

**The Florida Senate**  
**BILL ANALYSIS AND FISCAL IMPACT STATEMENT**

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: The Professional Staff of the Committee on Banking and Insurance

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BILL: CS/SB 708

INTRODUCER: Committee on Banking and Insurance and Senator Bean

SUBJECT: Insurance Claims

DATE: February 12, 2014 REVISED: \_\_\_\_\_

ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1. Billmeier	Knudson	BI	Fav/CS
2.		AP	

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**Please see Section IX. for Additional Information:**

COMMITTEE SUBSTITUTE - Substantial Changes

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## I. Summary:

CS/SB 708 revises the law relating to property insurance claims. This bill gives the Department of Financial Services (DFS) the ability to investigate mediators and neutral evaluators in a manner similar to how it investigates agents and agencies. It allows the DFS and the Office of Insurance Regulation (OIR) to share information with other regulatory bodies while any investigation is ongoing. This bill gives the DFS increased power to take disciplinary action against mediators and neutral evaluators.

This bill prohibits insurers from denying claims or canceling an insurance policy or contract based on credit information available in the public record if the insurance policy or contract has been in effect for more than 90 days.

Current law allows a policyholder to assign the benefits of the policy to a third party, such as the party repairing the property. This bill provides that in order for a post-loss assignment to be valid, the assignment agreement must require the assignee to notify the insurance company within 48 hours, limit the assignment to contracted work to be performed, specify the estimated scope and price of work before it is performed, and prohibit the assignee from charging the policyholder more than the applicable deductible.

Insurance contracts often contain an appraisal provision allowing parties who agree that there is a covered loss to use an umpire to determine the amount of the loss. This bill allows parties to disqualify an umpire for specified conflicts of interest such as where the umpire is related to one of the parties or has been employed by one of the parties.

The bill creates a “Homeowner Claim Bill of Rights,” describing some of the rights held by insurance policyholders and requires the insurer to provide a copy to the policyholder within 14 days of a claim. It does not create a new civil cause of action.

This bill creates new requirements for agreements between insureds and providers of services needed to mitigate the damage caused by fire, water, or catastrophic events.

This bill is effective July 1, 2014.

## **II. Present Situation:**

### **Ability of the Department of Financial Services to Investigate Licensees**

The Department of Financial Services (DFS) is the agency charged with the regulation of insurance agents, insurance agencies, insurance adjusters,<sup>1</sup> insurance school officials, and insurance school instructors.<sup>2,3</sup> Section 626.601, Florida Statutes, allows the DFS to investigate licensed insurance agencies, agents, adjusters, service representatives, managing general agents, customer representatives, title insurance agents and agencies, continuing education course providers, instructors, school officials, and monitor groups. During the investigation, the DFS may contact the person being investigated and may inspect the person’s books and records.<sup>4</sup> Investigations may be initiated by the DFS independently or may be initiated based on a complaint received by the DFS.<sup>5</sup>

Section 626.601(6), F.S., provides that a complaint and any information obtained pursuant to an investigation by the DFS or the OIR are confidential and exempt from disclosure unless the DFS or OIR files an administrative complaint, emergency order, or consent order against the licensee. The DFS or OIR may disclose information to any law enforcement agency prior to the filing of an administrative complaint, consent order, or emergency order.

### **DFS Alternative Dispute Resolution Programs**

The DFS administers alternative dispute programs for various types of insurance. The DFS has mediation programs for property insurance<sup>6</sup> and automobile insurance<sup>7</sup> claims. The DFS has a neutral evaluation program, similar to mediation, for sinkhole insurance claims.<sup>8</sup> The DFS approves mediators used in the two mediation programs and certifies the neutral evaluators used in neutral evaluations for sinkhole insurance claims.<sup>9</sup>

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<sup>1</sup> See s. 624.317, F.S.

<sup>2</sup> See ss. 626.2816, 626.2817, F.S.

<sup>3</sup> Insurance schools provide instruction for students seeking licensure as insurance agents.

<sup>4</sup> See s. 626.601(1), (2), F.S.

<sup>5</sup> See s. 626.601(1), F.S.

<sup>6</sup> See s. 627.7015, F.S.

<sup>7</sup> See s. 626.745, F.S.

<sup>8</sup> See s. 627.7074, F.S.

<sup>9</sup> See ss. 627.7015, 627.7074, and 627.745, F.S.

To qualify as a mediator for the property or automobile mediation programs, a person must possess graduate level degrees in specified areas, be a member of the Florida Bar, be a licensed certified public accountant, or be a mediator for 4 years.<sup>10</sup> In addition, an applicant must complete a training program approved by the DFS.<sup>11</sup>

To qualify as a neutral evaluator for sinkhole insurance claims, a neutral evaluator must be a professional engineer or a professional geologist who has completed a course of study in alternative dispute resolution approved by the DFS and who is determined by the DFS to be fair and impartial.<sup>12</sup>

According to an analysis provided by the DFS,<sup>13</sup> the number of reported mediations and neutral evaluations is:

#### Mediations

FY 2012-13 – 3,966

FY 2011-12 – 3,323

FY 2010-11 – 3,489

#### Neutral Evaluations

FY 2012-13 – 1,867

FY 2011-12 – 2,681

FY 2010-11 – 2,245

The DFS does not have the explicit authority to investigate, remove, or discipline mediators and neutral evaluators.

### **Misrepresentations on Insurance Applications and Cancellation of Insurance Policies**

Section 627.409, F.S., provides recovery under an insurance policy may be prevented if a misrepresentation, omission, concealment of fact, or incorrect statement on an application for insurance (1) is fraudulent or is material either to the acceptance of the risk or to the hazard assumed by the insurer or (2) if the true facts had been known to the insurer, the insurer would not have issued the policy, would not have issued it at the same premium rate, would not have issued a policy in as large an amount, or would not have provided coverage with respect to the hazard resulting in the loss. If an insurer discovers a misrepresentation or omission after issuing the policy, it may deny coverage after a claim is made. In *Nationwide Mutual Fire Insurance Company v. Kramer*,<sup>14</sup> an insurer refused to pay a claim for a stolen automobile because the insureds did not disclose a previous bankruptcy filing. In *Kieser v. Old Line Insurance Company of America*,<sup>15</sup> an insurance company refused to pay a life insurance policy because the insured

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<sup>10</sup> See ss. 627.7015, 627.745(3), F.S.

<sup>11</sup> See ss. 627.7015, 627.745(3), F.S.

<sup>12</sup> See s. 627.706, F.S.

<sup>13</sup> See Department of Financial Services, *Senate Bill 708 Analysis* (February 4, 2014)(on file with the Committee on Banking and Insurance).

<sup>14</sup> 725 So.2d 1141 (Fla. 2<sup>d</sup> DCA 1998).

<sup>15</sup> 712 So.2d 1261 (Fla. 1<sup>st</sup> DCA 1998).

failed to disclose certain health conditions and failed to disclose that he was shopping for other life insurance policies. In *Universal Property and Casualty Insurance Company v. Johnson*,<sup>16</sup> an insurance company refused to pay a property insurance claim because the insureds failed to disclose prior criminal history. A misrepresentation from or an omission in an insurance application need not be intentional in order for the insurance company to deny recovery.<sup>17</sup>

Section 627.4133(2), F.S., requires notice to the insured before an insurer can cancel, nonrenew, or terminate any personal lines or commercial residential property insurance policy. The timing of the notice ranges from 10 days for nonpayment of premium to 120 days for certain policyholders.<sup>18</sup> After the policy has been in effect for 90 days, such a policy cannot be canceled unless that has been a material misstatement, a nonpayment of premium, a failure to comply with underwriting requirements with 90 days after the date of effectuation of coverage, or a substantial change in the risk covered by the policy.<sup>19</sup> According to the DFS, there are instances of insurance companies reviewing a policyholder's application for insurance after a claim has been filed and denying coverage based on misrepresentations about credit history.<sup>20</sup>

### **Assignment of Benefits**

An assignment is the transfer of the rights of one party under a contract to another party. Current law generally allows a policyholder to assign the benefits of the policy, such as the right to be paid, to another party, typically the party that repairs the damaged property. Once an assignment is made, the assignee can take action to enforce the contract. Accordingly, if the benefits are assigned and the insurer refuses to pay, the assignee can file a lawsuit against the insurer to recover the benefits. Section 627.422, F.S., governs assignability of insurance contracts and provides that a policy may or may not be assignable according to its terms. However, the general rule in Florida is that an assignment made after the loss (a post-loss assignment) is valid even if the contract states otherwise.<sup>21</sup> "A provision against assignment of an insurance policy does not bar an insured's assignment of an after-loss claim."<sup>22</sup>

### **Appraisal**

Property insurance contracts often contain "appraisal" provisions. Appraisal provisions are used when the parties agree that there is a covered loss but disagree as to the amount of the loss.<sup>23</sup> Such provisions typically provide that each party select an appraiser. The two appraisers jointly select an umpire. The two appraisers submit a report to the insurer. If the appraisers agree as to the amount of the loss, the insurer pays the claim. If they do not agree, the umpire resolves the

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<sup>16</sup> 114 So.3d 1031 (Fla. 1<sup>st</sup> DCA 2013).

<sup>17</sup> *Universal Property and Casualty Insurance Company*, 114 So.3d at 1035.

<sup>18</sup> See s. 627.4133(2), F.S.

<sup>19</sup> *Id.*

<sup>20</sup> See Department of Financial Services, *Senate Bill 708 Analysis* (February 4, 2014)(on file with the Committee on Banking and Insurance).

<sup>21</sup> See *West Florida Grocery Company v. Teutonia Fire Insurance Company*, 77 So. 209, 211 (Fla. 1917)(“The policy was assigned after loss, and it is a well-settled rule that the provision in a policy relative to the consent of the insurer to the transfer of an interest therein does not apply to an assignment after loss”).

<sup>22</sup> See *Better Construction, Inc. v. National Union Fire Insurance Company of Pittsburgh*, 651 So.2d 141, 142 (Fla. 3d DCA 1995).

<sup>23</sup> See Fla.Jur. Insurance §3292.

dispute.<sup>24</sup> Current law does not limit or restrict who may act as an umpire and does not provide a method for either party to challenge whether an umpire is fair and impartial.

### **Homeowner Rights in Property Insurance Claims**

Property insurance policy holders have a number of rights pursuant to statute or rule. Section 627.70131, F.S., and rule 69O-166.24, Florida Administrative Code, require an insurer to review and acknowledge receipt of communication with respect to a claim within 14 days of receipt. Section 626.9541(1)(i), F.S., requires an insurer to affirm or deny full or partial coverage of claims or provide a written statement that the claim is being investigated upon the written request of the insured within 30 days after proof-of-loss statements have been completed. An insurer must pay or deny the claim within 90 days.<sup>25</sup>

The DFS provides services to insurers and consumers such as the mediation of property insurance claims<sup>26</sup> and neutral evaluation<sup>27</sup> of sinkhole claims. In addition, the DFS has a Division of Consumer Services that can assist consumers in the claims process.<sup>28</sup>

### **Emergency Mitigation Services**

Homeowners can experience significant damage to their homes in situations that require immediate action to prevent further damage. There are companies that provide services such as “drying” a structure after a loss caused by water. These companies are not regulated by the state. According to the DFS, consumers have no guarantee or protection in place to ensure their homes will be repaired by an accredited professional.<sup>29</sup>

## **III. Effect of Proposed Changes:**

### **Disclosure of Information Obtained During an Investigation**

Section 1 allows the DFS or the OIR to share information obtained during an investigation with other regulatory bodies in cases where no administrative complaint, emergency order, or consent order is filed. This will allow the DFS to share information with federal and state regulators during the course of an investigation. It will also allow the sharing of information with private regulatory bodies such as FINRA.<sup>30</sup> According to the DFS staff, there can be investigations where an agent is licensed in Florida and also licensed in another state. Being able to share information with other regulators can aid the investigation.<sup>31</sup>

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<sup>24</sup> *Citizens Property Insurance Corporation v. Mango Hill Condominium Association 12 Inc.*, 54 So.3d 578 (Fla.3d DCA 2011) and *Intracoastal Ventures Corp. v. Safeco Ins. Co. of America*, 540 So.2d 162 (Fla. 3d DCA 1989), contain examples of appraisal provisions.

<sup>25</sup> See s. 627.70131, F.S.

<sup>26</sup> See s. 627.7015, F.S.

<sup>27</sup> See s. 627.7074, F.S.

<sup>28</sup> See <http://www.myfloridacfo.com/division/consumers/#.UvTl9vldUeE> (last accessed on February 7, 2014).

<sup>29</sup> See Department of Financial Services, *Senate Bill 708 Analysis* (February 4, 2014) at p. 4 (on file with the Committee on Banking and Insurance).

<sup>30</sup> FINRA is the “Financial Industry Regulatory Authority.” See <http://www.finra.org/AboutFINRA/>

<sup>31</sup> Interview with DFS staff, February 7, 2014.

## **Mediators and Neutral Evaluators**

Section 1 gives the DFS the authority to investigate mediators and neutral evaluators in the same manner it investigates agencies and agents. This bill allows the DFS to initiate investigations of neutral evaluators and mediators on its own authority or after a complaint is received. The DFS may require a neutral evaluator or mediator to open its books and records for inspection.

The bill gives the DFS the authority to discipline mediators and neutral evaluators. Section 6 of this bill requires the DFS to adopt rules for the denial of application, suspension, and other penalties for mediators. Section 9 requires the DFS to adopt rules for certifying, denying certification, and revoking the certification as a neutral evaluator.

Section 9 provides that the DFS must deny an application for a neutral evaluator or suspend or revoke the approval of a neutral evaluator if there is a material misstatement, misrepresentation, or fraud in the attempt to obtain approval, a demonstrated lack of fitness and trustworthiness to act as a neutral evaluator, fraudulent or dishonest practices in the conduct of an evaluation or in the conduct of financial services business, or violations of statutes, DFS rules, or DFS orders. The DFS has similar power to discipline insurance agents and other regulated persons or entities.

Section 12 provides that the DFS must deny an application as a mediator or suspend or revoke the certification of a mediator if there is a material misstatement, misrepresentation, or fraud in the attempt to obtain approval or certification, a demonstrated lack of fitness and trustworthiness to act as a mediator, fraudulent or dishonest practices in the conduct of mediation or if the conduct of financial services business, or violations of statutes, DFS rules, DFS orders, or the Florida Rules for Certified and Court-Appointed Mediators. The DFS has similar power to discipline insurance agents and other regulated persons or entities.

Section 12 of the bill replaces the DFS mediator education, experience, and training program requirements. The bill provides that an individual with an active certification as a Florida Circuit Court Mediator is qualified to be a mediator for the DFS. An individual not certified as a Florida Circuit Court Mediator can be a DFS mediator if the person is an approved DFS mediator on July 1, 2014, and has conducted at least one DFS mediation from July 1, 2010 – July 1, 2014. This provision essentially grandfathered in current and active DFS mediators so they can continue to be DFS mediators, even if they are not certified as a Florida Circuit Court Mediator.

In order to become certified as a Florida Circuit Court Mediator, one must fulfill education requirements set by the Florida Supreme Court, complete a mediation training program certified by the Florida Supreme Court, and observe and conduct mediations under the supervision of a certified mediator.<sup>32</sup>

## **Misrepresentations on Insurance Applications and Cancellation of Insurance Policies**

Section 3 amends s. 627.409, F.S. The bill provides that if a residential property insurance policy or contract has been in effect for more than 90 days, a claim filed by the insured cannot be denied based on credit information available in the public record. The bill does not change the

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<sup>32</sup> See <http://www.flcourts.org/core/fileparse.php/283/urlt/HowToBecomeMediator.pdf> (last accessed February 7, 2014).

law relating to other types of insurance or other types of misrepresentations (such as a misrepresentation regarding health or criminal history).

Section 4 provides after a policy or contract has been in effect for more than 90 days, the insurer may not cancel or terminate the policy or contract based on credit information available in public records.

### **Assignment of Benefits**

Section 5 provides that an agreement assigning post-loss benefits for repair or replacement is valid only if the agreement:

- Requires the assignee to notify the insurance company within 48 hours of the assignment or as soon as practicable if the insurer is unavailable during the first 48 hours;
- Limits the assignment to the contracted work and is restricted to claims for damage to structures covered under the policy;
- Specifies the estimated scope and price of the work before it is performed;
- Prohibits the assignee from charging the policy owner for any portion of the repair beyond the deductible contained in the insurance policy;
- Prohibits a person performing any portion of the repair on behalf of the assignee from charging the policy owner;
- Prohibits the assignee from retaining insurance proceeds that are earmarked by the insurer for payment of work to be performed by vendors other than the assignee; and
- Requires the assignee to guarantee that the work performed conforms to the most recent, accepted industry standards.

### **Standards for Disqualification of an Appraisal Umpire**

Section 7 creates requirements for challenging the selection of an umpire when an appraisal provision is used to resolve a dispute. This bill allows an insurer or policyholder to challenge an umpire's impartiality and disqualify the proposed umpire only if:

- A familial relationship within the third degree exists between the umpire and a party or a representative of a party;
- The umpire has previously represented a party or a representative of a party in a professional capacity in the same or a substantially related matter;
- The umpire has represented another person in a professional capacity on the same or a substantially related matter that includes the claim or the same property, and the other person's interests are materially adverse to the interests of a party; or
- The umpire has worked as an employer or employee of a party within the preceding 5 years.

### **Homeowner Claims Bill of Rights**

Section 10 of this bill creates a "Homeowner Claims Bill of Rights." It requires an insurer issuing a personal lines residential property insurance policy to provide a copy of the Homeowner Claims Bill of Rights ("Bill of Rights") to a policyholder within 14 calendar days

after receiving an initial communication with respect to a claim unless the claim follows an event that is the subject of a declaration of state of emergency by the Governor.

This bill provides that the purpose of the Bill of Rights is to explain the rights of a residential property insurance policyholder who files a claim of loss. This bill further provides that the Bill of Rights does not create a civil cause of action by a policyholder or class of policyholders against an insurer.

This bill provides the exact language of the Bill of Rights. In summary, the Bill of Rights informs policyholders that they have the right to:

- Receive acknowledgment of the reported claim and necessary claim forms within 14 days after the claim is communicated to the insurance company.
- Receive confirmation that a claim is covered in full, partially covered, or denied, or receive a written statement that a claim is being investigated within 30 days.
- Receive full settlement payment for the claim or payment of the undisputed portion of the claim or the insurance company's denial of the claim within 90 days.
- Receive free mediation of the claim by the DFS under most circumstances and subject to certain restrictions.
- Receive a neutral evaluation of a disputed sinkhole claim covered by the policy.

The Bill of Rights informs consumers of services provided by the DFS, such as the Division of Consumer Services helpline.

The Bill of Rights advises policyholders to contact the insurance company before entering into any contract for repairs, to make and document emergency repairs that are necessary to prevent further damage, to read any contract that requires a payment of out-of-pocket expenses or a fee that is based on a percentage of the insurance proceeds, and to confirm that the contractor is licensed to do business in Florida.

This Bill of Rights informs policyholders that it does not create a civil cause of action by an individual policyholder, or a class of policyholders, against an individual insurer.

## **Emergency Mitigation Services**

Section 11 provides conditions upon which an agreement for emergency mitigation services will be valid. The bill defines "emergency mitigation services" as the delivery of goods or services<sup>33</sup> that are needed to mitigate damage caused by fire, water, or catastrophic events when delay may exacerbate the damage to the covered property. An agreement for emergency mitigation services to which insurance proceeds may be applied is valid only if:

- The agreement specifies in writing the estimated scope and price of the work before it is performed;

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<sup>33</sup> Services include the removal of contents, removal of water or other contaminants, cleaning, sanitizing, incidental demolition, or other treatment, including preventive activities.

- Any change from the original estimated scope and price of the work is preapproved by the policyholder; and
- The work is performed by an individual or company possessing a valid certification consistent with the most recent Standard and Reference Guide for Professional Water Damage Restoration, as developed by the Institute of Inspection, Cleaning and Restoration Certification and approved by the American National Standards Institute, or by a company that possesses a valid Division I license under chapter 489, which is providing services within the scope of that license.<sup>34</sup>

Section 13 of this bill provides an effective date of July 1, 2014.

#### **IV. Constitutional Issues:**

##### A. Municipality/County Mandates Restrictions:

None.

##### B. Public Records/Open Meetings Issues:

None.

##### C. Trust Funds Restrictions:

None.

#### **V. Fiscal Impact Statement:**

##### A. Tax/Fee Issues:

None.

##### B. Private Sector Impact:

None.

##### C. Government Sector Impact:

The DFS analysis does not indicate a fiscal impact on the department.

#### **VI. Technical Deficiencies:**

On line 12, the title should state that a policy or contract may not be cancelled based on certain credit information.

On line 35, the title should state that bill revises qualifications for mediators of specified motor vehicle insurance claims.

On line 141, the word “record” should be plural.

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<sup>34</sup> A Division 1 license includes general contractors, building contractors, and residential contractors. See s. 489.105(3), F.S.

Lines 365-371 refer to the “approval” of neutral evaluators. This is not necessary because the DFS certifies neutral evaluators.

**VII. Related Issues:**

None.

**VIII. Statutes Affected:**

This bill substantially amends the following sections of the Florida Statutes: 626.601, 627.3518, 627.409, 627.4133, 627.422, 627.7015, 627.706, 627.7074, and 627.745.

This bill creates the following sections of the Florida Statutes: 627.70151, 627.7142, and 627.715.

**IX. Additional Information:****A. Committee Substitute – Statement of Substantial Changes:**

(Summarizing differences between the Committee Substitute and the prior version of the bill.)

**CS by Banking and Insurance on February 11, 2014:**

The committee adopted an amendment providing that the Claims Bill of Rights must be distributed within 14 calendar days after receiving an initial communication with respect to a claim and providing that the Claims Bill of Rights must be provided to personal lines residential policyholders.

**B. Amendments:**

None.

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This Senate Bill Analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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