HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 1421 Property Insurance Assignment Agreements
SPONSOR(S): Commerce Committee; Grant, J.; Plasencia
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	14 Y, 1 N	Peterson	Luczynski
2) Commerce Committee	21 Y, 7 N, As CS	Peterson	Hamon

SUMMARY ANALYSIS

Current statute provides that an insurance policy may be assignable, or not assignable, as provided by its terms. Florida courts have held that an insurance policy may prohibit a pre-loss assignment of benefits; however, the courts have also held that an insurance policy may not prohibit a post-loss assignment. The bill codifies the case law that bars a residential property insurance policy from restricting the assignment of post-loss benefits.

In addition, the bill defines "assignment agreement" and establishes requirements related to the execution, validity, effect, and enforcement of an assignment agreement. Specifically, the bill requires a written agreement, a 7-day period within which the policyholder may rescind the agreement, an estimate of services, notice to the insurer when an assignment agreement has been executed, and notice to the policyholder regarding the legal implications of an assignment agreement. The bill prohibits specified fees in connection with an assignment agreement and prohibits an assignment agreement from altering a policy provision related to managed repair. The bill transfers certain duties of the insurance contract to the assignee which must be carried out before a lawsuit may be filed and duties that shift the burden to the assignee to prove why failure to carry out the duties has not limited the insurer's ability to perform under the contract. The bill also limits an assignee's ability to recover certain costs directly from the policyholder. The new requirements apply to assignment agreements executed after July 1, 2017.

If an assignee intends to file suit against an insurer to enforce an assignment agreement, the bill requires that the assignee give the insurer prior notice. Notice must be served at least 10 business days before filing suit, but may not be filed before the insurer has made a determination of coverage according to the timeframes and requirements of current law. Both parties must exchange specific information related to the claim, including the assignee's presuit settlement demand and the insurer's presuit settlement offer. If the parties fail to settle and litigation results in a judgment, the bill provides the exclusive means for either party to recover attorney fees, other than fees awarded as a sanction. The bill allows an award of attorney fees based on how much the litigation improved the amount that otherwise could have been obtained during settlement negotiations. The bill defines the difference between the insurer's offer and the assignor's demand as "the disputed amount." Fees are then awarded as follows:

- If the difference between the judgment and the settlement offer is less than 25 percent of the disputed amount, then the insurer is entitled to attorney fees.
- If the difference between the judgment and the settlement offer is at least 25 percent but less than 50 percent of the disputed amount, neither party is entitled to fees.
- If the difference between the judgment and the settlement offer is at least 50 percent of the disputed amount, the vendor receives attorney fees.

The Office of Insurance Regulation is directed to require each insurer to report by January 30, 2020, and each year thereafter, specified data on claims paid in the prior year pursuant to an assignment agreement.

The bill does not have a fiscal impact on the state or on local governments. It will have an indeterminate fiscal impact on the private sector.

The bill provides an effective date of July 1, 2017.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background on Assignment Agreements

Generally, an agreement assigning contract benefits allows a third party to collect and enforce collection of insurance proceeds owed to the policyholder directly from the insurance company. Consequently, the proceeds are not paid to the policyholder. Assignment agreements 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. Assignment agreements are becoming more common in property insurance claims, particularly in water damage claims where a homeowner assigns his or her benefits from the property insurance policy to a contractor, water remediation company, or roofer (hereinafter collectively referred to as a "vendor") who repairs the damaged property.

With losses caused by water damage, such as leaky pipes, the homeowner is often facing emergency circumstances where he or she must, as a condition of the insurance policy, mitigate the damage before further damage results. This often involves calling a vendor to the home to immediately mitigate and prevent further flooding. Some insurers assert that the increasingly popular practice of assigning benefits to a vendor in a water damage claim[1] can be problematic. In claims not involving an assignment agreement, typically, the homeowner notifies the insurance company of the loss and the company has the opportunity to inspect the property before permanent repairs begin. Insurers report that in claims involving an assignment agreement, often the work has begun and may be substantially completed before the insurer has the opportunity to inspect the property. This makes it difficult to verify the cause and the extent of the damage and, as a result, the scope of coverage and the appropriate amount of the claim. Insurance policies typically impose certain duties which policyholders must comply with in order to receive coverage under their policies; homeowners must file proofs of loss, produce records, and submit to examinations under oath. However, some Florida courts have held that vendors obtaining an assignment agreement for the claim do not have to comply with these obligations 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.[2]

Assignment agreements used by some vendors attempt to transfer broad rights under the policy and combine the assignment with authorization to perform services described only in general terms.[3] "When a party assigns a contract, the party assigns all equitable and legal interest in the contract to the assignee. The assignee thereafter stands in the shoes of the assignor and may enforce the contract against the original obligor in the assignee's own name."[4] Thus, assignment of the right to receive payment under an insurance contract necessarily assigns the right to enforce payment. An unqualified assignment transfers to the vendor all of the interest the policyholder has under the assigned contract and the policyholder has no right to make any claim on the contract once the assignment is complete, unless authorized to do so by the vendor.[5] Thus, a policyholder who enters into an agreement may unknowingly be assigning away his or her right to determine whether or not to bring suit on the claim. Industry representatives have reported that some homeowners have been unaware litigation was

[1] Insurers report an increasing number of assignment agreements in connection with roof replacement and repair claims, as well.
[2] *See, e.g., Citizens Property Insurance Corporation v. Ifergane,* 114 So. 3d 190 (Fla. 3d DCA 2012); *Shaw v. State Farm Fire and Casualty, Co.*, 37 So. 3d 329, 332 (Fla. 5th DCA 2010).
[3] *See, e.g.*, ERICKSON'S, *Contract for Services, Assignment of Benefits*, http://ericksonsdrying.com/contact-us/contract-for-services-assignment-of-benefits/ (last visited Mar. 5, 2017) (assigning "any and all insurance rights, benefits, and proceeds under applicable insurance policies …; authorizing release of any and all information requested by Erickson's its representative, or its attorney to [sic] the direct purpose of obtaining actual benefits to be paid …; waiv[ing] privacy rights …; appointing Erickson's as attorney-in-fact, authorizing Erickson's to endorse [insured's] name, and to deposit insurance checks ….").
[4] 3A Fla. Jur 2d *Assignments* § 34 (Nov. 2015).
[5] *See, e.g., State Farm Fire and Casualty Co. v. Ray*, 556 So. 2d 811, 813 (Fla. 5th DCA 1990) (citing 4 Fla.Jur.2d, *Assignments, § 23 (1978)).*

pending on their claim until they, themselves, were deposed or subpoenaed by one of the parties. In these cases, the suit may be proceeding against the homeowner's wishes.

Section 627.428(1), F.S., provides for an award of attorney fees against an insurer in a court proceeding "in which the insured or beneficiary prevails …." This "one-way" attorney fee provision, as it is commonly described, serves to level the playing field between an insurance company and a policyholder, thereby creating a disincentive for an insurance company to improperly deny or delay coverage. The Florida Supreme Court has construed the statute as making an award of attorney fees available to a policyholder, the policyholder's estate, specifically named policy beneficiaries, and "third parties who claim policy coverage by assignment from the insured."[6] The policyholder typically sues to be made whole for damages incurred and covered by the policy. A vendor, however, could use litigation and the threat of attorney fees to maximize profit from an insurance claim. This combination of a broad assignment of rights, no assignment of duties, open-ended authorization to perform work, authority to enforce transferred rights to the exclusion of the policyholder's authority to enforce, and the potential for attorney fees has created an environment of escalating concern to insurance companies.

Reported Data

On February 7, 2017, the Commissioner of the Office of Insurance Regulation (Commissioner) testified before the Financial Services Commission regarding the impact of assignment agreements on the domestic insurance market.[7] Of concern is a substantial decrease in the net underwriting gains and net income of domestic insurers, which he attributed to rising loss and loss adjustment expense[8] ratios. He indicated this reduces a company's ability to build policyholder surplus; procure reinsurance; and, lower rates. Between 2010 and the 3rd quarter of 2015, domestic insurers reported a 28 percent increase in the average severity and a 46 percent increase in the frequency per 1,000 policies of water loss claims associated with personal residential insurance policies. During this same period, the use of assignment agreements increased from 5.7 percent to 15.9 percent.[9] The Commissioner also shared data from Citizens Property Insurance Corporation (Citizens). Citizens reports that the percent of litigated water claims has increased from 20.7 percent in 2012 to 34 percent in 2015. During this same period, the percent of litigated water claims with an assignment agreement increased from 9.7 percent to 55 percent, and the percent of litigated water claims with representation at first notice of loss increased from 2.4 percent to 76.1 percent. In 2015, Citizens reports the average cost of litigated water claims was $33,918; the average cost of non-litigated water claims was $5,857.[10] Based on the trend lines, the Commissioner projected the potential for recurring annual rate increases due to water claims and the potential for insurers to discontinue writing policies within specific zip codes.[11] The reduction in available insurance combined with the widening gap between rates in the private market and rates available from Citizens,[12] he indicated, jeopardizes the depopulation of Citizens that has occurred during the last 5 years.[13]

[6] *Roberts v. Carter*, 350 So. 2d 78, 79 (Fla. 1977).
[7] Commissioner David Altmaier, *The Florida Property Insurance Market and Assignment of Benefits (AOB),* Presented to: The Financial Services Commission, Feb. 7, 2017.
[8] A loss adjustment expense, or LAE, is defined as the sum insurers pay for investigating and settling insurance claims, including the cost of defending a lawsuit in court. (INSURANCE INFORMATION INSTITUTE, *Glossary*, http://www.iii.org/services/glossary/l? (last visited Mar. 9, 2017).
[9] Altmaier, *supra* note 7, at 4. *See also* Florida Office of Insurance Regulation, *2015 Report on Review of the 2015 Assignment of Benefits Data Call*, at 6, http://www.floir.com/siteDocuments/AssignmentBenefitsDataCallReport02082016.pdf.
[10] Altmaier, *supra* note 7, at 5.
[11] The percent of approved rate filings requesting a rate increase increased from 37.6 percent in 2014 to 72.3 percent in 2016.
[12] Citizens' rates may not increase more than 10 percent per year, except for sinkhole coverage and increases due to coverage changes and surcharges. s. 627.351(6)(n)6., F.S.
[13] By law, a new policy is ineligible for coverage in Citizens if a private company offers comparable coverage with a premium that is up to 15 percent higher than the Citizens premium. A policy is ineligible for renewal coverage through Citizens if a private company offers comparable coverage at or below Citizens' premium. Thus, if rates for private carriers increase significantly, it is more likely that a policy will meet the threshold for new or renewal coverage by Citizens.

Background on Form Filing and Approval for Property and Casualty Insurance Forms

The Office of Insurance Regulation (OIR) has primary responsibility for regulation, compliance, and enforcement of statutes related to the business of insurance and the admission of new insurers to the market. The OIR oversees insurance company solvency, policy forms and rates, market conduct performance, and new companies entering the Florida market. With limited exceptions,[14] s. 627.410(1), F.S., requires every insurance policy form to be filed with the OIR and approved by the OIR before the form can be used by the insurance company. Thus, residential property insurance policies are not only contracts executed between a policyholder and an insurance company, but contracts whose terms are subject to oversight by the OIR.

Background on Assignability of Insurance Policies

Currently, Florida law provides that "a policy may be assignable, or not assignable, as provided by its terms."[15] An assignment can occur in two circumstances: pre-loss assignments and post-loss assignments. A pre-loss assignment occurs before a policyholder experiences a loss, and a post-loss assignment occurs after a policyholder experiences a loss. Florida courts have held that an insurance company may include language in the policy prohibiting pre-loss assignments.[16] However, the courts have also held that an insurance company may not include language in the policy prohibiting post-loss assignments.[17]

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."[18] In other words, an insurance company can include a provision in a property insurance policy that prohibits a policyholder from assigning his or her policy to a third party. However, the courts have consistently rejected attempts by insurance companies to limit or prohibit a policyholder from assigning his or her rights under the policy once a claim arises. The purpose of a provision that prohibits assignment of the policy is to protect an insurer against unbargained-for risks.[19] One reason a post-loss assignment is valid despite a provision prohibiting assignment without consent of the insurance company is that once a loss occurs, the financial exposure of the insurance company does not change. If a post-loss assignment agreement is executed, the third party cannot assert new rights of his or her own that did not belong to the policyholder. Nevertheless, the assignment agreement can sometimes undermine the insurance company's ability to administer a claim according to the terms of the insurance contract because the assignment agreement conveys only contract rights, not contract duties, e.g., examination under oath.

Effect of the Bill on Assignability of Insurance Policies

The bill amends s. 627.422, F.S., by codifying in statute case law that bars a residential property insurance policy from prohibiting the assignment of post-loss benefits.

In addition, the bill creates s. 627.7152, F.S., which establishes procedural requirements applicable to the assignment of post-loss benefits. The provisions regulating assignment agreements are divided between the execution, validity, and effect, and enforcement of assignment agreements.

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[14] Commercial property insurance forms are among the exceptions.
[15] s. 627.422, F.S.
[16] *Id.*
[17] *Security First Ins. Co. v. Fla. Office of Ins. Reg.,* 177 So. 3d 627 (Fla. 1st DCA 2015).
[18] *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. Kravecas*, 719 So. 2d 320, 321 (Fla. 3d DCA 1998); *One Call Prop. Serv, Inc. v. Sec. First Ins. Co.,* 165 So. 3d 749 (Fla. 4th DCA 2015); *Security First Ins.*, at 628 (prohibiting an insurance company from including language in a property insurance policy that prohibits a policyholder from assigning a post-loss claim).
[19] *Lexington Ins. Co. v. Simkins Industries, Inc.,* 704 So. 2d 1384, 1386 (Fla. 1998).

Execution, Validity, and Effect

The bill defines an "assignment agreement" as a written instrument which assigns post-loss benefits under a residential property insurance policy to a vendor who performs either emergency or non-emergency repairs on the property. To be valid and enforceable an assignment agreement must:

- Be executed in writing concurrently by a named insured and the assignee;
- Permit the policyholder to rescind the agreement within 7 business days of execution, without penalty (the policyholder shall be responsible to pay for work performed before the agreement is rescinded);
- Require the assignee to provide the insurer with a copy of the assignment agreement within 3 business days after the agreement is executed or work has begun, whichever is earlier;
- Include a written, itemized, per-unit cost estimate of services and, if the estimate includes water restoration services, provide proof that the assignee is certified by an entity that requires services to be performed according to a nationally-recognized standard;
- Relate only to the work to be performed by the assignee; and
- Contain notice to the policyholder of the right to rescind the agreement and that, by executing the assignment agreement, the policyholder is giving up certain rights that could result in litigation by the assignee against the insurer.

The bill specifically prohibits an assignment agreement from containing specified fees related to the administration or rescission of the agreement. In addition, the agreement may not alter any term or defense relating to a managed repair arrangement provided in the insurance policy.

The bill transfers duties of the insurance contract to the assignee which, if not carried out, shift the burden to the assignee to prove why the failure did not limit the insurer's ability to perform under the contract. The duties are to:

- Maintain and provide requested service records for copying;
- Cooperate in the investigation of a claim; and
- Deliver the assignment agreement to the insurer as required (within 3 business days of execution or when work begins).

The bill also transfers duties to the assignee which must be performed before the assignee may file suit. If required by the insurer, the assignee must participate in:

- Examinations under oath and recorded statements that are reasonably necessary, based on the scope of work and complexity of the claim, and limited to matters related to the services provided, the cost of the services and the assignment.
- Appraisal or other alternative dispute resolution process in accordance with the terms of the property insurance policy.

The bill requires the assignee to provide the assignor with revised statements regarding work to be performed as supplemental or additional repairs are required and to perform work in compliance with current industry standards.

By entering into an assignment agreement, the assignee and its subcontractors waive any claim against the policyholder, including the right to claim a lien against the policyholder's real property, for payment related to the services performed. The waiver does not include a claim for payment of applicable deductibles, work performed before the agreement was rescinded by the policyholder, or any enhancements ordered and approved by the policyholder.

Enforcement

The bill requires an assignee to give an insurer and the assignor prior written notice before filing suit on a claim. Notice must be served at least 10 business days before filing the complaint, but may not be served before the insurer has made a determination of coverage according to the timeframes and requirements of current law.[20] Notice must also specify the damages in dispute, the amount claimed, and any presuit settlement demand and must include an itemized, detailed written invoice or estimate of the work performed or to be performed. If the work includes water remediation services, then the invoice must include proof the assignee possesses the required certification. The insurer must respond in writing within the 10 days by making a settlement offer or requiring appraisal or other alternative dispute resolution as may be provided in the policy.

If the parties fail to settle and litigation results in a judgment, the bill provides the exclusive means for either party to recover attorney fees. In effect, the bill precludes use of the one-way attorney fee statute by the assignee, but allows an award of attorney fees based on how much the litigation improved the amount that otherwise could have been obtained during settlement negotiations. To accomplish this, the bill defines the difference between the insurer's offer and the assignor's demand as "the disputed amount." Fees are then awarded as follows:

- If the difference between the judgment and the insurer's settlement offer is less than 25 percent of the disputed amount, then the insurer is entitled to attorney fees.
- If the difference between the judgment and the insurer's settlement offer is at least 25 percent but less than 50 percent of the disputed amount, neither party is entitled to fees.
- If the difference between the judgment and the settlement offer is at least 50 percent of the disputed amount, the vendor receives attorney fees.

Fees and costs are also recoverable under s. 57.105, F.S.[21]

Other Provisions

The bill directs the OIR to require insurers to report by January 30, 2020, and each year thereafter, detailed data related to claims, including, at a minimum, specific data about claims adjustment and settlement timeframes and trends, broken out by whether litigated or not litigated; by loss adjustment expenses; and by amount and type of attorney fees incurred or paid.

The requirements of the new section apply to assignment agreements entered into after July 1, 2017. The requirements do not apply to post-loss assignments to a subsequent purchaser of the property; power of attorney that grants specified parties authority to act for the insured in connection with the claim; and the liability coverages under a property insurance policy.

B. SECTION DIRECTORY:

Section 1: Creates s. 627.7152, F.S., relating to assignment agreements.
Section 2: Amends s. 627.422, F.S., relating to assignment of policies.
Section 3: Provides an effective date of July 1, 2017.

[20] Section 627.70131, F.S., requires an insurer to pay or deny a claim or any portion of a claim within 90 days after first notice of loss, or of a reopened or supplemental property insurance claim.
[21] Section 57.105, F.S., requires the award of attorney fees, paid in equal amounts by the losing party and the losing party's attorney, when the court finds that a claim or defense is not supported by necessary material facts or the material facts are not supported by the law.

II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

A. FISCAL IMPACT ON STATE GOVERNMENT:

1. Revenues:

   None.

2. Expenditures:

   None.

B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

1. Revenues:

   None.

2. Expenditures:

   None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

It will have an indeterminate fiscal impact on insurers and vendors who enter into assignment agreements.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. The bill does not appear to affect county or municipal governments.

2. Other:

   None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On April 19, 2017, the Commerce Committee considered a proposed committee substitute and reported the bill favorably as a committee substitute. The committee substitute reflects multiple changes, as follows:

- Requires assignment agreements to be concurrently executed by a named insured and assignee.

- Clarifies the timeframe within which an assignment agreement must be transmitted to an insurer.
- Requires an assignee to submit to examinations under oath and to participate in appraisal or other alternative dispute resolution, pursuant to the terms of the policy, as a requirement before filing suit.
- Revises the presuit notice and demand procedures.
- Revises the attorney fee award available in litigation pursuant to a residential property insurance assignment agreement. Specifically, the bill defines the difference between the insurer's offer and the assignor's demand as "the disputed amount." The bill then states:
    - If the difference between the judgment and the settlement offer is less than 25 percent of the disputed amount, then the insurer is entitled to attorney fees.
    - If the difference between the judgment and the settlement offer is at least 25 percent but less than 50 percent of the disputed amount, neither party is entitled to fees.
    - If the difference between the judgment and the settlement offer is at least 50 percent of the disputed amount, the vendor receives attorney fees.
- Directs the Office of Insurance Regulation to require insurers to report by January 30, 2020, and each year thereafter, detailed data related to claims, including, at a minimum, specific data about claims adjustment and settlement timeframes and trends, broken out by whether litigated or not litigated; by loss adjustment expenses; and amount and type of attorney fees incurred or paid.

The analysis has been updated to reflect the committee substitute.