts accord considerable deference to legislative determinations relating to the need for laws which impair private obligations.<sup>32</sup>

The DFS asserts that these constitutional concerns are not implicated, because the legislation is remedial in nature (i.e., corrects or remedies a problem or redresses an injury) and does not create new or take away vested rights.<sup>33</sup>

<sup>29</sup> Section 624.01, F.S., provides that chs. 624-632, 634-636, 641-642, 648, and 651, F.S., constitute the Florida Insurance Code.

<sup>30</sup> *Menendez v. Progressive Exp. Ins. Co., Inc.*, 35 So.3d 873 (Fla. 2010).

<sup>31</sup> *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234 (1978).

<sup>32</sup> *East N.Y. Sav. Bank v. Hahn*, 326 U.S. 230 (1945).

<sup>33</sup> Department of Financial Services, Agency Analysis of 2016 House Bill 1041, p. 3 (Jan. 8, 2016), citing *City of Lakeland v. Catinella*, 129 So.2d 133 (Fla. 1961).

[E]stimates indicate the amount of unclaimed life insurance proceeds nationwide to be in the billions of dollars. Accordingly, to address this growing problem, the legislation provides that insurance companies utilize the DMF to determine whether any of their insured, annuitants or retained asset account holders may now be deceased. Remedial legislation is appropriate in this instance because the Florida Legislature has the authority to adopt reasonable insurance regulations in the public interest.<sup>34</sup> In addition, there is no vested right to conduct business in Florida without legislatively imposed regulations or even the subsequent abrogation by the legislature of the "right" to engage in the regulated industry.<sup>35</sup> "Where 'rights' have been subject to modification or elimination at any time by the Legislature, courts have found them to be neither fixed nor vested."<sup>36</sup> In such cases, there is no more than an expectation of the continuance of an existing law.<sup>37</sup> Because insurance companies have never been granted a substantive vested right in, or title to, the life insurance proceeds of deceased insured, it is appropriate to redress this injury to Florida consumers.

On the other hand, industry representatives counter that the application of the bill's requirements to life insurance policies creates an unconstitutional impairment of existing insurance contracts, since the *Thrivent* court held that s. 627.461, F.S., controlled regarding contractual terms requiring proof of death.<sup>38</sup> In 2013, an insurer prevailed in a challenge to a Kentucky statute requiring insurers to conduct DMF searches on a retroactive basis. The Kentucky Court of Appeals held that the statute may only be applied prospectively, and that while "the Act's requirements are primarily regulatory and do not directly alter the operations of any conditions precedent for coverage under the insurance contracts...the Act clearly imposes new and substantive requirements which affect the contractual relationship between insurer and insureds."<sup>39</sup>

**B. RULE-MAKING AUTHORITY:**

None provided by the bill.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

The OIR noted that Section 2 should be clarified so that the restriction against fines, penalties, or additional interest imposed for failure to report and remit unclaimed property applies only to the Act, and not to the OIR's authority to pursue penalties arising from its authority relating to unfair insurance claims settlement practices.<sup>40</sup>

**IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

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<sup>34</sup> *Feller v. Equitable Life Assur. Soc. of the United States*, 57 So.2d 581, 586 (Fla. 1952).

<sup>35</sup> *State v. White*, 194 So.2d 601, 603 (Fla. 1967).

<sup>36</sup> *Florida Hospital Waterman, Inc. v. Buster*, 984 So.2d 478, 491 (Fla. 2008).

<sup>37</sup> *Id.* at 490; see also *Lakeland Regional Medical Center, Inc. v. Agency for Healthcare Admin.*, 917 So.2d 1024, 1032 (Fla. 1st DCA 2006); *Campus Communications, Inc., v. Earnhardt*, 821 So.2d 388, 399 (Fla. 5th DCA 2002).

<sup>38</sup> FLORIDA INSURANCE COUNCIL & AMERICAN COUNCIL OF LIFE INSURERS, *Objections to the DFS Proposed Bill on Unclaimed Property*, on file with the Insurance & Banking Subcommittee.

<sup>39</sup> *United Ins. Co. of Am. v. Commonwealth of Kentucky, Dep't. of Ins.*, 2014 WL 3973160 (Ky. Ct. App. 2014). The insurer in the Kentucky challenge brought similar challenges in Maryland and Indiana, which were dismissed on procedural grounds. *United Ins. Co. of Am. V. Indiana Dep't. of Ins.*, No. 49D10-1408-PL 029135 (Ind. Sup. Ct. 2014) and *United Ins. Co. of Am., et al. v. Maryland Ins. Admin., et al.*, No. C-13-179785 (Md. Cir. Ct. 2014).

<sup>40</sup> Office of Insurance Regulation, *Agency Analysis of 2016 House Bill 1041*, p. 5 (Jan. 15, 2016).



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Section 1. Section 717.107, Florida Statutes, is amended to read:

717.107 Funds owing under life insurance policies, annuity contracts, and retained asset accounts; fines, penalties, and interest; United States Social Security Administration Death Master File.—

(1) Funds held or owing under any life or endowment insurance policy or annuity contract which has matured or terminated are presumed unclaimed if unclaimed for more than 5 years after the date of death of the insured, annuitant, or retained asset account holder ~~funds became due and payable as established from the records of the insurance company holding or owing the funds,~~ but property described in paragraph (3)(d) ~~(3)(b)~~ is presumed unclaimed if such property is not claimed for more than 2 years. The amount presumed unclaimed shall include any amount due and payable under s. 627.4615.

(2) If a person other than the insured, ~~or~~ annuitant, or retained asset account holder is entitled to the funds and no address of the person is known to the company or it is not definite and certain from the records of the company who is entitled to the funds, it is presumed that the last known address of the person entitled to the funds is the same as the last known address of the insured, ~~the~~ or annuitant, or the retained asset account holder according to the records of the company.

53 (3) For purposes of this chapter, a life or endowment  
 54 insurance policy or annuity contract not matured by actual proof  
 55 of the death of the insured, the ~~or~~ annuitant, or the retained  
 56 asset account holder according to the records of the company is  
 57 deemed matured and the proceeds due and payable if any of the  
 58 following applies:

59 (a) The company knows that the insured, the ~~or~~ annuitant,  
 60 or the retained asset account holder has died. ~~or~~

61 (b) A presumption of death made in accordance with  
 62 paragraph (8)(b) has not been rebutted.

63 (c) The policy or contract has reached its maturity date.

64 (d) ~~(b)~~ 1. The insured has attained, or would have attained  
 65 if he or she were living, the limiting age under the mortality  
 66 table on which the reserve is based;

67 2. The policy was in force at the time the insured  
 68 attained, or would have attained, the limiting age specified in  
 69 subparagraph 1.; and

70 3. Neither the insured nor any other person appearing to  
 71 have an interest in the policy within the preceding 2 years,  
 72 according to the records of the company, has assigned,  
 73 readjusted, or paid premiums on the policy; subjected the policy  
 74 to a loan; corresponded in writing with the company concerning  
 75 the policy; or otherwise indicated an interest as evidenced by a  
 76 memorandum or other record on file prepared by an employee of  
 77 the company.

78 (4) For purposes of this chapter, the application of an

79 | automatic premium loan provision or other nonforfeiture  
 80 | provision contained in an insurance policy does not prevent the  
 81 | policy from being matured or terminated under subsection (1) if  
 82 | the insured has died or the insured or the beneficiaries of the  
 83 | policy otherwise have become entitled to the proceeds thereof  
 84 | before the depletion of the cash surrender value of a policy by  
 85 | the application of those provisions.

86 |       (5) If the laws of this state or the terms of the life  
 87 | insurance policy require the company to give notice to the  
 88 | insured or owner that an automatic premium loan provision or  
 89 | other nonforfeiture provision has been exercised and the notice,  
 90 | given to an insured or owner whose last known address according  
 91 | to the records of the company is in this state, is  
 92 | undeliverable, the company shall make a reasonable search to  
 93 | ascertain the policyholder's correct address to which the notice  
 94 | must be mailed.

95 |       (6) Notwithstanding any other provision of law, if the  
 96 | company learns of the death of the insured, the ~~or~~ annuitant, or  
 97 | the retained asset account holder and the beneficiary has not  
 98 | communicated with the insurer within 4 months after the death,  
 99 | the company shall take reasonable steps to pay the proceeds to  
 100 | the beneficiary.

101 |       (7) Commencing 2 years after July 1, 1987, every change of  
 102 | beneficiary form issued by an insurance company under any life  
 103 | or endowment insurance policy or annuity contract to an insured  
 104 | or owner who is a resident of this state must request the

105 following information:

106 (a) The name of each beneficiary, or if a class of  
 107 beneficiaries is named, the name of each current beneficiary in  
 108 the class.

109 (b) The address of each beneficiary.

110 (c) The relationship of each beneficiary to the insured.

111 (8) (a) Notwithstanding any other provision of law, an  
 112 insurer shall perform a comparison of its insureds' life or  
 113 endowment insurance policies, annuity contracts that provide a  
 114 death benefit, and retained asset accounts that were in force at  
 115 any time on or after January 1, 1992, against the United States  
 116 Social Security Administration Death Master File to determine if  
 117 the death of an insured, an annuitant, or a retained asset  
 118 account holder is indicated. The comparison must be made on at  
 119 least an annual basis before August 31 of each year. If an  
 120 insurer performs such a comparison regarding its annuities or  
 121 other books of business more frequently than once a year, the  
 122 insurer must also make a comparison regarding its life insurance  
 123 policies, annuity contracts that provide a death benefit, and  
 124 retained asset accounts at the same frequency as is made  
 125 regarding its annuities or other books or lines of business.

126 (b) There is a rebuttable presumption that an insured, an  
 127 annuitant, or a retained asset account holder is deceased if the  
 128 date of the insured's, annuitant's, or retained asset account  
 129 holder's death is indicated on the United States Social Security  
 130 Administration Death Master File. The insurer shall account for

131 common variations in data and for any partial names, social  
 132 security numbers, dates of birth, and addresses of the insured,  
 133 the annuity owner, or the retained asset account holder which  
 134 would otherwise preclude an exact match.

135 (c) For purposes of this section, a policy, a contract, or  
 136 a retained asset account is deemed to be in force if it has not  
 137 lapsed, has not been cancelled, or has not been terminated at  
 138 the time of death of the insured, the annuity owner, or the  
 139 retained asset account holder.

140 (d) This subsection does not apply to an annuity contract  
 141 that is issued in connection with an employment-based plan  
 142 subject to the Employee Retirement Income Security Act of 1974  
 143 or that is issued to fund an employment-based retirement plan,  
 144 including any deferred compensation plans.

145 (9) An insurer is not required to confirm the possible  
 146 death of an insured with respect to benefits payable under  
 147 accidental death or when the insurer does not perform  
 148 recordkeeping functions. For purposes of this subsection, the  
 149 term "recordkeeping" means maintaining, or being legally or  
 150 contractually responsible for maintaining, either directly or  
 151 through a third party, the information necessary to process a  
 152 claim or having access to information necessary to process a  
 153 claim.

154 (10) An insurer, or any agent or third party that it  
 155 engages or that works on its behalf, may not charge insureds,  
 156 annuity owners, retained asset account holders, beneficiaries,

157 | or the estates of insureds, annuity owners, retained asset  
 158 | account holders, or the beneficiaries of an estate any fees or  
 159 | costs associated with any search, verification, claim, or  
 160 | delivery of funds conducted pursuant to this section.

161 |       Section 2. The amendments made by this act are remedial in  
 162 | nature and apply retroactively. Fines, penalties, or additional  
 163 | interest may not be imposed due to the failure to report and  
 164 | remit an unclaimed life or an endowment insurance policy, a  
 165 | retained asset account, or an annuity contract with a death  
 166 | benefit if any unclaimed life or endowment insurance policy,  
 167 | retained asset account, or annuity contract proceeds are  
 168 | reported and remitted to the Department of Financial Services on  
 169 | or before May 1, 2021.

170 |       Section 3. This act shall take effect upon becoming a law.



## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** HB 7073      PCB RORS 16-01      Ratification of Rules/Florida Workers' Compensation Health Care Provider Reimbursement Manual/DFS  
**SPONSOR(S):** Rulemaking Oversight & Repeal Subcommittee, Ray  
**TIED BILLS:**            **IDEN./SIM. BILLS:** SB 1402

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Rulemaking Oversight & Repeal Subcommittee	11 Y, 0 N	Stranburg	Rubottom
1) Government Operations Appropriations Subcommittee		Keith 	Topp 
2) Regulatory Affairs Committee			

### SUMMARY ANALYSIS

Florida's Workers' Compensation law requires that the provider reimbursement manuals setting maximum reimbursement rates for medical services must be updated every three years. Due to the Legislature's not ratifying the most recent 2011 manual, the current manual dates from 2008.

Since the 2015 Legislature adjourned, the Department of Financial Services (DFS) has adopted amendments to the rule incorporating by reference the Florida Workers' Compensation Health Care Provider Reimbursement Manual, 2015 Edition (2015 Manual). The 2015 Manual sets out the policies, guidelines, codes, and maximum reimbursement allowances for services and supplies furnished by health care providers under the Workers' Compensation statutes. The Manual also states the reimbursement policies and payment methodologies for pharmacists and medical suppliers pertaining to Workers' Compensation.

The Statement of Estimated Regulatory Costs showed Rule 69L-7.020, F.A.C., *Florida Workers' Compensation Health Care Provider Reimbursement Manual, 2015 Edition*, would have a specific, adverse economic effect, or would increase regulatory costs, exceeding \$1 million over the first 5 years the rule was in effect. Accordingly, the Rule must be ratified by the Legislature before it may go into effect.

The Rule was adopted on July 16, 2015, and submitted for ratification on November 3, 2015.

The proposed bill authorizes the Rule to go into effect. The scope of the bill is limited to this rulemaking condition and does not adopt the substance of any rule into the statutes.

The bill will have a significant negative fiscal impact to state expenditures from the State Risk Management Trust Fund (SRMTF) within the DFS. The DFS Division of Risk Management (division) estimates an increase in workers' compensation expenses for the division by \$2.1 million in FY 2016-17, \$2.1 million in FY 2017-18, and \$2.2 million in FY 2018-19. However, the fiscal year-end balance of the SRMTF (including the impact of HB 7073) will maintain a positive surplus cash balance of \$26.0 million in FY 2016-17 and \$6.4 million in FY 2017-18. In FY 2018-19, the REC projected negative cash balance of (\$10.9) million will grow to a negative (\$17.4) million as a result of the bill.

The impact to local government and the private sector is indeterminate. However, local governments and private employers responsible for paying workers' compensation claims or obtaining workers' compensation insurance will incur increased costs due to the increase in the maximum reimbursements for providers.

The bill is effective upon becoming law.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME:

DATE:

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Present Situation

Florida's workers' compensation law<sup>1</sup> provides medically necessary treatment and care for injured employees, including medications. The Division of Workers' Compensation within the Department of Financial Services (DFS) provides regulatory oversight of Florida's workers' compensation system. The law provides for reimbursement formulas and methodologies to compensate providers of health services to compensation claimants, subject to maximum reimbursement allowances (MRAs).<sup>2</sup> DFS incorporates the uniform schedules MRAs by rule in reimbursement manuals.<sup>3</sup>

Currently, the reimbursement schedules for individual licensed providers are contained in the Florida Workers' Compensation Health Care Provider Reimbursement Manual (Manual), 2008 Edition. On January 22, 2015, the Three-Member Panel approved a revised uniform schedule of MRAs for physicians and other recognized practitioners. DFS initiated rulemaking to update the Manual and on July 16, 2015, adopted the amended version of Rule 69L-7.020, F.A.C., incorporating by reference the 2015 Edition of the Manual and updating incorporating references to other materials used for provider reimbursement together with the Manual. According to the National Council on Compensation Insurance, the revisions to MRAs in the updated Manual will result in increased costs to the overall compensation system of \$64 million over the next five years.<sup>4</sup>

##### Rulemaking Authority and Legislative Ratification

A rule is an agency statement of general applicability that interprets, implements, or prescribes law or policy, including the procedure and practice requirements of an agency as well as certain types of forms.<sup>5</sup> Rulemaking authority is delegated by the Legislature<sup>6</sup> through statute and authorizes an agency to "adopt, develop, establish, or otherwise create"<sup>7</sup> a rule. Agencies do not have discretion whether to engage in rulemaking.<sup>8</sup> To adopt a rule, an agency must have a general grant of authority to implement a specific law by rulemaking.<sup>9</sup> The grant of rulemaking authority itself need not be detailed.<sup>10</sup> The specific statute being interpreted or implemented through rulemaking must provide specific standards and guidelines to preclude the administrative agency from exercising unbridled discretion in creating policy or applying the law.<sup>11</sup>

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<sup>1</sup> Chapter 440, F.S.

<sup>2</sup> Section 440.13(12), F.S. The law creates the Three-Member Panel (CFO or CFO designee and 2 Governor appointees subject to Senate confirmation) that sets all MRAs.

<sup>3</sup> Section 440.13(12), (14)(b), F.S. Chapter 69L-7, F.A.C. Currently there are three such manuals: the Florida Workers' Compensation Health Care Provider Reimbursement Manual (Rule 69L-7.020, F.A.C.), Florida Workers' Compensation Reimbursement Manual for Ambulatory Surgical Centers (Rule 69L-7.100, F.A.C.), and Florida Workers' Compensation Reimbursement Manual for Hospitals (Rule 69L-7.501, F.A.C.). Each manual is adopted by reference in the indicated rule.

<sup>4</sup> Email correspondence with The National Council on Compensation Insurance (Jan. 26, 2016) on file with the Government Operations Appropriations Subcommittee.

<sup>5</sup> Section 120.52(16); *Florida Department of Financial Services v. Capital Collateral Regional Counsel-Middle Region*, 969 So. 2d 527, 530 (Fla. 1<sup>st</sup> DCA 2007).

<sup>6</sup> *Southwest Florida Water Management District v. Save the Manatee Club, Inc.*, 773 So. 2d 594 (Fla. 1<sup>st</sup> DCA 2000).

<sup>7</sup> Section 120.52(17).

<sup>8</sup> Section 120.54(1)(a), F.S.

<sup>9</sup> Section 120.52(8) & s. 120.536(1), F.S.

<sup>10</sup> *Save the Manatee Club, Inc.*, supra at 599.

<sup>11</sup> *Sloban v. Florida Board of Pharmacy*, 982 So. 2d 26, 29-30 (Fla. 1<sup>st</sup> DCA 2008); *Board of Trustees of the Internal Improvement Trust Fund v. Day Cruise Association, Inc.*, 794 So. 2d 696, 704 (Fla. 1<sup>st</sup> DCA 2001).

An agency begins the formal rulemaking process by filing a notice of the proposed rule.<sup>12</sup> The notice is published by the Department of State in the Florida Administrative Weekly<sup>13</sup> and must provide certain information, including the text of the proposed rule, a summary of the agency's statement of estimated regulatory costs (SERC) if one is prepared, and how a party may request a public hearing on the proposed rule. The SERC must include an economic analysis projecting a proposed rule's adverse effect on specified aspects of the state's economy or increase in regulatory costs.<sup>14</sup>

The economic analysis mandated for each SERC must analyze a rule's potential impact over the 5 year period from when the rule goes into effect. First is the rule's likely adverse impact on economic growth, private-sector job creation or employment, or private-sector investment.<sup>15</sup> Next is the likely adverse impact on business competitiveness,<sup>16</sup> productivity, or innovation.<sup>17</sup> Finally, the analysis must discuss whether the rule is likely to increase regulatory costs, including any transactional costs.<sup>18</sup> If the analysis shows the projected impact of the proposed rule in any one of these areas will exceed \$1 million in the aggregate for the 5 year period, the rule cannot go into effect until ratified by the Legislature pursuant to s. 120.541(3), F.S.

Present law distinguishes between a rule being "adopted" and becoming enforceable or "effective."<sup>19</sup> A rule must be filed for adoption before it may go into effect<sup>20</sup> and cannot be filed for adoption until completion of the rulemaking process.<sup>21</sup> A rule projected to have a specific economic impact exceeding \$1 million in the aggregate over 5 years<sup>22</sup> must be ratified by the Legislature before going into effect.<sup>23</sup> As a rule submitted under s. 120.541(3), F.S., becomes effective if ratified by the Legislature, a rule must be filed for adoption before being submitted for legislative ratification.

#### Impact of Rule

The Rule incorporates by reference the 2015 Edition of the Manual, providing for reimbursement of health care providers under the increased MRAs approved by the Three-Member Panel.

#### Effect of Proposed Change

The bill ratifies Rule 69L-7.020, F.A.C., allowing the rule to go into effect.

#### B. SECTION DIRECTORY:

**Section 1:** Ratifies Rule 69L-7.020, F.A.C., solely to meet the condition for effectiveness imposed by s. 120.541(3), F.S. Expressly limits ratification to the effectiveness of the rules. Directs the act shall not be codified in the Florida Statutes but only noted in the historical comments to each rule by the Department of State.

**Section 2:** Provides the act goes into effect upon becoming law.

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<sup>12</sup> Section 120.54(3)(a)1, F.S..

<sup>13</sup> Section 120.55(1)(b)2, F.S.

<sup>14</sup> Section 120.541(2)(a), F.S.

<sup>15</sup> Section 120.541(2)(a)1., F.S.

<sup>16</sup> Including the ability of those doing business in Florida to compete with those doing business in other states or domestic markets.

<sup>17</sup> Section 120.541(2)(a) 2., F.S.

<sup>18</sup> Section 120.541(2)(a) 3., F.S.

<sup>19</sup> Section 120.54(3)(e)6. Before a rule becomes enforceable, thus "effective," the agency first must complete the rulemaking process and file the rule for adoption with the Department of State .

<sup>20</sup> Section 120.54(3)(e)6, F.S.

<sup>21</sup> Section 120.54(3)(e), F.S.

<sup>22</sup> Section 120.541(2)(a), F.S.

<sup>23</sup> Section 120.541(3), F.S.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

### A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

None.

2. Expenditures:

The Department of Financial Services (DFS) Division of Risk Management (division) estimates that ratifying the 2015 edition of the Health Care Provider Reimbursement Manual will increase workers' compensation expenses for the division by \$2.1 million in Fiscal Year 2016-17, \$2.1 million in Fiscal Year 2017-18, and \$2.2 million in Fiscal Year 2018-19.<sup>24</sup> However, the fiscal year-end balance of the SRMTF (including the impact of HB 7073) will maintain a positive surplus cash balance in FY 2016-17 and FY 2017-18. In FY 2018-19, the REC projected negative cash balance will grow as a result of the bill.

<b>State Risk Management Trust Fund</b>			
	<b>FY 2016-17</b>	<b>FY 2017-18</b>	<b>FY 2018-19</b>
Beginning Balance	61,800,000	26,028,342	6,392,084
Estimated Revenue	193,500,000	193,500,000	193,500,000
<b>TOTAL REVENUE</b>	<b>255,300,000</b>	<b>219,528,342</b>	<b>199,892,084</b>
Estimated Expenditures	(227,200,000)	(211,000,000)	(215,100,000)
Impact of HB 7073	(2,071,658)	(2,136,258)	(2,202,758)
<b>Estimated Year-end Balance</b>	<b>26,028,342</b>	<b>6,392,084</b>	<b>(17,410,674)</b>

### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

None.

2. Expenditures:

The impact to local government is indeterminate. Local governments who are responsible for paying workers' compensation claims or obtaining workers' compensation insurance will incur increased costs due to the increase in the maximum reimbursements for providers.

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

The impact to local government is indeterminate. Local governments who are responsible for paying workers' compensation claims or obtaining workers' compensation insurance will incur increased costs due to the increase in the maximum reimbursements for providers.

### D. FISCAL COMMENTS:

None.

<sup>24</sup> Email correspondence with The Department of Financial Services (Jan. 26, 2016) on file with the Government Operations Appropriations Subcommittee.

### **III. COMMENTS**

#### **A. CONSTITUTIONAL ISSUES:**

##### **1. Applicability of Municipality/County Mandates Provision:**

The legislation does not appear to require counties or municipalities to take any action requiring the expenditure of funds, reduce the authority that counties or municipalities have to raise revenue in the aggregate, nor reduce the percentage of state tax shared with counties or municipalities.

##### **2. Other:**

No other constitutional issues are presented by the bill.

#### **B. RULE-MAKING AUTHORITY:**

The bill meets the final statutory requirement for the department to exercise its rulemaking authority concerning the periodic adjustment of Workers' Compensation health care provider reimbursement policies and rates. No additional rulemaking authority is required.

#### **C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

### **IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES**

1                                   A bill to be entitled  
 2           An act relating to ratification of rules of the  
 3           Department of Financial Services; ratifying specified  
 4           rules relating to the Florida Workers' Compensation  
 5           Health Care Provider Reimbursement Manual, for the  
 6           sole and exclusive purpose of satisfying any condition  
 7           on effectiveness pursuant to s. 120.541(3), F.S.,  
 8           which requires ratification of any rule meeting any  
 9           specified thresholds for likely adverse impact or  
 10          increase in regulatory costs; providing applicability;  
 11          providing an effective date.

12  
 13 Be It Enacted by the Legislature of the State of Florida:

14  
 15           Section 1. (1) The following rule is ratified for the sole  
 16 and exclusive purpose of satisfying any condition on  
 17 effectiveness imposed under s. 120.541(3), Florida Statutes:  
 18 Rule 69L-7.020, Florida Administrative Code, titled "Florida  
 19 Workers' Compensation Health Care Provider Reimbursement Manual"  
 20 as filed for adoption with the Department of State pursuant to  
 21 the certification package dated July 16, 2015.

22           (2) This act serves no other purpose and shall not be  
 23 codified in the Florida Statutes. After this act becomes law,  
 24 its enactment and effective dates shall be noted in the Florida  
 25 Administrative Code, the Florida Administrative Register, or  
 26 both, as appropriate. This act does not alter rulemaking

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27 | authority delegated by prior law, does not constitute  
28 | legislative preemption of or exception to any provision of law  
29 | governing adoption or enforcement of the rule cited, and is  
30 | intended to preserve the status of any cited rule as a rule  
31 | under chapter 120, Florida Statutes. This act does not cure any  
32 | rulemaking defect or preempt any challenge based on a lack of  
33 | authority or a violation of the legal requirements governing the  
34 | adoption of any rule cited.

35 |       Section 2. This act shall take effect upon becoming a law.