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.)

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

BILL:	CS/SB 1218
INTRODUCER:	Banking and Insurance Committee and Senator Farmer
SUBJECT:	Property Repair
DATE:	April 5, 2017
REVISED:	

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Billmeier	Knudson	BI	**Fav/CS**
2.			RI	
3.			RC	

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1218 creates new requirements for assignment of post-loss benefits from personal residential, commercial residential, and commercial property insurance policies. The bill places various requirements and restrictions on assignments of post-loss benefits in personal residential, commercial residential, and commercial property insurance policies. The bill does not allow such policies to prohibit the post-loss assignment of benefits. It provides, however, that an agreement to assign post-loss benefits is not valid unless the agreement:

- Is in writing between the policyholder and assignee and is delivered to the insurer under specified time requirements;
- Is limited to claims for work performed by the assignee for damages claimed to be covered;
- Allows the policyholder to unilaterally rescind the assignment of post-loss benefits to a vendor within 5 days of execution of the agreement; and
- Contains an accurate and up-to-date statement of the scope of work to be performed.

The bill provides that an assignee:

- Must provide the policyholder with accurate and up-to date revised statements of the scope of work to be performed as supplemental or additional repairs are required;
- Must guarantee to the policyholder that the work performed conforms to current and accepted industry standards;
- May not charge the policyholder more than the applicable deductible contained in the policy unless the policyholder opts for additional work at the policyholder's own expense;

- May not charge the policyholder directly, except for additional work not covered under the policy; and
- May not pay referral fees totaling more than $750 in connection with the assignment.

The bill creates a regulatory system for professional water damage restorers similar to the regulatory system for mold assessors. It prohibits unlicensed persons from practicing water damage restoration and requires assignees of water damage claims to be licensed. It requires the Department of Business and Professional Regulation (DBPR) to license professional water damage restorers if they are of good moral character, have passed an appropriate examination, and meet certain education requirements. The bill provides for fees, disciplinary rules, continuing education requirements, and insurance requirements for professional water damage restorers.

The bill provides that attorney fees and costs paid by a property insurer pursuant to s. 627.428, F.S., may not be included in a property insurer's rate base and may not be used to justify a rate or rate change.

The bill creates new reporting requirements for insurers and claimant attorneys relating to claims in which an assignment of benefits is obtained.

II. Present Situation:

Background on Assignment of Benefits

An assignment is the voluntary transfer of the rights of one party under a contract to another party. Current law generally allows an insurance policyholder to assign the benefits of the policy, such as the right to be paid, to another party. 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 may 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. In *Lexington Insurance Company v. Simkins Industries*,[1] the court held that a provision in an insurance contract prohibiting assignment of the policy was enforceable under the plain language of s. 627.422, F.S. The court explained that the purpose of a provision prohibiting assignment was to protect an insurer against unbargained-for risks.[2] However, an assignment made after the loss is valid even if the contract states otherwise.[3] In *Continental Casualty Company v. Ryan Incorporated*,[4] the court noted that it is a "well-settled rule that [anti-assignment provisions do] not apply to an assignment after loss." A court explained that a rationale for post-loss assignments is that "assignment of the policy, or rights under the policy, before the loss is incurred transfers the insurer's contractual relationship to a party with whom it never intended to contract, but an assignment after loss is

[1] 704 So.2d 1384 (Fla. 1998).
[2] *Id*. at 1386.
[3] *West Fla. Grocery Co. v. Teutonia Fire Ins. Co*., 74 Fla. 220, 77 So. 209 (1917); *Gisela Inv., N.V. v. Liberty Mut. Ins. Co.*, 452 So.2d 1056 (Fla. 3d DCA 1984).
[4] 974 So.2d 368, 377 n. 7 (Fla. 2000).

simply the transfer of the right to a claim for money" and "has no effect upon the insurer's duty under the policy."[5]

Assignments have been prohibited by contract in other insurance contexts. In *Kohl v. Blue Cross Blue Shield of Florida, Inc.*,[6] the court found anti-assignment language was sufficiently clear and upheld language prohibiting the assignment of a health insurance claim. The court explained that anti-assignment clauses "prohibiting an insured's assignments to out-of-network medical providers are valuable tools in persuading health [care] providers to keep their costs down and as such override the general policy favoring the free alienability of choses in action."[7]

Section 627.428, F.S., provides, in part:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

This statute allows the insured to recover attorney's fees if the insured prevails in an action against an insurer. A person who takes an assignment of benefits is entitled to attorney's fees if that assignee prevails in an action against an insurer.[8]

Assignment of Benefits in Property Insurance Cases

In recent years, insurers have complained of abuse of the assignment of benefits process. An insurance company recently described the issue in a court filing:

> The typical scenario surrounding the use of an "assignment of benefits" involved vendors and contractors, mostly water remediation companies, who were called by an insured immediately after a loss to perform emergency remediation services, such as water extraction. The vendor came to the insured's home and, before performing any work, required the insured to sign an "assignment of benefits" – when the insured would be most vulnerable to fraud and price gouging. Vendors advised the insured, "We'll take care of everything for you." The vendor then submitted its bill to the insurer that was, on average, nearly 30 percent higher than comparative estimates from vendors without an assignment of benefits. Some vendors added to the invoice an additional 20 percent for "overhead and profit," even though a general contractor would not be required or hired to oversee the work. Vendors used these inflated invoices to extract higher

[5] *Wehr Constructors, Inc. v. Assurance Company of America*, 384 S.W.3d 680, 683 (Ky. 2012).
[6] 955 So.2d 1140 (Fla. 4th DCA 2007).
[7] *Id*. at 1144-1145.
[8] *All Ways Reliable Bldg. Maint., Inc. v. Moore*, 261 So.2d 131 (Fla. 1972); *Allstate Insurance Co. v. Regar*, 942 So.2d 969 (Fla.2d DCA 2006).

> settlements from insurers. This, in turn, significantly increases litigation over the vendors' invoices.[9]

In a court filing in a different case, a company that provides emergency repair and construction services explained the rationale behind assignments of insurance benefits:

> As a practical matter, a homeowner often will not be able to afford or hire a contractor immediately following a loss unless the contractor accepts an assignment of benefits to ensure payment. A homeowner may be unable to comply with the … provision requiring the homeowner to protect and repair the premises unless the remediation contractor accepts an assignment of benefits, however, contractors will become unwilling to accept payments by assignment if court decisions render the assignments unenforceable …
>
> Whether the repair invoice is routed through the insured or submitted by the service provider directly by assignment, the service provider's repair invoice is submitted to the insurer for coverage and reviewed by an adjuster. The only difference an assignment makes is that, if an insurance company wishes to partially deny coverage or contest an invoice as unreasonable, the insured policyholder is not mired in litigation in which he or she has no stake.[10]

There have been a number of cases in recent years where courts have held that post-loss benefits are assignable.[11]

Insurers have also reported increases in litigation by assignees in "auto glass" cases. In such cases, the assignee is usually a vendor that repairs or replaces automobile windshields. Section 627.7288, F.S., provides that the deductible provisions of a motor vehicle insurance policy are not applicable to damage to windshields. Insurers contend that assignment of benefits has caused an increase in litigation over damaged windshields.[12]

Data and Recommendations for Reform

In 2015, the Office of Insurance Regulation (OIR) did a data call to attempt to determine the effect of assignment of benefits in the insurance market.[13] The OIR found that water losses alone could require rate increases of 10 percent per year.[14] One company reported that, in 2015, the claim cost of a claim with an assignment of benefits was 141 percent greater than the claim cost

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[9] *Security First Insurance Company v. State of Florida, Office of Insurance Regulation*, Case No. 1D14-1864 (Fla. 1st DCA), Appellant's Initial Brief at pp. 3-4 (appellate record citations omitted).
[10] *One Call Property Services, Inc. v. Security First Insurance Company*, Case No. 4D14-0424 (Fla. 4th DCA), Appellant's Initial Brief at 46-48.
[11] *See, e.g., Security First Ins. Co. v. State of Florida Office of Insurance Regulation*, 177 So.3d 627, *rehearing denied* (Fla. 1st DCA 2015); *Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co.*, 185 So.2d 638 (Fla.2d DCA 2016); *One Call Property Services, Inc. v. Security First Ins. Co.*, 165 So.3d 749 (Fla. 4th DCA 2015); *Accident Cleaners, Inc. v. Universal Ins. Co.*, 186 So.3d 1 (Fla. 5th DCA 2015);
[12] Florida Justice Reform Institute, *Restoring Balance in Insurance Litigation* (October 2015) at pp. 19-23.
[13] http://www.floir.com/Sections/PandC/AssignmentofBenefits.aspx (last accessed April 5, 2017).
[14] Office of Insurance Regulation, *2015 Report on Review of the 2015 Assignment of Benefits Data Call* (February 8, 2016) at p. 8.

of a claim without an assignment of benefits.[15] The company reported 90 cases of suspected insurance fraud to the Department of Financial Services in 2015 and part of 2016.

Citizens Property Insurance Company recently reported that the percentage of claims litigated with an assignment of benefits increased from 9.6 percent in 2012 to 46.9 percent in 2015.[16] It projects that the average premium will increase in Miami-Dade County from $2,926 to $4,712 by 2022, and in Broward County from $2,390 to $3,850 by 2022.[17] Citizens reports that water claims, including those that do not involve an assignment of benefits, have been increasing:

> 8,097 new lawsuits were filed against Citizens between January and November 2016, a 30 percent increase from the same period in 2015. Meanwhile, Citizens' policy count dropped by 26.3 percent between January 2015 and November 2016.[18]

Citizens noted that factors other than assignment of benefits contribute increase in the number of lawsuits. It noted that in many cases, it is made aware of a loss only after repairs are made or the policyholder has hired an attorney or a public adjuster.[19]

In a presentation to the Florida Cabinet on February 7, 2017, the State Insurance Commissioner explained that the frequency of water claims rose by 46 percent from 2010 to 2015 and the amount the insurers pay on those claims has increased 28 percent.[20] Data gathered in a data call by the OIR showed that the use of assignments of benefits has increased from 5.7 percent of the claims in 2010 to 15.9 percent of the claims in 2015.[21] The Commissioner continued:

> Absent any other type of reform, absent any other type of coverage or other expense that might be present on an insurance policy, were these trends to continue unchecked, policyholders would expect to see about a 10 percent rate increase going forward just to keep up with the water trends that are covering their policy.[22]

The Commissioner recommended various reforms:

- Amending s. 627.428, F.S., to apply to insureds only and not to assignees;
- Consumer protections so that consumers are not left "holding the bag" if there is a dispute between the insurance company and a contractor; and

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[15] Security First Insurance, *Troubled Water: An Analysis of Water Damage Claims and the Impact on Homeowner's Insurance Premiums in Florida* (July 20, 2016) at p. 13.
[16] Citizens Property Insurance Corporation, *Non-Catastrophic Homeowners Water Claims* (January 2016) at p. 3. The report can be found here: https://www.citizensfla.com/documents/20702/1335431/20160121+White+Paper+Non-Catastrophic+Homeowners+Water+Claims.pdf/f66d4f43-e4cf-4e6e-b857-d457d761f5d6 (last accessed March 27, 2017).
[17] Citizens Property Insurance Company, AOB Reform Makes Pocket Sense (on file with the Committee on Banking and Insurance).
[18] https://www.citizensfla.com/-/20161207_bog-press-release (last accessed March 27, 2017).
[19] *Id*.
[20] Transcript of the Meeting of the Governor and Cabinet, February 7, 2017, at p. 11. The transcript can be found at http://www.myflorida.com/myflorida/cabinet/agenda17/0207/transcript.pdf (last accessed March 27, 2017).
[21] Office of Insurance Regulation, *2015 Report on Review of the 2015 Assignment of Benefits Data Call* (February 8, 2016) at p. 6 and 11.
[22] *Id*. at 11-12.

- Notice requirements so the insurer is aware of the assignment and can participate in the claims adjustment process.[23]

The First District Court of Appeal recently noted:

> [W]e are not unmindful of the concerns that Security First expressed in support of [limiting assignment of benefits], providing evidence that inflated or fraudulent post-loss claims filed by remediation companies exceeded by thirty percent comparable services; that policyholders may sign away their rights without understanding the implications; and that a "cottage industry" of "vendors, contractors, and attorneys" exists that use the "assignments of benefits and the threat of litigation" to "extract higher payments from insurers." These concerns, however, are matters of policy that we are ill-suited to address.[24]

The Fourth District Court of Appeal explained the competing policy arguments raised by the assignment of benefits issue:

> Turning to the practical implications of this case, we note that this issue boils down to two competing public policy considerations. On the one side, the insurance industry argues that assignments of benefits allow contractors to unilaterally set the value of a claim and demand payment for fraudulent or inflated invoices. On the other side, contractors argue that assignments of benefits allow homeowners to hire contractors for emergency repairs immediately after a loss, particularly in situations where the homeowners cannot afford to pay the contractors up front.[25]

The court noted that if "studies show that these assignments are inviting fraud and abuse, then the legislature is in the best position to investigate and undertake comprehensive reform."[26]

Regulation of Water Remediation Companies

The Sunrise Act

A proposal for new regulation of a profession must meet the requirements in s. 11.62, F.S., the Sunrise Act. The act provides the intent of the Legislature that it should not:

- Subject a profession or occupation to regulation by the state unless the regulation is necessary to protect the public health, safety, or welfare from significant and discernible harm or damage; or
- Regulate a profession or occupation by the state in a manner that unnecessarily restricts entry into the practice of the profession or occupation or adversely affects the availability of the professional or occupational services to the public.

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[23] *Id*. at 16-18.
[24] *Security First Ins. Co. v. State of Florida Office of Insurance Regulation*, 177 So.3d 627, 628, *rehearing denied* (Fla. 1st DCA 2015).
[25] *One Call Property Services, Inc. v. Security First Ins. Co.*, 165 So.3d 749, 755 (Fla. 4th DCA 2015).
[26] *Id*.

In determining whether to regulate a profession or occupation, s. 11.62, F.S., requires the Legislature to consider the following:

- Whether the unregulated practice of the profession or occupation will substantially harm or endanger the public health, safety, or welfare, and whether the potential for harm is recognizable and not remote;
- Whether the practice of the profession or occupation requires specialized skill or training, and whether that skill or training is readily measurable or quantifiable so that examination or training requirements would reasonably assure initial and continuing professional or occupational ability;
- Whether the regulation will have an unreasonable effect on job creation or job retention in the state or will place unreasonable restrictions on the ability of individuals who seek to practice, or who are practicing, a given profession or occupation to find employment;
- Whether the public is or can be effectively protected by other means; and
- Whether the overall cost-effectiveness and economic impact of the proposed regulation, including the indirect costs to consumers, will be favorable.

Section 11.62(4), F.S., requires proponents of legislation regulating an occupation or profession to provide specified information. Section 11.62(5), F.S., requires the agency to provide information concerning the effect of proposed legislation. Section 11.62(6), F.S., requires legislative committees to consider whether the legislation is justified, whether it is the least restrictive and most cost-effective way to protect the public, and whether the legislation is technically sufficient.[27]

Regulation of Water Remediation Companies

Water remediation companies are not regulated by the DBPR.

Insurance Rates

The Rating Law in part I of ch. 627, F.S., specifies the rate filing process for property and casualty insurers and provides rating standards for these insurers. The rating law applies to property, casualty and surety insurance and prohibits rates that are excessive, inadequate, or unfairly discriminatory. At the same time, an insurer is allowed a reasonable rate of return. The OIR regulates insurer rate and form filing.

A rate is excessive if:

- It is likely to produce a profit from Florida business that is unreasonably high in relation to the risk involved or if expenses are unreasonably high in relation to the services rendered.
- The rate structure established by a stock insurance company provides for replenishment of surpluses from premiums, when the replacement is attributable to investment losses.[28]

A rate is inadequate if:

[27] While the Sunrise Act purports to place requirements on the legislature and its committees, "a legislature may not bind the hands of future legislatures by prohibiting amendments to statutory law." *Neu v. Miami Herald Pub. Co*., 462 So.2d 821 (Fla. 1985).

[28] ss. 627.062(2)(e)1. and 2., F.S.

- It is clearly insufficient, together with the investment income attributable to them to sustain projected losses and expenses in the class of business to which it applies.
- If discounts or credits are allowed that exceed a reasonable reflection of expense savings and reasonably expected loss experience from the risk or group or risks.[29]

A rate is unfairly discriminatory if:

- The rating plan, including discounts, credits, or surcharges fails to clearly and equitably reflect consideration of the policyholder's participation in a risk management program pursuant to s. 627.0625, F.S.
- As to a risk or group of risks, the application of premium discounts, credits, or surcharges among the risks does not bear a reasonable relationship to the expected loss and expense experience among the various risks.[30]

Replacement Coverage

Section 627.7011, F.S., requires an insurer, prior to issuing a homeowner's insurance policy, to offer each of the following:

- A policy providing that any loss that is repaired or replaced will be adjusted on the basis of replacement costs to the dwelling not exceeding policy limits, rather than actual cash value, but not including costs necessary to meet applicable laws and ordinances regulating the construction, use, or repair of any property or requiring the tearing down of any property, including the costs of removing debris.
- A policy providing that, subject to other policy provisions, any loss that is repaired or replaced at any location will be adjusted on the basis of replacement costs to the dwelling not exceeding policy limits, rather than actual cash value, and also including costs necessary to meet applicable laws and ordinances regulating the construction, use, or repair of any property or requiring the tearing down of any property, including the costs of removing debris.

Unless the insurer obtains the policyholder's written refusal of the policies or endorsements discussed above, any policy covering the dwelling is deemed to include the law and ordinance coverage limited to 25 percent of the dwelling limit.

In the event of a loss for which a dwelling or personal property is insured on the basis of replacement costs, the insurer must initially pay at least the actual cash value of the insured loss, less any applicable deductible. The insurer shall pay any remaining amounts necessary to perform such repairs as work is performed and expenses are incurred. If a total loss of a dwelling occurs, the insurer shall pay the replacement cost coverage without reservation or holdback of any depreciation in value.

[29] ss. 627.062(2)(e)3. and 5., F.S.
[30] ss. 627.062(2)(e)4. and 6., F.S.

III. Effect of Proposed Changes:

Reforms Related to Assignment of Post-Loss Benefits

The bill provides that a personal lines residential property insurance policy, a commercial residential property insurance policy, or a commercial property insurance policy may not prohibit the assignment of post-loss benefits. This codifies the current case law regarding assignments. The bill further provides that it does not affect the assignment of benefits in other policies. Therefore, the bill does not change the law relating to the assignment of post-loss benefits in other lines of insurance.

Requirements to Assign Post-Loss Benefits under Residential Property Insurance Policies

The bill places various requirements and restrictions on assignments of post-loss benefits under personal residential, commercial residential, and commercial property insurance policies. It provides that an agreement to assign post-loss benefits is not valid unless the agreement:

- Is in writing between the policyholder and assignee and is delivered to the insurer as provided by the bill;
- Is limited to claims for work performed by the assignee for damages claimed to be covered;
- Allows the policyholder to unilaterally rescind the assignment of post-loss benefits within 5 days after execution of the agreement. It provides that the policyholder or insurer may be responsible for work performed during that period; and
- Contains an accurate and up-to-date statement of the scope of work to be performed.

An assignee:

- Must provide the policyholder with accurate and up-to date revised statements of the scope of work to be performed as supplemental or additional repairs are required and must provide to the policyholder and insurer a final invoice and bill for service rendered within 7 business days after the date of submission of the final invoice or bill;[31]
- Must guarantee to the policyholder that the work performed conforms to current and accepted industry standards;
- May not charge the policyholder more than the applicable deductible contained in the policy unless the policyholder opts for additional work at the policyholder's own expense;
- May not charge the policyholder directly, except for additional work not covered under the policy, including work performed that is rightfully denied as not covered and betterments or additional work not part of the loss; and
- May not pay referral fees totaling more than $750 in connection with the assignment.

In addition, for water damage claims, the assignee:

- Must be licensed as a professional water damage restorer or a contractor under ch. 489, F.S., to perform any work requiring such a license; and
- Must verify that any vendor it contracts with to perform work meets the applicable license requirements.

[31] It is not clear exactly when the 7 day time period begins to run.

The bill requires each insurer to provide on its website and in the policy its contact information for receiving an agreement assigning post-loss benefits. It must include at least a dedicated facsimile number.

After executing the assignment agreement, the bill requires the assignee to deliver the agreement to the insurer within the later of:

- If a state of emergency was declared under s. 252.36, F.S., for a hurricane or other natural disaster and the property covered under the policy was damaged as a result of the hurricane or natural disaster, 7 days after the state of emergency is terminated; or
- Seven business days after execution of the agreement.

The bill requires the insurer to make any initial inspections of the covered property within the later of:

- If a state of emergency was declared under s. 252.36, F.S., for a hurricane or other natural disaster and the property covered under the policy was damaged as a result of the hurricane or natural disaster, 7 days after the state of emergency is terminated; or
- Seven business days after receiving the agreement.

The bill requires an insured or assignee to provide the insurer notice of intent to initiate litigation no later than 7 days before an insured or assignee initiates litigation against an insurer relating to a denied or limited claim. The notice must include a copy of the final invoice. The bill does not increase the time limits of s. 627.70131, F.S.

Reporting Requirements Related to Assignment Agreements

The bill requires each insurer to report, by January 1, 2019, and each year thereafter, data on each claim paid in the prior calendar year pursuant to an assignment agreement. This report must be made to the OIR. The data must include, but are not limited to:

- The number of days between the first notice of loss and the initial inspection;
- Loss severity;
- Allocated loss adjustment expense;
- For nonlitigated claims, the difference between the insurer's initial offer and the amount paid on the claim;
- The time from first notice of loss until the claim was closed; and
- For claims involving water damage, whether the adjuster was licensed as a water damage restorer.

For litigated claims, the report must include:

- Any amount paid before litigation, the amount in dispute, the amount of any proposal for settlement, and the settlement or judgment amount;
- The amount of fees paid to the claimant's attorney; and
- The amount and structure, whether fixed, hourly, or contingency, of fees paid to the insurer's attorney.

This information must be reported by the insurer to the opposing counsel on the litigated claim for verification or certification. The opposing counsel on the litigated claim shall report to the

OIR its agreement or disagreement with the accuracy of the figures reported. The bill does not provide the OIR with enforcement power if the claimant's attorney fails to provide the required information.

Regulation of Water Remediation Companies

The bill creates part XVII of ch. 468, F,S,, to regulate water damage restoration companies and water damage restorers. The DBPR will be the regulator. They are not regulated under current law. These regulatory provisions are modeled after part XVI of ch. 468, F.S., relating to mold assessors and mold remediators.

This bill creates numerous sections of law. Each section will be referenced by the section, subsection, or paragraph designations as listed in the bill.

Section 468.94 contains a finding that it is necessary in the interest of the public safety and welfare to prevent damage to real and personal property, to avert economic injury to the residents, and to regulate persons and companies that hold themselves out to the public as qualified to perform water damage restoration services.

Section 468.941 provides that following persons are not required to comply with any provisions relating to water damage restoration:

- A residential property owner who performs water damage restoration on his or her own property;
- A person who performs water damage restoration on property owned or leased by the person, the person's employer, or an entity affiliated with the person's employer through common ownership, or on property operated or managed by the person's employer or an entity affiliated with the person's employer through common ownership. This exemption does not apply if the person, employer, or affiliated entity engages in the business of performing water damage restoration for the public;
- An employee of a professional water damage restorer while directly supervised by the professional water damage restorer;
- Persons or business organizations that are action within the scope of the respective licenses required under part XV of chapter 468, chapter 471, part I or part II of ch. 481, ch. 482, or ch. 489; that are acting on behalf of an insurer under part VI of ch. 626; or that are persons in the manufactured housing industry who are licensed under ch. 320, except when any such persons or business organizations hold themselves out for hire to the public as a "certified water damage restorer," "registered water damage restorer," "licensed water damage restorer," "water damage restorer," "professional water damage restorer," or any combination thereof, stating or implying licensure under this part; and
- An authorized employee of the United States, this state, or any municipality, county, or other political subdivision, or public or private school, and who is conducting water damage restoration within the scope of that employment, as long as the employee does not hold himself or herself out for hire to the general public or otherwise engage in water damage restoration.

Section 468.9411, F.S., defines "professional water damage restorer" as "any person who performs water damage restoration." It defines "water damage restoration" means water removal,

demolition, dehumidification, or other treatment related to water damage or water-contaminated matter larger than 10 square feet."

Section 468.9412, F.S., establishes fee schedules. It provides that DBPR may establish fees to be paid for application, examination, reexamination, licensing and renewal, inactive status application and reactivation of inactive licenses, delinquency fees, and application for providers of continuing education. The bill requires the DBPR to base the fees on estimates of the revenue required to administer the provisions of the bill but sets fee caps. The application fee may not exceed $125. The examination fee may not exceed $125 plus the actual per applicant cost to the DBPR to purchase the examination, if the DBPR chooses to purchase the examination.

The bill provides that the fee for an initial license may not exceed $200 and that the fee for an initial certificate of authorization may not exceed $200. The fee for a biennial license renewal may not exceed $400 and the fee for licensure by endorsement may not exceed $200. The fee for application for inactive status may not exceed $100 and the fee for reactivation of an inactive license may not exceed $200. The bill provides that the fee for applications from providers of continuing education may not exceed $500.

Section 468.9413, F.S., requires a person desiring to be licensed as a professional water damage restorer to apply to the DBPR after satisfying the examination requirement. An applicant may practice as a professional water damage restorer if he or she passes the required examination, is of good moral character, and has successfully completed the Water Damage Restoration Technician course and the Advanced Structural Drying course approved by the Institute of Inspection, Cleaning and Restoration Certification (IICRC) or similar courses approved by the DBPR. The IICRC describes the course:

> The Water Damage Restoration Technician course is designed to teach restoration personnel that perform remediation work to give them a better concept of water damage, its effects and techniques for drying of structures. This course will give residential and commercial maintenance personnel the background to understand the procedures necessary to deal with water losses, sewer backflows, and contamination such as mold. (3 day course; 19 hours, not including exam time, lunch and breaks).[32]

The IICRC describes its course on applied structural drying:

> The IICRC-approved Applied Structural Drying course is designed to teach the effective, efficient and timely drying of water-damaged structures and contents, using comprehensive classroom and hands-on training, in order to facilitate appropriate decision making within a restorative drying environment. (3 day course; 21 hours, not including exam time, lunch and breaks).[33]

The bill requires the DBPR to review and approve courses of study in water damage restoration.

[32] http://www.iicrc.org/education-certification/course-schedule/ (last accessed March 28, 2017).
[33] http://www.iicrc.org/education-certification/course-schedule/ (last accessed March 28, 2017).

The bill defines "good moral character" as "a personal history of honesty, fairness, and respect for the rights of others and for the laws of this state and nation." The DBPR may refuse to certify an applicant who fails to satisfy the requirement for good moral character only if:

- There is a substantial connection between the lack of good moral character of the applicant and the professional responsibilities of a licensed professional water damage restorer; and
- The finding by the DBPR of lack of good moral character is supported by clear and convincing evidence.

If an applicant is found to be unqualified for a license because of a lack of good moral character, the DBPR must furnish the applicant with a statement containing the findings of the DBPR, a complete record of the evidence upon which the determination was based, and a notice of the rights of the applicant to a hearing and appeal. The bill allows the DBPR to adopt rules pursuant to ss. 120.536(1) and 120.54, F.S., to administer the section.

The bill requires an applicant to submit, together with the application, a complete set of electronic fingerprints to the DBPR. The DBPR submits the fingerprints to the Department of Law Enforcement for state processing, and the Department of Law Enforcement forwards them to the Federal Bureau of Investigation for national processing, to determine whether the applicant has a criminal history record. The DBPR reviews the background check results to determine if the applicant meets licensure requirements. The applicant is responsible for the costs associated with processing the fingerprints.

Section 468.9414, F.S., requires licensure of any applicant who the DBPR certifies is qualified to practice professional water damage restoration. The DBPR must certify for licensure any applicant who satisfies character requirements, who has passed the licensing examination, and who has met the education requirements.

The bill provides procedures for licensure by endorsement if an applicant is of good moral character, who has the insurance coverage required under the bill, and who:

- Is qualified to take the state examination and has passed a certification examination offered by a nationally recognized organization that certifies persons in the specialty of water damage restoration. The certification examination offered must be approved by the DBPR as substantially equivalent to the requirements of the bill; and
- Holds a valid license to practice water damage restoration issued by another state or territory of the United States if the criteria for issuance of the license were substantially the same as the licensure criteria established by the bill.

The bill prohibits the DBPR from issuing a license by endorsement to any applicant who is under investigation in another state for any act that would constitute a violation of the bill or ch. 455 until such time as the investigation is complete and disciplinary proceedings have been terminated.

Section 468.9415, F.S., requires the DBPR to renew a license upon receipt of the renewal application and fee and upon certification by the DBPR that the licensee has satisfactorily completed continuing education requirements. The bill provides that the DBPR shall adopt rules establishing a procedure for the biennial renewal of licenses.

Section 468.9416, F.S., creates continuing education requirements for professional water damage restorers. It provides that the DBPR may not renew a license if the licensee has not completed 14 hours of continuing education during the previous 2 years.

Section 468.9417, F.S., allows a licensee to request his or her license be placed in inactive status. A license that becomes inactive may be reactivated by application to the DBPR. The DBPR may prescribe continuing education requirements as a condition of reactivating a license. The DBPR is required to adopt rules relating to licenses that have become inactive and for the renewal of inactive licenses. The fee to reactivate or renew an inactive license may not exceed $200.

Section 468.9418, F.S., provides that the practice of or the offer to practice water damage restoration by licensees through a corporation or partnership offering water damage restoration to the public, or by a corporation or partnership offering such services to the public through licensees is permitted.

Section 468.9419, F.S., provides that effective January 1, 2018, a person may not perform or offer to perform any water damage restoration unless the person is licensed as a professional water damage restorer. The bill provides that effective January 1, 2018, a person may not perform or offer to perform any water damage restoration unless the person has complied with the provisions of the bill. A person who is not licensed as a professional water damage restorer may not:

- Use the name or title "certified water damage restorer," "registered water damage restorer," "licensed water damage restorer," "water damage restorer," "professional water damage restorer," or any combination thereof unless the person has complied with the provisions of the bill; and
- Remediate for a fee any property in which the professional water damage restorer or the professional water damage restorer's company has any financial or transfer interest.

Section 468.942, F.S., provides that certain acts constitute grounds for which the disciplinary actions may be taken:

- Violation of any provision of part XVII or s. 455.227(1), F.S.;
- Attempting to procure a license to practice water damage restoration by bribery or fraudulent misrepresentations;
- Having a license to practice water damage restoration revoked, suspended, or otherwise acted against, including the denial of licensure, by the licensing authority of another state, territory, or country;
- Being convicted or found guilty of, or entering a plea of nolo contendere to, regardless of adjudication, a crime in any jurisdiction that directly relates to the practice of water damage restoration or the ability to practice water damage restoration;
- Making or filing a report or record that the licensee knows to be false, willfully failing to file a report or record required by state or federal law, willfully impeding or obstructing such filing, or inducing another person to impede or obstruct such filing;
- Advertising goods or services in a manner that is fraudulent, false, deceptive, or misleading in form or content;
- Engaging in fraud or deceit, or negligence, incompetency, or misconduct, in the practice of water damage restoration;

- Failing to perform any statutory or legal obligation placed upon a professional water damage restorer;
- Violating any provision of chapter 468, a DBPR rule, or a lawful order of the DBPR previously entered in a disciplinary hearing or failing to comply with a lawfully issued subpoena of the DBPR;
- Practicing on a revoked, suspended, inactive, or delinquent license; or
- Failing to meet any standard of practice adopted by rule of the DBPR.

The bill provides for administrative penalties for violations including denial of an application for licensure, revocation or suspension of a license, imposition of an administrative fine not to exceed $5,000 for each count or separate offense, issuance of a reprimand, placement of the professional water damage restorer on probation for a period of time and subject to such conditions as the DBPR, and restriction of the professional water damage restorer's authorized scope of practice. The DBPR may assess costs against licensees.

Section 468.9421, F.S., requires a professional water damage restorer to maintain general liability and errors and omissions insurance coverage of at least $1 million.

Section 468.9422, F.S., provides that a contract to perform water damage restoration must be in a document or electronic record, signed or otherwise authenticated by the parties.

Section 468.9423, F.S., provides some "grandfather" provisions to allow persons currently practicing water damage restoration to qualify for licensure as a professional water damage restorer if the person submits an application by September 1, 2017, and if the person, at the time of application, has at least 3 years of experience as a professional water damage restorer. To establish the 3 years of experience, an applicant must submit at least 40 water damage restoration invoices prepared by the applicant. The DBPR may investigate the validity of a water damage restoration invoices submitted to comply with grandfather provisions. If the applicant submits a false assessment or invoice, the DBPR may take disciplinary action against the applicant.

An applicant may not qualify for licensure under the "grandfather" provision if he or she has had a professional water damage restorer license or a license in any related field[34] revoked at any time, suspended within the previous 5 years, or has been assessed a fine that exceeds $500 within the previous 5 years.

An applicant for licensure under the "grandfather" provision must still comply with the good moral character and insurance requirements of the bill.

Section 468.9424, F.S., provides that the DBPR shall adopt rules to administer part XVII of ch. 468, F.S.

[34] A license in a related field includes, but is not limited to, licensure in real estate, construction, home inspection, building code administration or inspection, or indoor air quality.

Attorney Fees in Insurance Rates

The bill provides that attorney fees and costs paid by a property insurer pursuant to s. 627.428, F.S., may not be included in a property insurer's rate base and may not be used to justify a rate or rate change.

Replacement Cost Coverage

The bill amends s. 627.7011, F.S., to prohibit an insurer from requiring that a particular vendor make repairs to a dwelling insured on the basis of replacement costs. It also prohibits the insurer from recommending or suggesting a particular vendor to make repairs to a dwelling insured on the basis of replacement costs.

Effective Date

The bill provides an effective date of January 1, 2018. The revisions to s. 627.422, F.S., apply to assignment agreements entered into after January 1, 2018.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues

The Florida Constitution provides:

> Every law shall embrace but one subject and matter properly connected therewith, and the subject shall be briefly expressed in the title.[35]

This bill is titled, "[a]n act relating to property repair." The bill creates a new regulation system for water damage restorers, creates new requirements relating to assignment of post-loss benefits in property insurance policies, and prohibits the use of attorney fees paid pursuant to s. 627.428, F.S. It may be argued that this bill embraces more than one subject or that its subject is not expressed in the title.

[35] Art. III, s. 6, Fla. Const.

In *Smith v. Department of Insurance*,[36] the Florida Supreme Court held that an act relating to tort reform and insurance reform did not violate the single subject requirement. The act at issue in *Smith* contained provisions relating to tort reform, insurance regulation, and insurance rates did not violate the single subject requirement because the Legislature was addressing a crisis in the availability and affordability of liability insurance. Here, it can be argued that the bill's provisions all related to dealing with the rising number of water claims and the increase in property insurance rates.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

The bill imposes fees for licensure of water damage restorers.

B. Private Sector Impact:

Persons who currently work in water remediation will have to obtain a license from the DBPR, comply with continuing education requirements, and be subject to discipline for violations of the regulatory statutes.

The bill prohibits property insurers from including in their rates any attorney fees and costs paid by a property insurer pursuant to s. 627.428, F.S. This will result in a component of the insurer's expenses not being included in rates.

Insurers and claimant attorneys will be subject to new reporting requirements.

C. Government Sector Impact:

The DBPR provided an analysis of the licensing provisions of the original bill. The amendment adopted by the Banking and Insurance Committee made significant changes to the bill. This analysis will be updated when the DBPR has had the opportunity to analyze the committee substitute.

The OIR will have to collect information relating to claims paid and attorney fees paid.

VI. Technical Deficiencies:

The requirement that each insurer report on January 1, 2019, data on claims paid pursuant to an assignment agreement should refer specifically to property insurers. The due date on the report does not provide sufficient time for insurers to compile and submit the required data. The bill requires such data to first be reported to opposing counsel for verification or certification, who must then report to the OIR its agreement or disagreement with the accuracy of the report. The OIR does not have authority to require attorneys to comply with reporting requirements, though perhaps the Florida Bar could discipline such attorneys for lack of compliance.

[36] 507 So.2d 1080 (Fla. 1987).

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 627.062, 627.422, and 627.7011.

This bill creates the following sections of the Florida Statutes: 468.94, 468.941, 468.9411, 468.9412, 468.9413, 468.9414, 468.9415, 468.9416, 468.9417, 468.9418, 468.9419, 468.942, 468.9421, 468.9422, 468.9423, and 468.9424,

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 April 1, 2017:

- Removes provisions allowing insurers to include provisions in certain policies that prohibit assignments of post-loss benefits;
- Creates a regulatory system for professional water damage restorers. The system is modeled after the system of regulating mold assessors in ch. 468, F.S.;
- Requires insurers to report certain information relating to assignment of benefits to the OIR; and
- Prohibits insurers from using attorney fees and costs paid pursuant to s. 627.428, F.S., in their rate base or use the fees to justify a rate or rate change.

B. Amendments:

None.