

**SUPREME COURT OF FLORIDA**

**FEDERAL DEPOSIT INSURANCE CORP.,** Case No. 82,495

**Appellant,**

**Certified by the United States Court  
of Appeals for the Eleventh Circuit**

**v.**

**VEREX ASSURANCE, INC.,**

**Appellee.**

---

---

**APPELLANT'S REPLY BRIEF**

---

**Alan L. Briggs  
SQUIRE, SANDERS & DEMPSEY  
201 South Biscayne Boulevard  
Miami Center, Suite 3000  
Miami, Florida 33131  
(305) 577-7780  
Counsel for Appellant**

**Of Counsel for Appellant:**

**Gregory Gore  
Counsel  
Ann S. DuRoss  
Assistant General Counsel  
Robert D. McGillicuddy  
Senior Counsel  
Federal Deposit Insurance Corporation  
550 17th Street, N.W.  
Washington, D.C. 20429  
(202) 898-7109**

**TABLE OF CONTENTS**

	<b><u>Page</u></b>
1. Section 627.401 Does Not Exclude Mortgage Guaranty Insurance Because Mortgage Guaranty Insurance Is Not Part of The Insurance Code . . . . .	1
2. Statutory Amendments Can Be Made To Clarify The Law Or To Change The Law . . . . .	3
3. The Legislative History States That §635.091 Was Enacted To Clarify The Law Rather Than Change It . . . . .	5
CONCLUSION . . . . .	6

**TABLE OF AUTHORITIES**

**Page**

**CASES:**

Home Guar. Ins. Corp. v. Numerica Fin. Serv., Inc.  
835 F.2d 1354 (11th Cir. 1988) . . . . . 4

**STATUTES:**

627.401 . . . . . 1-3  
627.406 . . . . . 3  
627.409 . . . . . 1, 2, 6  
627.415 . . . . . 3  
627.416 . . . . . 3  
627.419 . . . . . 3  
627.420 . . . . . 2  
627.427 . . . . . 3  
627.428 . . . . . 2, 3  
627.4133 . . . . . 4  
627.4145 . . . . . 4  
635.091 . . . . . 3-6  
Sections 6-10 . . . . . 4

**ADDITIONAL CITES:**

1983 General Index at 797 . . . . . 3  
Chapter 624 . . . . . 2  
Chapter 625 . . . . . 2  
Chapter 626 . . . . . 2  
Chapter 627 . . . . . 1, 2  
Chapter 628 . . . . . 2  
Chapter 629 . . . . . 2  
Chapter 630 . . . . . 2

Chapter 631 . . . . .	2
Chapter 632 . . . . .	2
Chapter 633 . . . . .	2
Chapter 634 . . . . .	2
Chapter 635 . . . . .	2, 5
Chapter 637 . . . . .	2
Chapter 638 . . . . .	2
Chapter 639 . . . . .	2
Chapter 641 . . . . .	2
Chapter 642 . . . . .	2
Chapter 648 . . . . .	2
Chapter 649 . . . . .	2
Chapter 650 . . . . .	2
Chapter 651 . . . . .	2
Chapters 633-651 . . . . .	3
Part II of Chapter 627 . . . . .	3
Part IX of Chapter 627 - (§§627.676 to §§627.684) . . . . .	3
Part XIII of Chapter 627 - (§§627.7711 to §§627.7865) . . . . .	3
Title XXXVII . . . . .	1, 2

Three points in Appellee's brief require a response.

1. Section 627.401 Does Not Exclude Mortgage Guaranty Insurance Because Mortgage Guaranty Insurance Is Not Part of The Insurance Code.

On pages 7-8 of Appellee's Brief, Appellee argues that because Section 627.401 does not exclude mortgage guaranty insurance from the scope of Chapter 627, Part II, hence it must be included and, therefore, §627.409 must apply. Appellee further stated:

"Conspicuously absent from the FDIC's brief is any mention let alone any discussion or analysis of 627.401. The reason for this absence is that the FDIC's argument simply cannot be reconciled with §627.401 and other statutory provisions within the Florida Insurance Code."

This representation could not be further from the truth. Appellee asks this Court to ignore pages 11-14 of Appellant's brief. Therein, Appellant carefully set forth the insurance that was provided in Title XXXVII: (1) the Florida Insurance Code and (2) other types of insurance not within The Florida Insurance Code. The importance of understanding the overall structure of Title XXXVII, the insurance title, is when one understands there are two separate and distinct parts of this title, it is apparent why a subdivision within one part does not discuss a section in the other part.

Title XXXVII

<u>The Florida Insurance Code</u>	<u>Other Types of Insurance Not Within the Florida Insurance Code</u>
Chapter 624 - Administration and General Provisions	Chapter 633 - Fire Prevention and Control
Chapter 625 - Accounting, Investments and Deposits	Chapter 634 - Warranty Association
Chapter 626 - Field Representation and Operation	Chapter 635 - Mortgage Guaranty Insurance
Chapter 627 - Rates and Contracts including	Chapter 637 - Professional Service Plans
Chapter 628 - Stock and Mutual Insurance	Chapter 638 - Ambulance Service Contracts
Chapter 629 - Reciprocal Insurers	Chapter 639 - Burial Insurance and Contracts
Chapter 630 - Alien Insurers	Chapter 641 - Health Care Service Programs
Chapter 631 - Insurer Insolvency	Chapter 642 - Legal Expense Insurance
Chapter 632 - Fraternal Benefit Societies	Chapter 648 - Bailbondsmen and Runners
	Chapter 649 - Automobile Clubs
	Chapter 650 - Social Security for Public Employees
	Chapter 651 - Life Care Contracts

With that background, let us move to an examination of §627.401 and the implication of not excluding mortgage guaranty insurance, which is not part of the Florida Insurance Code, from Chapter 627, Part II. Section 627.401 states:

- 627.401 Scope of this part.**-- No provision of this part of this chapter applies to:
- (1) Reinsurance.
  - (2) Policies or contracts not issued for delivery in this state nor delivered in this state, except as otherwise provided in this code.
  - (3) Wet marine and transportation insurance, except ss. 627.409, 627.420, and 627.428.

- (4) Title insurance, except ss. 627.406, 627.415, 627.416, 627.419, 627.427, and 627.428.
- (5) Credit life or credit disability insurance, except ss. 627.419(5) and 627.428.

This statute excludes five specific types of insurance from Part II of Chapter 627.

All of these relate to insurance within the Florida Insurance Code: (1) Reinsurance is covered by various provisions of the Florida Insurance Code, see 1983 General Index at page 715; (2) Policies not delivered in this state is a constitutional limitation; (3) Wet Marine and Transportation Insurance is covered by various provisions of the Florida Insurance Code, see 1983 General Index at 797 under Marine Insurance; (4) Title insurance is specifically covered in Part XIII of Chapter 627 - (§§627.7711 to §§627.7865); (5) Credit Life and Credit Disability is specifically covered by Part IX of Chapter 627 - (§§627.676 to §§627.684).

Accordingly, §627.401 excludes from the coverage of Part II of Chapter 627 sections of the Florida Insurance Code which would otherwise be included by basic statutory construction just because they are all part of the Florida Insurance Code. There is no attempt to deal with any of the multiple speciality insurance sections outside the Florida Insurance Code -- Chapters 633-651. There would be no reason to do this. It would be totally inconsistent with basic statutory interpretation.

Accordingly, Appellee's arguments regarding §627.401 are in error and upon analysis only demonstrate the correctness of Appellant's position.

2. Statutory Amendments Can Be Made To Clarify  
The Law Or To Change The Law.

Appellee advances several arguments based on a premise that the only legislative purpose for enacting a statute is to change the law. For example, the most fundamental argument Appellee makes is that the reason §635.091 was enacted was to change the law. This

statute specified which sections of the Florida Insurance Code apply to Mortgage Guaranty Insurance and became effective October 1, 1983.

Assume the Florida Insurance Code had ten sections (1-10) and §635.091 was enacted and stated sections 1-5 apply to Mortgage Guaranty Insurance. The clear holding of Home Guar. Ins. Corp. v. Numerica Fin. Serv., Inc., 835 F.2d 1354 (11th Cir. 1988) is, after the enactment of such a statute, sections 6-10 of the Florida Insurance Code do not apply to Mortgage Guaranty Insurance. The instant case before the Court addresses the question of whether or not, prior to the effective date of this statute, sections 6-10 of the Florida Insurance Code applied. Appellee argues that, since after the enactment of §635.091 sections 6-10 do not apply, it must be presumed that before its enactment they did apply. If not, Appellee argues there would be no reason for the legislature to have enacted §635.091.

On pages 8-11 of Appellee's brief, Appellee asks this Court to apply the same type of analysis to several other statutory changes. See Appellee's analysis regarding §627.4145 and §627.4133. Both of these arguments are premised on the same basic premise -- the reason the legislature enacted a particular statute was to change the law. Appellee's attempt at syllogistic reasoning is flawed because it requires one to presume that the only reason the legislature enacts legislation is to change the law.

That just simply is not the case. There can be many reasons. One of the most basic is to clarify the law. However, we do not have to guess whether the legislative purpose here was to change the law, clarify the law or for some other purpose. The legislative history clearly states it was to clarify the law.



3. The Legislative History States That §635.091 Was Enacted To Clarify The Law Rather Than Change It.

Exhibit C in Appellee's Appendix is the Florida Senate's staff review of Chapter 635 which was a comprehensive analysis done for sunset review. Therein, the proposal was made to enact §635.091 which specified the provisions of the Florida Insurance Code that applied to Chapter 635. The conclusion was a recommendation to re-enact Chapter 635 with the recommended changes for the following purpose:

"Provide technical corrections and clarifying amendments to improve organization and understanding."

[Exhibit C - page 42]

In Exhibit D of Appellee's Appendix, the analysis provided by the Department of Insurance, also specified the same reason:

"To clarify what provisions of the Insurance Code are applicable to Mortgage Guaranty Insurance."

[Exhibit D, page 3]

Attached hereto, as Exhibit A, is the "Staff Summary and Analysis of Chapter 635, Florida House of Representatives Committee on Commerce (December 21, 1982)" Again, the purpose is clear:

"A new section would clarify that certain provisions of the insurance code apply to mortgage guaranty insurers. This should be considered a technical amendment because casualty and surety insurers are currently subject to these parts of the code."

[Page 3]

The purpose for §635.091 could not be clearer. It was stated by the Department of Insurance, the Senate Committee that reviewed it and the House Committee that reviewed it. It was to clarify the law.

For Appellee to argue to this Court that the purpose was to change the law seems disingenuous.

### CONCLUSION

In conclusion, this Court should answer the certified question in the negative:

Question: Did Fla. Stat. §627.409 apply to applications for and contracts of mortgage guaranty insurance prior to the enactment of Fla. Stat. §635.091 on October 1, 1983?

Answer: No.



Alan L. Briggs  
Florida Bar No. 793108  
SQUIRE, SANDERS & DEMPSEY  
201 South Biscayne Boulevard  
Suite 3000, Miami Center  
Miami, Florida 33131  
(305) 577-7780  
Counsel for Appellant

Of Counsel:  
Gregory Gore  
Counsel  
Ann S. DuRoss  
Assistant General Counsel  
Robert D. McGillicuddy  
Senior Counsel  
Federal Deposit Insurance Corporation  
550 17th Street, N.W.  
Washington, D.C. 20429  
(202) 898-7107

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the above Appellant's Reply Brief was, on this 11<sup>th</sup> day of January, 1994, furnished by U.S. Mail to: Gerald B. Wald, Esquire and Marianne A. Vos, Esquire, MURAI, WALD, BIONDO & MORENO, P.A., Counsel for Appellee, 900 Ingraham Building, 25 Southeast Second Avenue, Miami, Florida, 33131.

  
ALAN L. BRIGGS



Staff Summary and Anaylysis of Chapter 635,  
Florida House of Representatives Committee on  
Commerce (December 21, 1982)

EXHIBIT - A

# Bill Analysis



## Florida House of Representatives

H. Lee Moffitt, Speaker Steve Pajole, Speaker pro tempore  
Committee on Commerce

Samuel P. Bell, III  
Chairman  
Dexter W. Lehtinen  
Vice Chairman

### STAFF SUMMARY AND ANALYSIS

HB \_\_\_\_\_ (PCB 83-8) by Commerce  
relating to Mortgage Guaranty Insurance  
(Sunset) Chapter 635

Other Committees of Reference:  
\_\_\_\_\_  
\_\_\_\_\_

DATE: 12/21/82

REVISED: 02/04/83

REVISED: 03/03/83

SENATE BILL: SB 129

EFFECTIVE DATE: \_\_\_\_\_

October 1, 1983

### I. SUMMARY AND PURPOSE

Florida's "Regulatory Sunset Act," adopted in 1976, mandates periodic review of statutes regulating various professions, businesses and industries. The act requires automatic repeal of each statute on a specified date, thereby forcing the Legislature to either reenact the statute or permit its expiration.

As stated in the act, in determining whether the statute should be reenacted, the Legislature considers the following criteria:

(a) Would the absence of regulation significantly harm or endanger the public health, safety, or welfare?

(b) Is there a reasonable relationship between the exercise of the police power of the state and the protection of the public health, safety, or welfare?

(c) Is there a less restrictive method of regulation available which would adequately protect the public?

(d) Does the regulation have the effect of directly or indirectly increasing the costs of any goods or services involved and, if so, to what degree?

(e) Is the increase in cost more harmful to the public than the harm which could result from the absence of regulation?

(f) Are any facets of the regulatory process designed for the purpose of benefiting, and do they have as their primary effect the benefit of, the regulated entity?

The Sunset Act establishes October 1, 1983 as the date of automatic repeal for Chapter 635, Florida Statutes, relating to mortgage guaranty insurance. A review of this chapter was initiated by the House Insurance Committee (now the Commerce Committee) at the conclusion of the 1982 Session. Through the process of "public workshops" attended by Legislators

and representatives of the Department of Insurance and industry organizations, staff drafted proposed legislation which is being presented for consideration by the 1983 Legislature.

Where agreement on certain questions was not reached by the workshop participants, the issues are contained in the bill, designated as alternatives.

Mortgage guaranty insurance is a form of casualty and surety insurance that may be transacted by any stock casualty insurer or stock surety insurer holding a certificate of authority in Florida. Chapter 635 imposes additional limitations on companies writing mortgage guaranty insurance in addition to the provisions of the Insurance Code generally applicable to casualty and surety insurers. Repeal of the chapter would eliminate these limitations.

Mortgage guaranty insurance insures lenders against financial loss by reason of nonpayment of money under the terms of a note secured by a mortgage. There are currently 61 casualty and surety insurers in Florida writing mortgage guaranty insurance.

## II. CURRENT LAW AND EFFECT OF CHANGES

Section 1. The bill makes only technical changes to the definition section, s. 635.011. Mortgage guaranty insurance insures lenders against financial loss by reason of nonpayment of principal, interest, and other sums agreed to be paid under the terms of any note, bond, or other evidence of indebtedness secured by a mortgage, deed-of-trust, or other instrument constituting a lien or charge on real estate. The real estate must contain a residential or commercial building.

Section 2. Mortgage guaranty insurance may be transacted by a stock casualty insurer or a stock surety insurer holding a certificate of authority in Florida. No change is made to this section.

Section 3. Section 635.031 limits the risk as to any one subject of insurance that may be assumed by a mortgage guaranty insurer to 10 percent of its surplus to policyholders. In addition mortgage guaranty insurance may only be written on loans which a bank, savings and loan association, or an insurance company is authorized to make. Only technical changes are made to this section.

Sections 4., 5. and 6. Section 635.041 presently establishes a contingency reserve requirement for mortgage guaranty insurers. Insurers are required to contribute 50 percent of earned premiums to the contingency reserve. (This is clarified by department rule, 4-2.06, Fla. Admin. Code.) The contingency reserve for each policy must be maintained for the term of the policy unless the insurer's incurred losses reach a certain level. The current statute provides that subject to the department's approval, the contingency reserve is available for loss payments if "the insurer's incurred losses in one calendar year exceed the rate formula expected losses by 10 percent of the corresponding earned premiums." Incurred losses are typically expected to be 25 percent of earned premiums, so this formula would generally allow payments from the contingency reserve when incurred losses reach 35 percent of earned premiums. However, mortgage guaranty insurers do not actually file their "rate formula expected losses."

The bill requires two separate reserves, a policyholder's reserve and a contingency reserve. If the policyholder's reserve is not maintained at the required amount the insurer must cease transacting new business. The amount of the policyholder's reserve is dependent on two main factors: (1) the total indebtedness as a percentage of the value of the collateral property and (2) the percentage of coverage assumed by the insurer. The higher the percentage of each of these factors, the higher the amount of the policyholder's reserve per \$100 of the face amount of the mortgage. (The highest reserve amount is \$2 per \$100 of the face amount of the

mortgage, when 100 percent of the coverage is assumed and total indebtedness is greater than 75 percent of the value of the property.)

The contingency reserve, similar to present law, requires at least 50 percent of earned premiums to be reserved. However, the contingency reserve in the bill may be greater than 50 percent of earned premiums if the policyholder's reserve reaches a certain magnitude. Current law requires the contingency reserve to be maintained for the term of the policy. The bill requires the contingency reserve to be maintained for 120 months. The contingency reserve would be available to make loss payments either when incurred losses exceed 35 percent of earned premiums in that year or when incurred losses exceed 70 percent of the amount contributed to the contingency reserve. (Since at least 50 percent of earned premiums must be deposited in the contingency reserve, 70 percent of this amount would be at least 35 percent of earned premiums.) In summary, the new reserve requirement would be at least as much as the present reserve requirement, but in some cases would be slightly more.

The bill requires the Florida Department of Insurance to approve payments made from the contingency reserve.

Section 7. A new section is created limiting the total outstanding liability that may be assumed by an insurer. As amended, no mortgage guaranty insurer may assume a total liability under its policies, net of reinsurance, exceeding 25 times its paid in capital, surplus, and contingency reserve combined. The NAIC model act and regulations of other states such as California, New York and Wisconsin have this requirement. The 25:1 ratio is also an eligibility requirement for the Federal Home Loan Mortgage Corporation. The Department of Insurance has adopted a rule (4-2.07, Fla. Admin. Code) with a similar 25:1 limitation, but which does not take into account the amount of the contingency reserve. An argument may be made that this rule exceeds the department's legislative authority.

Section 8. Section 635.051 applies all requirements that apply to general lines agents to agents of mortgage guaranty insurers, with certain exceptions. Such an agent is limited to the handling of mortgage guaranty insurance only. Presently an examination of a mortgage guaranty agent may be required at the discretion of the department. As amended, no examination may be required if the insurer guarantees that the applicant will receive the necessary training.

Section 9. No change is made to s. 635.061 which provides that the premium for mortgage guaranty insurance shall not be deemed to constitute part of the cost of, or interest upon, any mortgage loan.

Section 10. Section 635.071 requires forms to be approved by the department and rates to be filed with the department. An amendment clarifies that rate filings are for informational purposes only and are not subject to department approval.

Section 11. Only editorial changes are made to s. 635.081 which authorizes the department to adopt rules pursuant to this chapter.

Section 12. A new section would be added requiring mortgage guaranty insurance policies to contain a clause as a condition precedent to payment that the insured restore the property to its condition at the time of issuance of the policy, reasonable wear and tear being excepted. Nearly all mortgage guaranty insurance policies contain a restoration of property clause. Without such a clause, an insurer would in effect be insuring against total destruction of the property by fire or other hazard.

Section 13. A new section would clarify that certain provisions of the Insurance Code apply to mortgage guaranty insurers. This should be considered a technical amendment because casualty and surety insurers are currently subject to these parts of the code.

Section 14. This chapter is reenacted as amended.



Section 15. Chapter 635 is repealed on October 1, 1993, to be reviewed pursuant to the Regulatory Sunset Act.

Section 16. The new reserve requirements only apply to policies issued or renewed on or after October 1, 1983.

Section 17. This act becomes effective October 1, 1983.

III. ECONOMIC IMPACT CONSIDERATIONS

A. PRIVATE SECTOR CONSIDERATIONS

There are currently 61 casualty and surety insurers writing mortgage guaranty insurance in Florida. Total premiums earned in 1981 were \$17.6 million and incurred losses were \$5.4 million, a 31 percent loss ratio. The leading writer in Florida is the Mortgage Guaranty Insurance Corporation, whose premiums written in 1981 accounted for 34% of the market. The top three writers account for 61% of the market and the top eight account for 95%.

The solvency of the mortgage guaranty insurance business is strengthened by risk limitations and reserve requirements, designed to protect policyholders against periods of depression or severe recession. The top ten mortgage guaranty insurers in Florida were contacted for financial information in order to determine whether any of them would exceed the 25:1 limitation explained in section 7. (The total liability assumed by each company is not on file with the department.) Six companies responded, none of which exceed this limitation based on the data submitted.

B. PUBLIC SECTOR CONSIDERATIONS

The reenactment or repeal of this chapter would not significantly effect the revenue or expenses of the Department of Insurance. The repeal of the chapter would simply eliminate the limitations imposed on writing this line of insurance. Conceivably repeal could result in additional writings and additional premium tax revenue.

IV. COMMENTS

V. AMENDMENTS

Prepared by:

Brian J. Deffenbaugh  
Brian J. Deffenbaugh

Staff Director:

Wyatt T. Martin  
Wyatt T. Martin