

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 669 Assignment of Post-Loss Insurance Policy Benefits

SPONSOR(S): Civil Justice Subcommittee; Insurance & Banking Subcommittee; Tobia

TIED BILLS: None **IDEN./SIM. BILLS:** CS/SB 1064

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	10 Y, 3 N, As CS	Haston	Cooper
2) Civil Justice Subcommittee	12 Y, 0 N, As CS	Bond	Bond
3) Regulatory Affairs Committee			

SUMMARY ANALYSIS

An assignment of benefits allows a third party to collect insurance proceeds that would otherwise be paid to the policyholder. An assignment of benefits is most commonly used in health insurance and personal injury protection insurance where treating health care providers are paid directly by the insurer.

This bill provides that a property insurance policy may prohibit a post-loss assignment of benefits except in certain limited circumstances. An assignment of benefits that violates a prohibition against assignment contained in the policy is void, and the assignee may not collect the insurance proceeds.

However, the bill creates limited exceptions where an insurance company must allow a post-loss assignment of benefits:

- An assignment of up to \$3000 for services or materials to mitigate or repair damage directly related to the insurable loss.
- An assignment for the benefit of a public adjuster for the purpose of paying the adjuster's fee.
- An assignment to an attorney for the insured provided that the assignment requires the attorney to pay the loss from the insurance proceeds at the insured's direction.

The bill does not appear to have a fiscal impact on the state or local governments.

The bill has an effective date of July 1, 2015.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Assignment of Benefits

Generally, an assignment of benefits (AOB) allows a third party to collect insurance proceeds owed to the policyholder directly from the insurance company. Consequently, the proceeds are not paid to the policyholder. AOBs are commonly used in health insurance and personal injury protection insurance. In health insurance, a policyholder typically assigns his or her benefits for a covered medical service to the health care provider. Thus, the treating physician gets paid directly from the insurer.

AOBs are becoming more common in property insurance claims, particularly in water damage claims where a homeowner assigns his or her benefits on their property insurance policy to a contractor or water remediation company who repairs the damaged property (hereinafter collectively referred to as a “vendor”).

With losses caused by water damage, such as leaky pipes, the homeowner is often in an emergency position where he or she must mitigate the damage before further damage is caused. This often involves calling a water restoration company to the home to immediately mitigate and prevent further flooding. Some insurers assert AOBs to a vendor in a water damage claim can be problematic because if the vendor submits an invoice to the insurer that is more than what the insurer estimates it should cost to remediate and dry-out the policyholder’s residence, the insurer must investigate the claim, determine why the invoice is higher than estimated by the insurer, and identify whether all the work indicated in the invoice was performed. Insurance policies typically provide authority for the insurer to take certain actions to investigate claims, such as requiring policyholders to file proofs of loss, to produce records, and submit to examinations under oath. However, vendors obtaining an AOB for the claim many times allege they do not have to comply the insurer’s claims investigation authorized under the insurance policy because they agreed only to an assignment of the insurance benefits and did not agree to assume any of the duties under the insurance policy.¹

In testimony before the Insurance & Banking Subcommittee, Citizens Property Insurance Company (“Citizens”) reported that 70% of the property insurance claims in 2014 were caused by water damage, 56% of which caused by non-weather water damage.² Such water damage claims appear to be highest in the counties of Miami-Dade, Broward, and Palm Beach (collectively referred to as the “Tri-County”).³ Citizens reported that of the volume of water damage claims from 2014, 72% were from the Tri-County.⁴ Further, the results of a Citizens 2013 litigation study revealed that 75% of all 2013 litigation involved water claims.⁵

Assignability of Insurance Policies

Background on Assignability of Insurance Policies

Currently, Florida law provides that “a policy may be assignable, or not assignable, as provided by its terms.”⁶ An AOB can occur in two circumstances: pre-loss AOBs and post-loss AOBs. A pre-loss AOB occurs before a policyholder experiences a loss, and a post-loss AOB occurs after a policyholder experiences a loss. Florida law allows an insurance company to include language in the policy

¹ Florida House of Representatives Regulatory Affairs Committee, Staff Analysis of 2013 CS/CS/HB 909, p. 2 (Apr. 18, 2013).

² Citizens Property Insurance Corporation, *Citizens Presentation on Assignment of Benefits* (Feb. 9, 2015), on file with Insurance & Banking Subcommittee.

³ *Id.*

⁴ *Id.*

⁵ *Id.*

⁶ s. 627.422, F.S.

prohibiting pre-loss AOBs.⁷ However, it is less clear whether Florida law allows an insurance company to include language in the policy prohibiting post-loss AOBs; this question is currently on appeal to the Florida First District Court of Appeal.⁸

Florida case law provides that “a provision in a policy of insurance which prohibits assignment thereof except with the consent of the insurer does not apply to prevent assignment of the claim or interest in the insurance money then due, after loss.”⁹ In other words, an insurer can include a provision in a property insurance policy that prohibits a policyholder from assigning his or her policy to a third party. However, such a prohibition does not prohibit the policyholder from assigning his or her rights under the policy once a claim arises.¹⁰ The purpose of a no-assignment provision in a policy is to protect an insurer against unbargained-for risks.¹¹ One reason a post-loss assignment is valid despite a provision prohibiting assignment without consent of the insurer is that once a loss occurs, the financial exposure of the insurance company does not change. If a post-loss AOB is made, the assignee cannot assert new rights of his or her own that did not belong to the assignor.

The current debate regarding the assignability of a property insurance policy is whether an insurer can include language in the policy prohibiting the assignment of post-loss benefits.¹²

Effect of the Bill on Assignability of Insurance Policies

This bill amends s. 627.422, F.S., allowing a property insurance policy to prohibit the post-loss assignment of rights, benefits, causes of action, or other contractual rights under the policy, except in limited circumstances. The bill provides that the insured in a property insurance policy nonetheless has the right to make the following assignments:

- The insured may assign the benefit of payment not to exceed \$3,000 to a vendor providing services or materials to mitigate or repair damage directly arising from a covered loss. However, such assignment is limited solely to the ability to be named as a copayee for the benefit of payment for the reasonable value of services rendered and materials provided to mitigate or repair such damage. The insured may not assign the right to enforce payment of the post-loss benefits contained in the policy. In other words, even if the insured does make an assignment to a vendor, the vendor cannot itself enforce payment under the policy.
- The insured may make an assignment for the limited purposes of compensating a public adjuster for services as authorized by s. 626.854(11), F.S. Such an assignment is solely for the purposes of compensating the public adjuster.
- The insured may make an assignment for payment of an attorney representing the insured. Such assignment only contemplates that the benefits are paid to the attorney representing the insured, and that the insured will disperse the funds to repair the property at the direction of the insured.

The bill also adds language providing that any post-loss assignment in contravention of the statute is void.

⁷ *Id.*

⁸ *Security First Ins. Co. v. Fla. Office of Ins. Reg.*, No. 1D14-1864 (Fla. 1st DCA) (notice of appeal filed Apr. 25, 2014).

⁹ *Gisela Invs. ,N.V. v. Liberty Mut. Ins. Co.*, 452 So. 2d 1056 (Fla. 3d DCA 1984); see also *West Florida Grocery Co. v. Teutonia Fire Ins. Co.*, 77 So. 209, 224 (Fla. 1917) (“[I]t is a well-settled rule that the provision in a policy relative to the consent of the insurer to the transfer of an interest does not apply to an assignment after loss.”); *Better Construction, Inc. v. National Union Fire Ins. Co.*, 651 So. 2d 141, 142 (“[A] provision against assignment of an insurance policy does not bar an insured’s assignment of an after-loss claim.”); *Highlands Ins. Co. v. Kravecias*, 719 So. 2d 320, 321 (Fla. 3d DCA 1998).

¹⁰ *Florida House of Representatives Regulatory Affairs Committee, Staff Analysis of 2013 CS/CS/HB 909*, p. 2 (Apr. 18, 2013).

¹¹ *Lexington Ins. Co. v. Simkins Industries, Inc.*, 704 So. 2d 1384, 1386 (Fla. 1998).

¹² *Security First Ins. Co. v. Fla. Office of Ins. Reg.*, No. 1D14-1864 (Fla. 1st DCA) (notice of appeal filed Apr. 25, 2014).

Insurable Interest

Background on Insurable Interest

To enforce a property insurance contract, a person must have an insurable interest in the insured property. Specifically, Florida law provides: “No contract of insurance of property or of any interest in property or arising from property shall be enforceable as to the insurance except for the benefit of persons having an insurable interest in the things insured as at the time of the loss.”¹³ Florida law defines “insurable interest” in the property insurance context as “any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage from impairment.”¹⁴ “The measure of insurable interest in property is the extent to which the insured might be damnified by loss, injury, or impairment thereof.”¹⁵

The test for the existence of an insurable interest in the insured property is whether, at the time of the loss, one “benefits from [the property’s] existence and would suffer loss from its damage or destruction.”¹⁶

Current law provides that a contract of property insurance cannot be enforced in court without an insurable interest.¹⁷ There is currently debate over whether the vendor, by virtue of an AOB, has an insurable interest in the insured property such that it can enforce the contract of insurance following a loss.¹⁸

Effect of the Bill on Insurable Interest

This bill amends s. 627.405, F.S., to provide that an insurable interest does not survive an assignment, except to a subsequent purchaser of the property who acquires an insurable interest following a loss. Thus, if an insurer allowed a policyholder to assign the post-loss benefit of payment to a person or entity providing services or materials to mitigate or repair a loss, such assignee would not itself be able to bring suit to enforce payment.

If the insured property is sold, the bill provides that a subsequent purchaser can acquire an insurable interest following a loss. Thus, if the insured property experiences a loss and the policyholder sells the property together with the contract of property insurance, the purchaser would have an insurable interest that would not preclude the enforcement of the contract of insurance.

Public Adjusters

Background on Public Adjusters

Public adjusters are required to be qualified and licensed by the Department of Financial Services (DFS). A public adjuster is a person “who, for money, commission, or any other thing of value, prepares, completes, or files an insurance claim form for an insured or third-party claimant or who, for money, commission, or any other thing of value, acts on behalf of, or aids an insured or third-party claimant in negotiating for or effecting the settlement of a claim or claims for loss or damage covered by an insurance contract or who advertises for employment as an adjuster of such claims.”¹⁹

There are currently other limitations and regulations regarding public adjusting. For example, a licensed contractor or subcontractor may not adjust a claim on behalf of an insured unless licensed and

¹³ s. 627.405(1), F.S.

¹⁴ s. 627.405(2), F.S.

¹⁵ s. 627.405(3), F.S.

¹⁶ Peninsular Fire Ins. Co. v. Fowler, 166 So. 2d 206 (Fla. 2d DCA 1964).

¹⁷ See s. 627.405, F.S.

¹⁸ This has been brought up in briefing in three cases currently up on appeal to the Florida Fourth District Court of Appeal. See ‘Drafting Issues or Other Comments’ for further discussion.

¹⁹ s. 626.854(1), F.S.

compliant as a public adjuster under chapter 626, F.S.²⁰ However, the contractor may discuss or explain a bid for construction or repair of covered property with the residential property owner who has suffered a loss or damage covered by a property insurance policy, or the insurer of such property, if the contractor is doing so for the usual and customary fees applicable to the work to be performed as stated in the contract between the contractor and the insured.²¹

Current law also contains a public adjuster conflict of interest section that prohibits public adjusters from participating, directly or indirectly, in the reconstruction, repair, or remediation of the insured property that is the subject of the claim or engaging in any other activity that could reasonably be construed as a conflict of interest.²²

Some trial courts in Florida have dismissed cases brought by a vendor through a purported AOB, reasoning that the vendor was in engaging in unlawful or unlicensed public adjusting. For example, in *Emergency Services 24, Inc. v. American Traditions Ins. Co.*, the court dismissed a claim brought pursuant to a purported AOB, finding that the assignment was unauthorized under Florida law because it “holds Plaintiff out as a ‘public adjuster’ as defined in Florida Statute 626.854.”²³ Further, in *NextGen Restoration, Inc. v. Homeowners Choice Prop. & Cas. Ins. Co.*, the court conceded that “the right to receive post-loss insurance proceeds is assignable,” but suggested that there is a lack of case law permitting the “assignment of a prospective insurance recovery whose amount has not yet been determined.”²⁴ The court went on to state that “[e]stablishing that amount, fixing it as a sum certain, is the essence of ‘adjusting’ an insurance claim.”²⁵ As such, the court dismissed the plaintiff’s claim, holding that the claim, as pled, “fits the statutory definition of public adjusting . . . as defined in Section 626.854, Florida Statutes – which proscribes such conduct by contractors.”²⁶ However, other trial courts in Florida have come out differently on this issue. For example, in *Start to Finish Restoration, LLC v. Homeowners Choice Prop. & Cas. Ins. Co.*, the court denied the insurer’s motion to dismiss, finding that the vendor did not hold itself out to be a public adjuster in contravention of statute because the allegations “simply indicate[d] Plaintiff permissibly received the assignment of rights to receive payments due and [was] acting solely for its own benefit.”²⁷

Effect of the Bill on Public Adjusters

This bill provides that any assignment or agreement purporting to transfer the authority to adjust, negotiate, or settle any portion of a claim to a contractor or subcontractor, or that is otherwise in derogation of the public adjuster contractor prohibition section is void. The bill appears to have the effect of prohibiting a vendor from disputing the amount of payment with the insurer under an AOB. Thus, if a property insurance policy permitted a post-loss AOB, the assignment would be limited to payment of a fixed amount to the vendor.

B. SECTION DIRECTORY:

Section 1 amends s. 626.854, F.S., relating to public adjusters.

²⁰ s. 626.854(16), F.S.

²¹ *Id.*

²² “A public adjuster may not participate, directly or indirectly, in the reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the licensee; may not engage in any other activities that may be reasonably construed as a conflict of interest, including soliciting or accepting any remuneration from, of any kind or nature, directly or indirectly; and may not have a financial interest in any salvage, repair, or any other business entity that obtains business in connection with any claim that the public adjuster has a contract or an agreement to adjust.” s. 626.8795, F.S.

²³ *Emergency Services 24, Inc. v. American Traditions Ins. Co.*, No 12-CC-26928 (Fla. Hillsborough Cty. Ct. April 30, 2013).

²⁴ *NextGen Restoration, Inc. v. Homeowners Choice Prop. & Cas. Ins. Co.*, No 12-012813-CI-19 (Fla. Pinellas Cty. Ct. July 17, 2013).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Start to Finish Restoration, LLC v. Homeowners Choice Prop. & Cas. Ins. Co.*, No. 2012-CA-6605 (Fla. Manatee Cty. Ct. May 23, 2013).

Section 2 amends s. 627.405, F.S., relating to insurable interest; property.

Section 3 amends s. 627.422, F.S., relating to assignment of policies.

Section 4 provides an effective date of July 1, 2015.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

The bill does not appear to have any impact on state revenues.

2. Expenditures:

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

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

The bill does not appear to have any impact on local government revenues.

2. Expenditures:

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

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

The bill does not appear to have any direct economic impact on the private sector.

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:

There are three known cases on appeal to the Florida Fourth District Court of Appeal regarding post-loss assignment of benefits. They were all set for oral argument on March 24, 2015. These cases and corresponding issues on appeal are as follows:

- *ASAP Restoration and Constr., Inc. v. Tower Hill Signature Ins. Co.*, Case No. 4D13-4174.
Issue: Whether the trial court erred as a matter of law in dismissing the vendor's complaint on

the basis that the AOB was invalid under the anti-assignment and loss payment clauses of the policy?

- *One Call Prop. Services, Inc. v. Security First Ins. Co.*, Case No. 4D14-0424. **Issue:** Whether the trial court erred as a matter of law in dismissing the vendor's complaint on the basis that the AOB was invalid under the anti-assignment and loss payment clauses of the policy?
- *Emergency Services 24, Inc. v. United Prop. & Cas. Ins. Co.*, Case No. 4D14-0576. **Issue:** Whether the trial court erred in entering summary judgment in favor of the insurer on the basis that the vendor's AOB was invalid?

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 18, 2015, the Insurance & Banking Subcommittee considered a proposed committee substitute and reported the bill favorable with a committee substitute. The proposed committee substitute did the following:

- Removed the limitation on attorney's fees contained in the original bill;
- Clarified that a property insurance policy may prohibit the assignment of post-loss benefits except in certain limited circumstances;
- Clarified that insurable interest does not survive assignment, except when assigned to a subsequent purchaser of covered property;
- Clarified that any assignment or agreement that purports to assign to a contractor or subcontractor the authority to adjust, negotiate, or settle any portion of a claim is void;
- Shortened the timeframes associated with property insurance claims, requiring insurers to fulfill certain duties related to property insurance claims quicker.

On March 24, 2015, the Civil Justice Subcommittee adopted a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute passed by the Civil Justice Subcommittee differs from the committee substitute passed by the Insurance & Banking Subcommittee in that it does not include provisions that would have shortened the time within which a property insurance carrier is required to respond to communication or to pay a claim. This analysis is drafted to the committee substitute as passed by the Civil Justice Subcommittee.