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 Judiciary

BILL:	CS/SB 122
INTRODUCER:	Banking and Insurance Committee and Senator Broxson and others
SUBJECT:	Agreements Between Service Providers and Consumers
DATE:	March 15, 2019 REVISED:

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Billmeier	Knudson	BI	**Fav/CS**
2.	Davis	Cibula	JU	**Pre-meeting**
3.			RC	

Please see Section IX. for Additional Information:

PLEASE MAKE SELECTION

I. Summary:

CS/SB 122 provides that a post-loss assignments of benefits under a property insurance policy or under the comprehensive or combined additional coverage of a motor vehicle insurance policy for coverage of windshield damage is only valid if:

- A copy of the agreement is provided to the consumer's insurer within 3 business days after the agreement's execution;
- The agreement may be rescinded within 14 days of execution or at least 30 days after the execution if the service provider has not begun substantial work on the property;
- The agreement does not impose any fee or penalty for rescinding the agreement, for check processing, for not using a specified service provider for permanent repairs, or for mortgage processing;
- The agreement does not assign more than $500, if related to repairing a windshield under a motor vehicle insurance policy's comprehensive or combined additional coverage;
- The agreement does not transfer authority to adjust, negotiate, or settle a claim to a person who is not authorized to do so under the Insurance Adjusters Law;
- The agreement does not transfer a greater right to attorney fees than that created by the bill;
- The agreement does not prevent or inhibit an insurer from communicating with the consumer at any time; and
- The agreement relates only to work performed or to be performed by the service provider.

The bill removes the "one way" attorney fee for assignees of property insurance benefits or motor vehicle insurance benefits to repair or replace automobile windshields under

comprehensive or combined additional coverage. It does not change the law relating to first party insurance claims. Instead of "one way" attorney fees, the bill provides that the prevailing party in a suit between an assignee and an insurer has the right to attorney fees and costs. The bill defines the prevailing party as the party which prevails on the significant issues of the case and provides factors that a court must consider when determining the prevailing party:

- The issues litigated;
- The amount of the claim by the service provider versus the amount recovered;
- The existence of setoffs and counterclaims; and
- The amounts offered by either party to resolve the issues prior to or during litigation.

The bill provides that if a consumer acts under urgent or emergency circumstances to protect property from damage and enters into an agreement with a service provider, the service provider may only contract for the right to payment for the work necessary to protect and prevent additional damage to the property. The right to payment may include a post-loss assignment of benefits. However, a service provider may not receive from a consumer acting under urgent or emergency circumstances an assignment of post-loss benefits in excess of:

- Under a property insurance policy, in excess of the greater of $3,000 or 1 percent of the Coverage A limit under such policy.
- Under a motor vehicle insurance policy for comprehensive or combined additional coverage for windshield damage, in excess of $500.

The bill requires an assignee and any subcontractor of the assignee to waive any and all claims against a consumer. However, the consumer remains responsible for the payment of any deductible amount provided for by the terms of the insurance policy, and for the cost of any betterment ordered by the consumer. The waiver is effective even if the assignment agreement is subsequently found invalid or rescinded by the consumer.

The bill provides that if an assignee commences a suit based upon or including the same claim against the same adverse party that such assignee has previously voluntarily dismissed, the court may order the assignee to pay the costs of the adverse party of the action previously voluntarily dismissed.

This bill takes effect on July 1, 2019.

II. Present Situation:

Attorney Fees in Insurance Litigation

In general, parties to a lawsuit each pay their own attorney fees unless statutes or contractual provisions provide otherwise. 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.[1]

This statute allows an insured to recover his or her own attorney fees if the insured prosecutes a lawsuit to enforce an insurance policy. Some version of this statute has been the law in Florida since at least 1893.[2]

The Florida Supreme Court recently explained the purpose of the statute:

> The need for fee and cost reimbursement in the realm of insurance litigation is deeply rooted in public policy. Namely, the Legislature recognized that it was essential to "level the playing field" between the economically-advantaged and sophisticated insurance companies and the individual citizen. Most assuredly, the average policyholder has neither the finances nor the expertise to single-handedly take on an insurance carrier. Without the funds necessary to compete with an insurance carrier, often a concerned policyholder's only means to take protective action is to hire that expertise in the form of legal counsel… For this reason, the Legislature recognized that an insured is not made whole when an insurer simply grants the previously denied benefits without fees. The reality is that once the benefits have been denied and the plaintiff retains counsel to dispute that denial, additional costs that require relief have been incurred. Section 627.428, F.S., takes these additional costs into consideration and levels the scales of justice for policyholders by providing that the insurer pay the attorney's fees resulting from incorrectly denied benefits.[3]

Florida courts have interpreted the statute broadly to allow recovery of fees when the insurer ultimately settles the case before trial.[4] The court awards fees pursuant to the statute even if the insurer does not act in bad faith.[5]

There must be a dispute over the amount owed before attorney fees can be recovered pursuant to s. 627.428, F.S. In *Goldman v. United Services Automobile Association*,[6] homeowners sustained water damage due to a plumbing leak. The homeowners reported the claim to their insurance company. The insurance company investigated and paid the claim. The homeowners filed a lawsuit without informing the insurance company that they disputed the amount of the claim.

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[1] Section 626.9373, F.S., contains substantially similar language but it applies to surplus lines insurers. Florida courts have interpreted the statutes to have the same meaning.

[2] See *Tillis v. Liverpool & London & Globe Insurance Company*, 35 So. 171 (1903)(rejecting an insurance company argument that the 1893 law providing that an insured may recover attorney fees in actions against an insurance company to enforce a policy violates due process and equal protection).

[3] *Johnson v. Omega Ins. Co.*, 200 So.3d 1207, 1215-1216 (Fla. 2016)(internal citations omitted).

[4] *Johnson v. Omega Ins. Co.*, 200 So.3d 1207, 1215 (Fla. 2016)(noting that it is it is "well settled that the payment of a previously denied claim following the initiation of an action for recovery, but prior to the issuance of a final judgment, constitutes the functional equivalent of a confession of judgment").

[5] *Insurance Co. of North America v. Lexow*, 602 So.2d 528, 531 (Fla. 1992)("We reject the argument that attorney's fees should not be assessed against INA because this dispute involved a type of claim which reasonably could be expected to be resolved by a court. INA's good faith in bringing this suit is irrelevant. If the dispute is within the scope of s. 627.428, F.S., and the insurer loses, the insurer is always obligated for attorney's fees").

[6] *Goldman v. United Services Automobile Association*, 244 So.3d 310 (Fla. 4th DCA 2018).

The insurance company demanded an appraisal and paid the disputed amount after the appraisal award.[7] The court held the homeowners were not entitled to attorney fees because the insurance company was not aware of a dispute over the amount of the claim until the filing of the lawsuit. The court said that attorney fees may only be recovered when the claims process breaks down and the parties are no longer working to resolve the claim.[8]

Assignments of Post-Loss Insurance 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. This assignment is often called an "assignment of benefits" or "AOB." 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 insurance benefits.[9]

The Florida Supreme Court Applies Section 627.428, F.S., to AOB Cases

Section 627.428, F.S., provides that "any named or omnibus insured or the named beneficiary under a policy" may be entitled to attorney fees. In 1961, the First District Court of Appeal held that an assignee of the proceeds of a life insurance policy could recover attorney fees when the assignee had to sue to enforce payment.[10]

In 1971, the Fourth District Court of Appeal considered whether the insured's assignee of benefits from a property insurance policy was entitled to attorney fees and held the assignee was not entitled to fees because the assignee was not a named insured or beneficiary.[11] The Fourth District's opinion was appealed to the Florida Supreme Court and the Florida Supreme Court reversed. In 1972, the Florida Supreme Court held that an insured's assignee is entitled to attorney fees under s. 627.0127, F.S., the predecessor statute to s. 627.428, F.S. The court said "an assignee of an insurance claim stands to all intents and purposes in the shoes of the insured and logically should be entitled to an attorney's fee when he sues and recovers on the claim."[12]

The court reaffirmed the holding in 2008:

> [S]ection 627.428 authorizes an award of attorney's fees only to "the named or omnibus insured or named beneficiary" under an insurance policy and to other third parties who obtain coverage based on an assignment from an insured.[13]

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[7] *Goldman*, 244 So.3d at 311.
[8] *Goldman*, 244 So.3d at 312. *See also Hill v. State Farm Florida Insurance Company*, 35 So.3d 956, 961 (Fla. 2d DCA 2010)(stating that "fees should normally be limited to the work associated with filing the lawsuit after the insurance carrier has ceased to negotiate or has breached the contract and the additional legal work necessary and reasonable to resolve the breach of contract); *Lewis v. Universal Property and Casualty Insurance Co.*, 13 So.3d 1079 (Fla. 4th DCA 2009).
[9] *Nationwide Mutual Insurance Company v. Pinnacle Medical, Inc.* 753 So.2d 55, 57 (Fla. 2000)("The right of assignee to sue for breach of contract to enforce assigned rights predates the Florida Constitution").
[10] *Travelers Insurance Company v. Tallahassee Bank and Trust Company*, 133 So.2d 463 (Fla. 1st DCA 1961).
[11] *Southern American Fire Insurance Company v. All Ways Reliable Building Maintenance, Inc.*, 251 So.2d 11 (Fla. 4th DCA 1971), *reversed, All Ways Reliable Building Maintenance, Inc. v. Moore*, 261 So.2d 131 (Fla. 1972).
[12] *All Ways Reliable Bldg. Maintenance, Inc. v. Moore*, 261 So.2d 131, 132 (1972)
[13] *Continental Cas. Co. v. Ryan, Inc. Eastern*, 974 So.2d 368, 379 (Fla. 2008).

Anti-Assignment Provisions in Insurance Contracts Do Not Prevent AOB in Property Insurance or Motor Vehicle Insurance

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*,[14] 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.[15]

An assignment made after the loss is valid even if the contract states otherwise.[16] In *Continental Casualty Company v. Ryan Incorporated Eastern*,[17] 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 simply the transfer of the right to a claim for money" and "has no effect upon the insurer's duty under the policy."[18]

Assignments have been prohibited by contract in other insurance contexts. In *Kohl v. Blue Cross Blue Shield of Florida, Inc.*,[19] 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."[20]

AOB in Property Insurance Cases

In recent years, insurers have complained of abuse of the assignment of benefits process. An insurance company 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

[14] *Lexington Insurance Company v. Simkins Industries* 704 So.2d 1384 (Fla. 1998).
[15] *Id*. at 1386.
[16] *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).
[17] *Continental Casualty Company v. Ryan Incorporated Eastern*, 974 So.2d 368, 377 n. 7 (Fla. 2000).
[18] *Wehr Constructors, Inc. v. Assurance Company of America*, 384 S.W.3d 680, 683 (Ky. 2012). The Florida courts' interpretation of s. 627.422, F.S., appears to be the position of a majority of states that have considered the issue.
[19] *Kohl v. Blue Cross Blue Shield of Florida, Inc.*, 955 So.2d 1140 (Fla. 4th DCA 2007).
[20] *Id*. at 1144-1145.

> 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 settlements from insurers. This, in turn, significantly increases litigation over the vendors' invoices.[21]

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.[22]

There have been a number of cases in recent years where courts have held that post-loss benefits are assignable.[23]

Automobile Insurance

Automobile insurance consists of different types of insurance coverages. Personal injury protection or "PIP" coverage is required in Florida to cover injuries to the driver regardless of which party is at fault in an accident. Bodily injury liability coverage pays for damage that the insured causes to other drivers and passengers in an accident. Property damage liability coverage covers damage that the insured causes to the property of another individual. Collision coverage pays for damages to the insured automobile caused by a collision with another automobile. Comprehensive coverage generally pays for damages to the insured automobile, including damage to the windshield, caused by events other than a collision.

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[21] *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).
[22] *One Call Property Services, Inc. v. Security First Insurance Company*, Case No. 4D14-0424 (Fla. 4th DCA), Appellant's Initial Brief at 46-48.
[23] *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.3d 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).

The "deductible" is the amount the insured must pay before the insurance company pays any amount. Section 627.7288, F.S. states:

> The deductible provisions of any policy of motor vehicle insurance, delivered or issued in this state by an authorized insurer, providing comprehensive coverage or combined additional coverage shall not be applicable to damage to the windshield of any motor vehicle covered under such policy.[24],[25]

Consumers who purchase the minimum coverage required by law do not have first-party coverage for windshield repair or replacement. Consumers who purchase comprehensive coverage have first-party coverage if a windshield is damaged or broken. Lenders often require borrowers to purchase comprehensive coverage, so consumers who owe money on their vehicles will often qualify for windshield repair or replacement without a deductible.[26]

Windshield Replacement and Repair

Florida law does not contain insurer claim handling requirements specific to windshield claims. The claims are handled through the insurance contract. Current law does not prohibit an insurer from including an inspection requirement in policy forms.

Many Florida insurance carriers set up a network of providers that will provide windshield repair or replacement services at negotiated rates. If the insured uses one of these "in-network" providers, an insured windshield is repaired or replaced at no cost to the insured. Some glass shops do not participate in the insurer's provider network. To claim benefits from an insured's automobile insurer, the "out-of-network" shop often obtains an assignment of benefits from the insured. Florida law allows an insured to assign the benefits of his or her insurance policy to a third party, in this case, the out-of-network glass shop. The assignee glass shop can negotiate with the insurer and file a lawsuit against the insurance company if the two sides do not agree on the claim amount. [27]

Vehicle Safety Requirements

Section 316.2952, F.S., requires vehicles operated on highways to have a windshield. Section 316.610, F.S., prohibits driving a vehicle in such an unsafe condition that it endangers persons or property. A police officer is allowed to stop a vehicle if required equipment is not in proper repair.[28] Depending on the severity of the equipment damage, a police officer may order a vehicle removed from use until repairs are made or give the driver 48 hours to make the repairs.[29]

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[24] Language similar to s. 627.7288, F.S., has been part of Florida law since 1979. *See* Ch. 79-241, Laws of Florida.
[25] At least seven other states have provisions prohibiting insurers from requiring a deductible for windshield claims or allowing insureds to purchase a policy with no deductible for windshield claims.
[26] Florida Department of Financial Services, *Automobile Insurance A Toolkit for Consumers*, https://www.myfloridacfo.com/division/consumers/UnderstandingCoverage/Guides/documents/AutoToolkit.pdf (last visited March 15, 2019).
[27] Dale Parker and Brendan McKay, *Florida Auto Glass Claims: A Cracked System*, Trial Advocate Quarterly Fall 2016 (Westlaw Citation: 35 No. 4 Trial Advoc. Q. 20).
[28] Section 316.610(1), F.S.
[29] Section 316.610(2), F.S.

AOB Windshield Litigation

According to the Department of Financial Services,[30] the number of AOB auto glass lawsuits has increased in recent years:

Year	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Auto Glass	397	571	271	709	351	478	1,389	4,331	9,018	12,817	19,695	25,664	17,399

Some insurers argue that the increase in litigation is caused by the ability of some vendors to execute an assignment of benefits and recover attorney fees under s. 627.428, F.S. They allege that some vendors are obtaining an assignment of benefits from the insured and inflating the cost of the claim when they bill the insurance company.[31] Insurers also believe that many windshield claims brought by assignees are fraudulent.[32,33] In such cases, the insurer must determine whether to pay what it believes to be an inflated or fraudulent claim or pay its own attorneys to litigate the case and risk having to pay the other side's attorney fees if it does not prevail.[34]

Some auto glass vendors argue that litigation is necessary because insurers enter into agreements with preferred vendors and will not pay the "prevailing competitive price" for windshield repair or replacement. Instead, some vendors contend, insurers will only pay the price they pay to the preferred vendors and that litigation is necessary to force the insurers to pay the "prevailing competitive price" pursuant to the insurance policy language.[35]

Data and Recommendations for Reform

According to the Department of Financial Services,[36] the number of AOB lawsuits for water claims has increased in recent years:

Year	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Water	8	35	87	184	483	989	1,603	2,083	2,786	5,328	8,488	10,937	16,890

This chart shows the percentage of lawsuits with an AOB for water claims or for windshield glass:

Year	Lawsuits	AOB	AOB Percentage
2018	278,739	34,289	12.3%

[30] Data provided by the Department of Financial Services (on file with the Senate Committee on Banking and Insurance).
[31] One provider offers cash rebates and restaurant gift cards to customers "with qualifying insurance" for windshield repair or replacement. *See* http://www.auto-glassamerica.com (last accessed March 15, 2019).
[32] *Government Employees Insurance Co. v. Clear Vision Windshield Repair, L.L.C.*, 2017 WL 1196438 (M.D. Florida March 29, 2017).
[33] In *VIP Auto Glass, Inc. v. Geico General Insurance Co., 2018 WL 3649638* (M.D. Florida January 3, 2018), the court dismissed a class action lawsuit brought by an auto glass company because the court found the assignment of benefits was fraudulent. The court also awarded attorney fees to the insurance company.
[34] Florida Justice Reform Institute, White Paper: *Restoring Balance in Insurance Litigation* (2015)(on file with the Senate Committee on Banking and Insurance).
[35] *See VIP Auto Glass, Inc. v. Geico General Insurance Co.*, 2017 WL 3712918 (M.D. Florida March 17, 2017) at p. 1. (discussing a class action lawsuit against Geico by VIP Auto Glass).
[36] Data presented to the Senate Committee on Banking and Insurance on January 22, 2019 (on file with the Senate Committee on Banking and Insurance).

2017	229,188	36,601	16.0%
2016	192,598	28,183	14.6%
2015	161,062	18,145	11.3%
2014	148,003	11,804	8.0%
2013	141,320	6,414	4.5%[37]

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.[38] The OIR found that water losses alone could require rate increases of 10 percent per year.[39] The Insurance Commissioner showed that the OIR has approved a greater percentage of rate increases in personal residential insurance in recent years:

Year	Percentage of Filings with a Rate Increase
2017	91.9%
2016	72.0%
2015	44.9%
2014	37.6%[40]

In 2017, the OIR conducted another data call on AOB. The OIR found that water losses (a combination of the frequency of water claims and the severity of the claims) increased 14.2 percent per year from January 1, 2010, to September 30, 2015.[41] From January 1, 2015, to June 30, 2017, water losses increased by 42.1 percent per year.[42] In 2015, almost 13 percent of the water claims utilized an AOB. In 2017, that percentage was approximately 17 percent.[43]

Citizens Property Insurance Company (Citizens) reports an increase in both litigation and litigation where the claimant has an AOB:[44]

Year	Lawsuits	AOB	AOB Percentage
2018	13,363	3,631	27.2%
2017	7,624	2,718	35.6%
2016	10,061	3,242	32.2%
2015	7,653	1,250	16.3%

[37] The number of lawsuits was determined by entering a start date of January 1 and an end date of December 31 for each year as selection criteria into the Florida Department of Financial Services Service of Process reports site https://apps.fldfs.com/LSOPReports/Reports/Report.aspx (last visited March 15, 2019). The number of AOB lawsuits was provided the Florida Department of Financial Services.
[38] http://www.floir.com/Sections/PandC/AssignmentofBenefits.aspx (last accessed February 5, 2019).
[39] Office of Insurance Regulation, *2015 Report on Review of the 2015 Assignment of Benefits Data Call* (February 8, 2016) at p 8. The report can be accessed at https://www.floir.com/siteDocuments/AssignmentBenefitsDataCallReport02082016.pdf (last visited on February 5, 2019).
[40] Presentation by David Altmaier to the Senate Committee on Banking and Insurance on January 22, 2019 (on file with the Senate Committee on Banking and Insurance).
[41] Office of Insurance Regulation, *Report of the 2017 Assignment of Benefits Data Call*, January 8, 2018, at page 1. The report can be accessed at https://www.floir.com/siteDocuments/AssignmentBenefitsDataCallReport02082017.pdf (last visited on February 5, 2019).
[42] *Id*.
[43] *Id.* at p. 3.
[44] Presentation by Barry Gilway to the Senate Committee on Banking and Insurance on January 22, 2019 (on file with the Senate Committee on Banking and Insurance).

2014	9,525	1,062	11.1%
2013	9,146	860	9.4%

The current average actuarial rate indication for multiperil homeowners polices for policies issued by Citizens Property Insurance Company (Citizens) is 25.2 percent. Citizens anticipates an actuarial rate indication on the same policies of 10.1 percent if AOB reform is successful.[45] Citizens reports that 70 percent of its homeowners multiperil customers received rate decreases in 2015 while 97 percent of those customers will see rate increases in 2019.[46]

A restoration contractor testified that issues arise between assignees and insurers because insurers wrongly deny claims and adjusters are poorly trained.[47] The contractor suggested the following solutions:

- Regulation of restoration contractors;
- Increased training for insurance company claims staff;
- Increased penalties for insurance fraud committed by contractors; and
- Penalties against insurers for underpayment and delayed claims.[48]

Nebraska AOB Reform

In *Millard Gutter Company v. Farm Bureau Property and Casualty Insurance Company*,[49] the Nebraska Supreme Court held that assignment of post-loss benefits from an insured to a roofing contractor is allowed under Nebraska law. In 2018, the Nebraska Legislature adopted a statute to deal with perceived issues in Nebraska. The statute:

- Allows an assignment to authorize a contractor to be named as a copayee;
- Requires the assignment to be provided to the insurer within five business days after execution;
- Requires the following notice on an assignment:

> YOU ARE AGREEING TO ASSIGN CERTAIN RIGHTS YOU HAVE UNDER YOUR INSURANCE POLICY. WITH AN ASSIGNMENT, THE RESIDENTIAL CONTRACTOR SHALL BE ENTITLED TO PURSUE ANY RIGHTS OR REMEDIES THAT YOU, THE INSURED HOMEOWNER, HAVE UNDER YOUR INSURANCE POLICY. PLEASE READ AND UNDERSTAND THIS DOCUMENT BEFORE SIGNING;

- Provides that the assignment shall not impair the interest of a mortgagee; and
- Provides that the assignment shall not prevent or inhibit an insurer from communicating with the named insured or mortgagee.[50]

[45] Presentation by Barry Gilway to the Senate Committee on Banking and Insurance on January 22, 2019 (on file with the Senate Committee on Banking and Insurance).
[46] *Id*.
[47] Presentation by Josh Reynolds to the Senate Committee on Banking and Insurance on February 4, 2019 (on file with the Senate Committee on Banking and Insurance).
[48] *Id*.
[49] *Millard Gutter Company v. Farm Bureau Property and Casualty Insurance Company,* 889 N.W.2d 596 (Neb. 2016).
[50] Neb.Rev.St. s 44-8605.

Florida Courts Say if Policy Changes Are Needed, They Should be Made by the Legislature

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.[51]

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.[52]

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."[53]

III. Effect of Proposed Changes:

The bill creates requirements for assignment agreements between a consumer[54] and a service provider.[55] The bill changes how a service provider can obtain attorney fees in a civil action based on assignment of post-loss benefits under a property insurance policy or under a motor vehicle insurance policy for coverage of windshield damage. It limits the ability of consumers to contract for repairs in emergency or urgent situations. It provides a deterrent to prevent "judge shopping" by litigants. The bill contains legislative findings and intent. Each subject will be discussed as follows.

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[51] *Security First Ins. Co. v. State of Florida Office of Insurance Regulation*, 177 So.3d 627, 628, *rehearing denied* (Fla. 1st DCA 2015).
[52] *One Call Property Services, Inc. v. Security First Ins. Co.*, 165 So.3d 749, 755 (Fla. 4th DCA 2015).
[53] *Id*.
[54] The bill defines consumer as "a person who has an interest in, or who has a right to manage real or personal property, including improvements upon such property, regardless of whether for personal or business purposes, including an owner, a tenant, a licensee, or a property manager."
[55] The bill defines "service provider" as "a person who enters into an agreement with a consumer for the stabilization, repair, improvement, or remediation of real or personal property."

Requirements for Agreements Containing a Post-Loss Assignment of Benefits

The bill creates section 501.172, F.S., to govern assignment agreements between service providers and consumers. It requires that an agreement entered into by a consumer and a service provider after a loss or damage has occurred to the consumer's property which contains a post-loss assignment of benefits to the service provider or some third person is only valid if:

- The consumer or service provider provides a copy of the agreement to the consumer's insurer, sent to the location designated for receipt of such agreements if specified in the insurance policy, within 3 business days after the agreement's execution;
- The agreement contains a provision allowing the consumer to rescind the agreement in a writing signed by the assignor, if the consumer provides written notice of the rescission to the service provider within 14 days of the execution of the agreement or at least 30 days after the execution of the agreement if the service provider has not begun substantial work on the property;
- The agreement does not impose any fee or penalty for rescinding the agreement, for check processing, for not using a specified service provider for permanent repairs, or for mortgage processing;
- The agreement does not prevent or inhibit an insurer from communicating with the consumer at any time;
- The agreement, if made under a motor vehicle insurance policy for comprehensive or combined additional coverage for windshield damage, does not assign the right to more than $500 in post-loss benefits;
- The agreement does not transfer or create any authority to adjust, negotiate, or settle any portion of a claim to a person or an entity who is not authorized to adjust, negotiate, or settle a claim on behalf of the insured or claimant under part VI of chapter 626;
- The agreement does not transfer to the assignee any greater right to attorney fees and costs from the insurer than the right to attorney fees and costs as provided for in the bill; and
- The agreement relates only to work performed or to be performed by the service provider.

Attorney Fees

The bill provides that in a civil action under a property insurance policy or under the comprehensive or combined additional coverage under a motor vehicle insurance policy for coverage of windshield damage, between an insurer and a service provider who obtains an assignment of post-loss benefits, the prevailing party has the right to attorney fees and costs from the opposing party. The prevailing party is the party which prevails on the significant issues of the case. The court may determine that there is no prevailing party in a case. In determining if there is a prevailing party, the court must consider:

- The issues litigated;
- The amount of the claims by the service provider versus the amount recovered;
- The existence of setoffs and counterclaims, if any; and
- The amounts offered by either party to resolve the issues prior to or during litigation.

Service provider assignees will no longer be able to obtain attorney fees from an insurer under ss. 626.9373 or 627.428, F.S. Instead, they can obtain attorney fees from an insurer similar to the way a contractor can obtain fees against a homeowner in a construction lien case.

In *Trytek v. Gale Industries, Inc.*, 3 So.3d 1194, 1203 (Fla. 2009), the Florida Supreme Court discussed the factors that a lower court must consider when determining the prevailing party in a construction lien case:

> [W]e conclude that a trial court has the discretion to make a determination that neither party has prevailed on the significant issues in litigation after a thorough examination of all the factors, including the issues litigated, the amount of the claim of lien versus the amount recovered on the lien, the existence of setoffs and counterclaims by the homeowner, and the amounts offered by either party to resolve the issues prior to the litigation, assuming that those negotiations were not otherwise confidential either by agreement or statute.

The bill requires the court to consider the same factors set forth in *Trytek* when determining which party, if any, prevailed in the case. The bill's changes to attorney fee statutes in litigation against insurers only applies when certain benefits are assigned. It does not alter the ability of insureds to obtain attorney fees in actions against their own insurers.

Agreements Between Service Providers and Consumers Under Emergency Circumstances

The bill provides that if a consumer acts under urgent or emergency circumstances to protect property from damage and enters into an agreement with a service provider to stabilize, protect, repair, or improve such property, the service provider may only contract for the right to payment for the work necessary to stabilize, protect, and prevent additional damage to the property. Such right to payment may include a post-loss assignment of benefits under a property insurance policy or under the comprehensive or combined additional coverage under a motor vehicle insurance policy for coverage of windshield damage.

A service provider may not receive from a consumer acting under urgent or emergency circumstances an assignment of post-loss benefits:

- Under a property insurance policy, in excess of the greater of $3,000 or 1 percent of the Coverage A limit under such policy or
- Under a motor vehicle insurance policy for comprehensive or combined additional coverage for windshield damage, in excess of $500.

A service provider may receive an acknowledgement of the rights that may exist, if any, under chapter 713 to make a claim upon the property.

The bill provides that an agreement between a consumer and a service provider that provides greater rights to the service provider under such urgent or emergency circumstances, including rights to do further repairs, remediation, or improvements or an assignment of rights, benefits, causes of action, or other contractual rights is void.

Limitation on Recovery from the Consumer

An assignee service provider and any subcontractor of the service provider that accepts an assignment of post-loss benefits waives any and all claims against a consumer. However, the consumer remains responsible for the payment of any deductible amount provided for by the

terms of the insurance policy, and for the cost of any betterment ordered by the consumer. The bill does not prohibit the assignee from collecting or attempting to collect money from, maintaining an action at law against, or claiming a lien on the property of a consumer or reporting a consumer to a credit agency for payment of the amount of the insurance deductible, or any amount attributable to betterment ordered by the consumer. The waiver is effective notwithstanding any subsequent determination that the assignment agreement is invalid or the rescission of the assignment agreement by the consumer.

Actions Based on the Same Claim Previously Dismissed

The bill provides that if a service provider assignee commences an action in any court based upon or including the same claim against the same adverse party that such assignee has previously voluntarily dismissed, the court may order the assignee to pay the attorney fees and costs of the adverse party.

Application

This bill does not apply to a power of attorney granted to a management company, family member, guardian, or similarly situated person which complies with chapter 709 and which may include, as part of the authority granted, the authority to act in place of a principal as it relates to a property insurance or motor vehicle insurance claim, if such power of attorney is not provided to a service provider or any person with a personal or financial interest in the service provider.

Legislative Findings and Intent

The bill contains legislative findings and intent language. In these findings, the Legislature recognizes that "one way" attorney fee statutes are intended to level the economic playing field between the economically-advantaged insurance company and the individual consumer. It finds that the award of attorney fees to the individual consumer under these statutes makes the consumer financially whole and discourages insurance companies from contesting valid claims.

The Legislature finds that the increased use of post-loss assignment of benefits by service providers has led to a dramatic increase in assignment of benefits litigation. The Legislature recognizes that additional costs incurred by insurance companies in contesting assignment of benefits-related litigation are factored into the rates charged for property insurance and motor vehicle insurance. By explicitly providing that any right to attorney fees or costs against an insurer by an assignee service provider shall be as provided by the bill, the Legislature finds that it is addressing the increase in assignment of benefits litigation by nonparties to property insurance policies and motor vehicle insurance policies for coverage of windshield damage and the associated increase in insurance premiums that are experienced by consumers.

Other Provisions

The bill amends sections 626.9373 and 627.428, F.S., to provide that attorney fees may not be awarded under those sections to an assignee of post-loss benefits who is a service provider under section 501.172, F.S.

The bill provides that section 501.172, F.S., and the amendments to ss. 626.9373 and 627.428, F.S., apply to actions pending on or after July 1, 2019, to the extent they do not require the invalidation of any provision of a contract executed before July 1, 2019.

The bill takes effect on July 1, 2019.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:

Due Process

The Florida Supreme Court has explained that in order to determine whether a statute violates due process, it must determine whether the statute bears a reasonable relationship to a legitimate legislative objective and is not discriminatory, arbitrary, or oppressive.[56] In *Nationwide Mutual Fire Insurance Company v. Pinnacle Medical Inc.*,[57] the Court considered a challenge to a provision in the Florida Motor Vehicle No-Fault law that created a prevailing party standard for awarding attorney fees to medical provider assignees, rather than the standard applied to insureds under s. 627.428, F.S. The Court held that the prevailing party standard for awarding attorney fees to medical provider assignees violated the due process[58] rights of medical providers.

In 1998, the Motor Vehicle No-Fault Law required motor vehicle insurance policies to contain a provision requiring providers who accepted an assignment of personal injury protection benefits to provide medical services or supplies to resolve any dispute with the insurance company via binding arbitration. It provided the prevailing party could recover attorney fees but did not define prevailing party.[59] In 1998, the Legislature amended the

[56] *Nationwide Mutual Fire Insurance Company v. Pinnacle Medical Inc*., 753 So.2d 55, 59 (Fla. 2000).
[57] *Id*.
[58] Article 1, section 9 of the Florida Constitution provides that no person shall be deprived of life, liberty, or property without due process of law.
[59] *See* Section 627.736(5), F.S. (Supp. 1998).

No-Fault Law to create a prevailing party definition.[60] Under s. 626.736, F.S., providers who accepted assignments and had a dispute were not entitled to attorney fees under 627.428, F.S. Instead, they could only recover fees if they prevailed at arbitration under the statutory formula.

The court said that an objective of No-Fault Law was to provide persons injured in an accident with prompt payment of benefits and that the legislative objective of s. 627.428, F.S., was to discourage insurance companies from contesting valid claims and to reimburse successful insureds for their attorney fees when they are compelled to sue to enforce their insurance contracts. The court explained that the prevailing party attorney fee formula replaced s. 627.428, F.S., attorney fees with an award of attorney fees based on who was the prevailing party. Therefore, medical provider-assignees were subject to attorney fees while insureds suing to enforce the exact same contract could obtain one-way imposition of attorney fees against insurers. The court held that this distinction does nothing to further the prompt payment of benefits or to discourage insurers' denial of valid claims and that the effect of the attorney-fee provision was to delay insureds from receiving medical benefits by encouraging medical providers to require payment from insureds at the time the services are rendered. Therefore, the court said the prevailing party attorney-fee provision arbitrarily distinguished between medical providers and insureds and violated medical providers' due process rights.[61]

Opponents may argue that the provisions of this bill that prohibit an assignee from using s. 627.428, F.S., to collect attorney fees when the assignee prevails in an action against an insurance company similarly violates the assignee's due process rights. They could argue that the assignee, like the medical providers in *Pinnacle*, are suing to enforce the same contract as a named insured and the distinction between assignees and named insureds is arbitrary and does nothing to encourage the prompt payment of valid claims.

Proponents could argue that this bill's distinction is not arbitrary. Proponents could argue that the distinction was drawn because: (1) there has been a large increase in AOB litigation in recent years; (2) claims with an AOB are often higher cost than claims without an AOB; (3) AOB claims are more likely to be inflated; and (4) the one-way attorney fee statute limits the insurers' ability to litigate smaller claims. Proponents could argue that the Legislature is drawing this distinction to prevent further increases in insurances rates because higher rates harm the state's economy.

Freedom of Contract

The bill limits a consumer's ability to contract with a service provider during urgent or emergency circumstances. The Florida Supreme Court has explained that any "restraints

[60] *See* ch. 98-270, s. 2, Laws of Fla.. The definition provides that the claimant prevails if the PIP award at arbitration exceeds the sum of the insurer's offer at arbitration plus 50 percent of the difference between the insurer's demand at arbitration and the insurer's offer. The insurer prevails if the PIP award is less than the insurer's offer at arbitration plus 50 percent of the difference between the insurer's demand at arbitration and the insurer's offer. The formula can be expressed as PIP BENEFITS DETERMINED BY ARBITRATION < or > INSURER OFFER + .5(CLAIMANT DEMAND – INSURER OFFER)

[61] Pinnacle, 753 So.2d at 59.

imposed by legislation on the right to contract must not be arbitrary or unreasonable. The right to make contracts … should not be struck down or arbitrarily restrained unless such restraint be reasonably justified by the needs of the public health, safety or welfare."[62] If the limitation on contracts during emergency were challenged, a court would have to consider whether the restraint imposed by the bill is reasonably justified by the needs of public welfare.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

Contractors and other vendors who use assignments of benefits may use them less often. They could be responsible for their own attorney fees if they had to prosecute a lawsuit against an insurance company and did not prevail in the lawsuit.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

Lines 63, 64, and 68 contain the phrase "in excess of" and the phrase is unnecessary in all of those locations.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 501.172 of the Florida Statutes.
This bill substantially amends sections 626.9373 and 627.428 of the Florida Statutes.

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 March 4, 2019:

- Establishes standards for a valid assignment of post-loss benefits under property insurance policies and motor vehicle insurance policies for coverage of windshield damage under comprehensive or combined additional coverage.

[62] *Larson v. Lesser*, 106 So. 2d 188, 191–92 (Fla. 1958).

- Limits the scope of an AOB in urgent or emergency circumstances and requires the assignee service provider to waive all claims against a consumer other than for payment of the deductible and betterment ordered by the consumer.
- Provides that the prevailing party in litigation between an assignee service provider and insurer may be awarded attorney fees and establishes standard for the court to apply when determining the prevailing party.
- Prohibits "judge shopping" by authorizing judges to order assignees to pay attorney fees and cost to the other party when an assignee service provider files suit, voluntarily dismisses the action, and then refiles in hopes of being assigned a different judge.
- Contains legislative findings and intent.

B. Amendments:

None.