

HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/CS/HB 7065 PCB CJS 19-01 Insurance Assignment Agreements
SPONSOR(S): Judiciary Committee, Insurance & Banking Subcommittee; Civil Justice Subcommittee; Rommel and others
TIED BILLS: **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Civil Justice Subcommittee	13 Y, 2 N	Mawn	Poche
1) Insurance & Banking Subcommittee	14 Y, 1 N, As CS	Fortenberry	Luczynski
2) Judiciary Committee	14 Y, 3 N, As CS	Mawn	Poche

SUMMARY ANALYSIS

Insurance is a contract, commonly referred to as a "policy," under which, for stipulated consideration called a "premium," one party (the insurer) undertakes to compensate the other (the insured) for loss on a specified subject from specified perils. An insured may sign over their rights under an insurance policy to a third party through an assignment of benefits (assignment agreement or AOB), which allows the third party (assignee) to seek direct payment from the insurance company for monies owed under the policy. The Office of Insurance Regulation (OIR) reports concerning litigation trends related to assignment agreements for property insurance claims, projects recurring significant annual rate increases due to costs associated with such litigation, and predicts insurers may discontinue writing certain business within certain areas of the state if the trends continue.

CS/CS/HB 7065 addresses the abuse of post-loss AOBs for residential or commercial property insurance claims, or motor vehicle glass claims under motor vehicle comprehensive or combined additional coverage, by:

- Defining "assignment agreement" and establishing requirements for the execution, validity, and effect of such an agreement;
- Prohibiting certain fees and altering policy provisions related to managed repairs in an assignment agreement;
- Transferring certain pre-lawsuit duties under the insurance contract to the assignee and shifting the burden to the assignee to prove that any failure to carry out such duties has not limited the insurer's ability to perform under the contract;
- Limiting an assignee's ability to recover certain costs from the assignor;
- Requiring the assignee to give the insurer notice of the assignee's intent to file a lawsuit and establishing requirements for the notice;
- Requiring the insurer to respond to the assignee's notice;
- Setting the formula that will determine which party, if any, receives an award of attorney fees should litigation related to an assignment agreement result in a judgment;
- Allowing a court to award attorney fees to a respondent in a voluntarily dismissed action if the assignee brings an identical claim against the same respondent in a subsequent action in another court;
- Requiring each insurer to report specified data on claims paid in the prior year under assignment agreements by January 30, 2022, and each year thereafter; and
- Allowing an insurer to make available a policy prohibiting assignment, in whole or in part, under certain conditions.

The bill does not have a fiscal impact on state or local government.

The bill provides an effective date of July 1, 2019.

This document does not reflect the intent or official position of the bill sponsor or House of Representatives.

STORAGE NAME: h7065c.JDC

DATE: 3/29/2019

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background

Insurance

Insurance is a contract, commonly referred to as a "policy," under which, for stipulated consideration called a "premium," one party, the insurer, undertakes to compensate the other, the insured, for loss on a specified subject from specified perils. Florida residents often obtain two major categories of insurance: property insurance and liability insurance. Property insurance protects individuals from the loss of or damage to property and, in some instances, personal liability pertaining to the property. Motor vehicle liability insurance¹ covers suits against the insured for such damages as injury or death to another driver or passenger, as well as property damage. It is insurance against damages for which the driver can be held liable due to the operation of the automobile. Florida residents may also obtain comprehensive motor vehicle insurance coverage, which covers repair or replacement if the covered vehicle is stolen or damaged in an incident other than a collision; this coverage includes damage to automobile (auto) glass not related to a collision.

Assignment Agreements

An assignment of insurance contract benefits allows a third party (assignee) to stand in the shoes of an insured and collect insurance proceeds directly from the insurance company. Assignment of benefit agreements (AOBs) have been part of the Florida insurance marketplace for over 100 years and are commonplace in the health insurance industry, where an insured assigns his or her benefits for a covered medical service to the health care provider so that the insurer pays the health care provider directly.

Insurance policies typically impose certain duties on an insured in order to be covered under the policy, such as requiring an insured to file proof of loss, produce records, and submit to examination under oath. Florida courts have held that an assignee does 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

Some assignees attempt to transfer broad rights under the policy and combine the AOB with authorization to perform services described only in general terms.³ When an insured assigns a policy, they assign all equitable and legal interest in the policy to the assignee, placing the assignee in the shoes of the insured to enforce the policy against the insurer.⁴ An AOB to receive payment under an insurance contract necessarily assigns the right to enforce payment. An unqualified assignment transfers all of the insured's interest under the contract and the insured has no right to make any claim

¹ In Florida, every owner or operator of an automobile is required to maintain liability insurance to cover a minimum of \$10,000 in coverage for damage to another's property in a crash. Additionally, every owner or registrant of an automobile is required to maintain personal injury protection, which covers medical expenses related to a car accident regardless of fault up to \$10,000. Ss. 324.022 and 627.733, F.S.

² *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 Erickson's, *Contract for Services, Assignment of Benefits*, <http://ericksonsdrying.com/contact-us/contract-for-services-assignment-of-benefits/> (last visited Mar. 28, 2019) (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.

once the assignment is complete, unless authorized to do so by the assignee.⁵ An insured who enters into an AOB may unknowingly assign his or her right to determine whether to file suit on the claim.

Assignability of Insurance Policies

Florida law provides that a policy may be assignable, or not assignable, as provided by the policy's terms.⁶ An assignment can occur before an insured experiences a loss (pre-loss) or after an insured experiences a loss (post-loss). Florida courts have held that an insurance company may include language in the policy prohibiting pre-loss assignments.⁷ However, courts have also held that post-loss assignments are permitted during the term of an insurance contract and that an insurer cannot restrict the same.⁸ Courts have not addressed restrictions placed on post-loss assignments at the time of purchase or renewal of the insurance contract.

The purpose of prohibiting assignment of a policy is to protect an insurer against unbargained-for risks.⁹ However, in the case of a post-loss AOB, the financial exposure of the insurance company does not change; if a post-loss AOB is executed, the third party cannot assert new rights of his or her own that did not belong to the insured. Nevertheless, the AOB can impact the insurance company's ability to administer a claim according to the terms of the insurance contract because the AOB conveys only contract rights, not contract duties such as the requirement of examination under oath or participation in alternative dispute resolution.

Attorney Fees

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.¹⁰

This statute allows an insured to recover his or her own attorney fees if the insured prevails in a lawsuit to enforce an insurance policy. Some version of this statute has been the law in Florida since at least 1893.¹¹

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

⁵ *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)).

⁶ S. 627.422, F.S.

⁷ *Security First Ins. Co. v. Fla. Office of Ins. Reg.*, 177 So. 3d 627 (Fla. 1st DCA 2015).

⁸ *Id.*

⁹ *Lexington Ins. Co. v. Simkins Industries, Inc.*, 704 So. 2d 1384, 1386 (Fla. 1998).

¹⁰ 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.

¹¹ 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).

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.¹²

Florida courts have interpreted the statute broadly to allow recovery of fees when the insurer ultimately settles the case before trial.¹³ The court awards fees pursuant to the statute even if the insurer does not act in bad faith.¹⁴

However, 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*,¹⁵ 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. The insurance company demanded appraisal and paid the disputed amount after the appraisal award.¹⁶ 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.¹⁷

Application of s. 627.428, F.S., to AOB Litigation

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.¹⁸

In 1971, the Fourth District Court of Appeal considered whether the assignee under 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.¹⁹ The Fourth District's opinion was appealed to the Florida Supreme Court and the Florida Supreme Court reversed, holding that an 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

¹² *Johnson v. Omega Ins. Co.*, 200 So.3d 1207, 1215-1216 (Fla. 2016)(internal citations omitted).

¹³ *Id.* at 1215 (Fla. 2016)(noting that 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").

¹⁴ *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").

¹⁵ 244 So.3d 310 (Fla. 4th DCA 2018).

¹⁶ *Id.* at 311.

¹⁷ *Id.* 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).

¹⁸ *Travelers Insurance Company v. Tallahassee Bank and Trust Company*, 133 So.2d 463 (Fla. 1st DCA 1961).

¹⁹ *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).

and logically should be entitled to an attorney's fee when he sues and recovers on the claim."²⁰ 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.²¹

Assignment of Property Insurance Claims

In recent years, AOBs have become common in property insurance claims, where an insured property owner assigns his or her benefits under a property insurance policy to a contractor, water remediation company, or other vendor who repairs the damaged property and bills the insurer for the work. In the case of property insurance, an insured's loss is often an emergency, such as a burst water pipe or a damaged roof through which water enters the property. In Florida's humid environment, water damage can quickly turn a minor problem to a major problem involving mold and mildew, making remediation and repair a time-sensitive task and requiring an assignee to begin repairs immediately to prevent further damage. Remediation and mitigation of damages are often terms of a residential or commercial property insurance policy. In claims that do not involve an AOB, the property owner typically notifies the insurer of the loss and the insurer has the opportunity to inspect the property before permanent repairs begin. Insurers report that, in claims involving an AOB, the work has often begun or is substantially completed before the insurer has the opportunity to inspect the property; this makes it difficult for an insurer to verify the cause and the extent of the damage and to determine the scope of coverage and the appropriate amount of the claim.

Reported Litigation Data

On February 7, 2017, the Commissioner of the Office of Insurance Regulation (OIR) testified before the Financial Services Commission regarding the impact of assignment agreements on the domestic insurance market.²² A substantial decrease in the net underwriting gains and net income of domestic insurers, attributed to rising loss and loss adjustment expense²³ ratios, concerned OIR, as this reduces a company's ability to build policyholder surplus, procure reinsurance, and lower rates. The Commissioner reported concerning trends from 2010 to 2016, including:

- A 28 percent increase in the average severity of domestic property insurance claims;²⁴
- A 46 percent increase in the frequency per 1,000 policies of water loss claims associated with personal residential insurance policies;²⁵ and
- An increase from 5.7 percent to 15.9 percent in the use of AOBs.²⁶

The Commissioner also shared data from Citizens Property Insurance Corporation (Citizens), which reported an increase in the percent of litigated water claims 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 legal representation at first notice of loss increased from 2.4 percent to 76.1 percent. Citizens also reported that, in 2015, litigated water claims cost an average of \$33,918, while non-litigated water claims cost an

²⁰ *All Ways Reliable Bldg. Maintenance, Inc. v. Moore*, 261 So.2d 131 (1972)

²¹ *Continental Cas. Co. v. Ryan, Inc. Eastern*, 974 So.2d 368, 379 (Fla. 2008).

²² Commissioner David Altmaier, *The Florida Property Insurance Market and Assignment of Benefits (AOB)*, Presented to: The Financial Services Commission, Feb. 7, 2017, <https://www.floir.com/siteDocuments/FSCAOBPresentation02072017.pdf> (last visited Mar. 28, 2019).

²³ 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/> (last visited Mar. 28, 2019).

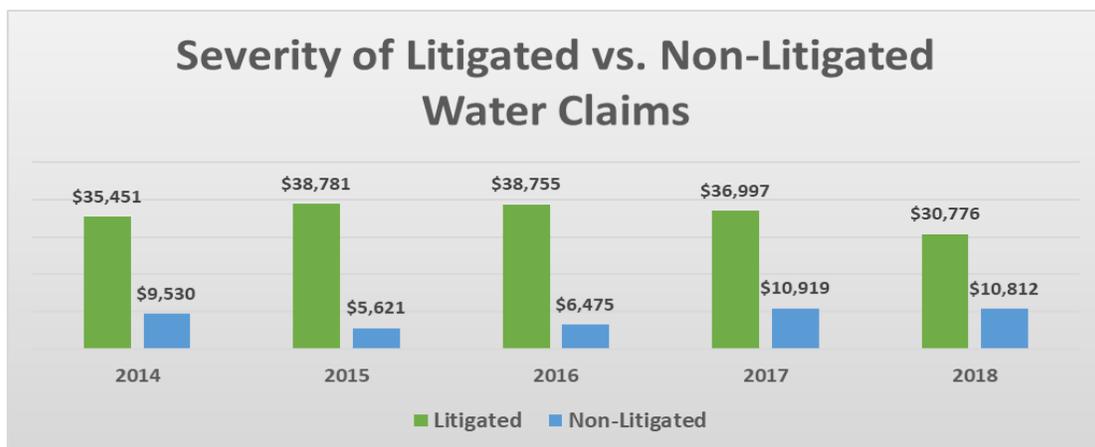
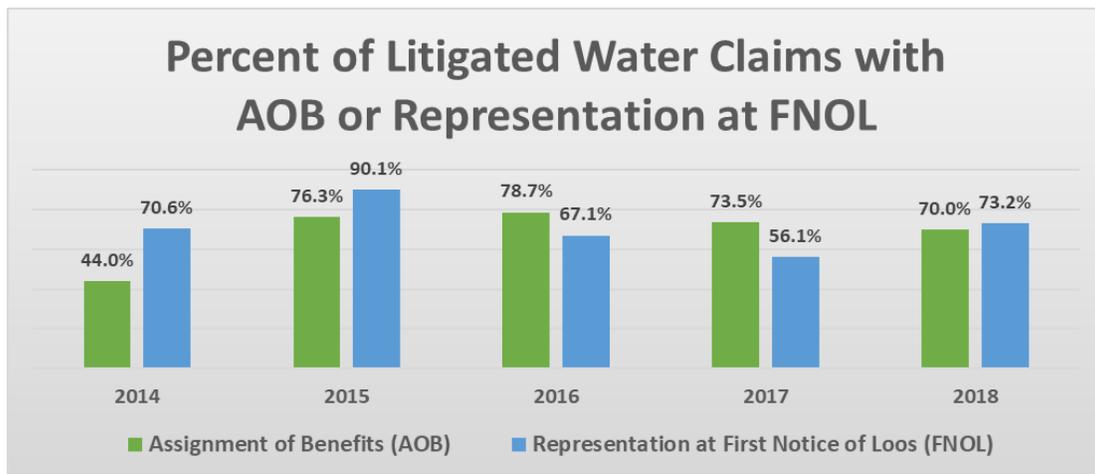
²⁴ Altmaier, *supra* note 22.

²⁵ *Id.*

²⁶ *Id.*; 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> (last visited Mar. 28, 2019).

average of \$5,857.²⁷ 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.²⁸ The Commissioner indicated that the reduction in available insurance, combined with the widening gap between rates in the private market and rates available from Citizens,²⁹ jeopardizes the depopulation of Citizens that has occurred during the last five years.³⁰

On February 7, 2019, the Commissioner testified before the House Civil Justice Subcommittee to provide updated information on AOBs in residential property insurance claims.³¹ The Commissioner testified that, based on the trend lines, OIR foresees higher insurance premiums for consumers and a lack of availability of insurance policies as insurers exit the market.³² The Commissioner also shared updated data from Citizens indicating that the percentage of litigated water claims with an assignment agreement or representation at first notice of loss remained high through 2018, as did the disparity between the severity of litigated versus non-litigated water claims.³³



²⁷ Altmaier, *supra* note 22.

²⁸ The percent of approved rate filings requesting a rate increase increased from 37.6 percent in 2014 to 72.3 percent in 2016.

²⁹ 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.

³⁰ 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.

³¹ David Altmaier, *Florida's Assignment of Benefits (AOB) Crisis*, Presented to: The Florida House of Representatives Civil Justice Subcommittee, Feb. 7, 2019, https://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2019021065 (last visited Mar. 28, 2019).

³² *Id.*

³³ *Id.*

At the same meeting on February 7, 2019, Barry Gilway, the President, CEO, and Executive Director of Citizens, provided an update on the continued adverse impact of assignment agreements on the domestic insurance market.³⁴ Mr. Gilway testified that residential property insurance litigation increased steadily for all insurers, including Citizens, from 2013 to 2018; during this time, litigation specifically associated with assignment agreements increased by roughly 26 percent.³⁵

CARRIER LITIGATION INCREASES

	2013	2014	2015	2016	2017	2018
Citizens Property Insurance Company						
All	9,146	9,525	7,653	10,061	7,624	13,363
AOB	860	1,062	1,250	3,242	2,718	3,631
AOB %	9%	11%	16%	32%	36%	27%
All Other Carriers						
All	18,270	22,122	30,167	31,790	41,524	69,300
AOB	4,613	4,820	6,645	5,968	9,772	17,421
AOB %	25%	22%	22%	19%	24%	25%
Total All	27,416	31,647	37,820	41,851	49,148	82,663
Total AOB	5,473	5,882	7,895	9,210	12,490	21,052
Total AOB %	20%	19%	21%	22%	25%	25%

Form Filing and Approval for Property Insurance Forms

OIR has primary responsibility for regulating, enforcing, and ensuring compliance with statutes governing the business of insurance. OIR oversees insurance company solvency, policy forms and rates, and market conduct performance. With limited exceptions, s. 627.410(1), F.S., requires every insurance policy form to be filed with and approved by OIR before the form can be used by the insurance company in Florida.³⁶

OIR data reveals that trends in AOB use are impacting the profitability and rate need of many of the state's domestic property insurance companies. For example, in 2014, 63 percent of rate filings for property insurance were for *decreases* in property insurance rates or no rate change. However, in 2016, 72.3 percent of approved rate filings were for *increases* in property insurance rates.³⁷ As of November 2017, increases in property insurance rates accounted for 90 percent of approved rate filings.³⁸

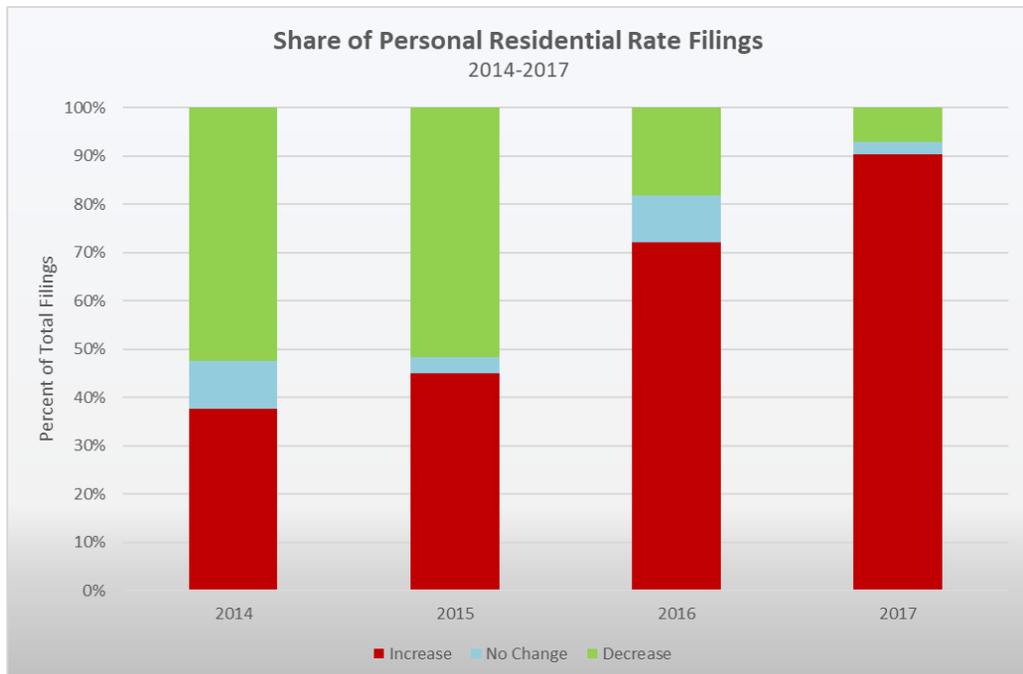
³⁴ Barry Gilway, *Citizens Property Insurance Corporation Assignment of Benefits*, Presented to: The Florida House of Representatives Civil Justice Subcommittee, Feb. 7, 2019, https://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2019021065 (last visited Mar. 28, 2019).

³⁵ *Id.*

³⁶ The exceptions include commercial property insurance forms.

³⁷ Altmaier, *supra* note 31.

³⁸ *Id.*



In keeping with the reported trends, Citizens predicts that 97 percent of its residential property insurance policyholders will see rate increases in 2019.³⁹ However, if AOB reform is signed into law, Citizens predicts the actuarial rate indication for its residential property insurance policies will decrease from 25.2 percent to 10.1 percent, and if overall litigation rates drop below 2015 levels, the actuarial rate indication for these policies will decrease to 1.5 percent.⁴⁰ Lower actuarial rate indications result in lower premiums for consumers.

Assignment of Auto Glass Claims

Automobile Insurance

When a consumer purchases the minimum motor vehicle insurance required by Florida law, including personal injury protection coverage (PIP), that consumer does not have first-party insurance coverage for the repair or replacement of auto glass. However, a consumer who purchases comprehensive coverage, which pays for damage to a motor vehicle caused by an event other than a collision, generally has coverage for damaged or broken auto glass.⁴¹

A “deductible” is the amount an insured must pay before an insurance company will make any payment on an insurance claim. Pursuant to s. 627.7288, F.S., the deductible provisions of a motor vehicle insurance policy “delivered or issued” in Florida and providing “comprehensive coverage or combined additional coverage shall not be applicable to the damage to the windshield of any motor vehicle covered under such policy.” Therefore, a consumer often qualifies for windshield glass repair or replacement without a deductible.⁴²

³⁹ Gilway, *supra* note 34.

⁴⁰ *Id.*

⁴¹ See Florida Department of Financial Services, *Automobile Insurance a Toolkit for Consumers*, <https://www.myfloridacfo.com/division/consumers/UnderstandingCoverage/Guides/documents/AutoToolkit.pdf> (last visited Mar. 28, 2019).

⁴² *Id.*

Auto Glass Repair and Replacement

Florida law has no specific requirements applicable to insurance claims made for damaged auto glass.⁴³ Instead, these claims are handled according to the terms of a consumer's motor vehicle insurance policy.⁴⁴ Some Florida motor vehicle insurers have a network of auto glass repair shops that will provide auto glass repair or replacement at negotiated rates.⁴⁵ If a consumer utilizes one of these network shops, the consumer's auto glass is repaired or replaced and paid for directly by the insurance company.⁴⁶ If an insured uses an auto glass repair shop that is not within the insurer's network, the provider often obtains an assignment of benefits from the consumer.⁴⁷

Reported Data

According to data from the Insurance Information Institute, the number of auto glass lawsuits in Florida has increased in recent years.⁴⁸



Some insurers have asserted that the increase in litigation is the result of the practice by some auto glass repair shops to execute AOBs, sue for unpaid claims, and collect attorney fees under s. 627.428, F.S.⁴⁹ They have also alleged that some auto glass repair shops obtain AOBs from the insured and inflate the costs of the auto glass repair or replacement when billing the insurance company.⁵⁰ Insurers also believe that some auto glass claims submitted by assignees are fraudulent.⁵¹

Some auto glass repair shops have argued that litigation is necessary because insurers have entered into agreements with preferred vendors (i.e., the network shops) and will not pay the "prevailing competitive price" for auto glass repair or replacement.⁵² The repair shops contend that the insurers

⁴³ Dale Parker and Brendan McKay, *Florida Auto Glass Claims: A Cracked System*, Trial Advocate Quarterly Fall 2016, *21 (Westlaw Citation: 35 No. 4 Trial Advoc. Q. 20).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *See id.*

⁴⁷ *See id.*

⁴⁸ James Lynch, *Florida's Assignment of Benefits Crisis*, Presented to: The Florida House of Representatives Civil Justice Subcommittee, Feb. 7, 2019, https://www.myfloridahouse.gov/VideoPlayer.aspx?eventID=2443575804_2019021065 (last visited Mar. 28, 2019).

⁴⁹ *See Parker and McKay, supra note 43.*

⁵⁰ *Id.*

⁵¹ *See, e.g., Government Employees Insurance Co. v. Clear Vision Windshield Repair, L.L.C.*, 2017 WL 1196438 (M.D. Fla. Mar. 29, 2017).

⁵² *VIP Auto Glass, Inc. v. Geico General Insurance Co.*, 2017 WL 3712918, *1 (M.D. Fla. Mar. 17, 2017).

will only pay the price that they pay to their preferred vendors and that they must litigate against the insurers to force them to pay the “prevailing competitive price” provided for in insurance policies.⁵³

Effect of Proposed Changes

Assignability of Insurance Policies

CS/CS/HB 7065 creates s. 627.7152, F.S., establishing requirements applicable to the assignment of post-loss residential and commercial property insurance benefits. The bill also amends s. 627.7288, F.S., to establish requirements applicable to the assignment of post-loss benefits for auto glass repair or replacement under a comprehensive or combined additional coverage motor vehicle insurance policy. The provisions regulating assignment agreements are divided between the execution, validity, and effect of assignment agreements and their enforcement.

Execution, Validity, and Effect

The bill defines an “assignment agreement” to mean any written instrument which assigns or transfers post-loss benefits under a residential or commercial property insurance policy or under specific coverage under a motor vehicle insurance policy to or from a person who protects, repairs, restores, or replaces property or mitigates against further damage to property, or repairs or replaces motor vehicle glass. To be valid and enforceable, an assignment agreement must:

- Be in writing and signed by the assignor and the assignee;
- Allow the assignor to rescind the agreement without penalty:⁵⁴
 - If under a residential or commercial property insurance policy, within:
 - Seven business days of execution of the agreement;
 - At least 30 days after the date work on the property is scheduled to commence if the assignee has not substantially performed; or
 - At least 30 days after the execution of the agreement if the agreement does not contain a commencement date and the assignee has not begun substantial work on the property; or
 - If under specific coverage under a motor vehicle insurance policy, within two calendar days of execution of the agreement if the policy is a comprehensive or combined additional coverage motor vehicle insurance policy;
- Require the assignee to provide the insurer with a copy of the assignment agreement within:
 - Three business days after the agreement is executed or work has begun, whichever is earlier, if the policy is a residential or commercial property insurance policy; or
 - One calendar day after the agreement is executed or work has begun, whichever is earlier, if the policy is a comprehensive or combined additional coverage motor vehicle insurance policy;
- 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;
- Contain notice to the assignor of the right to rescind the agreement and that, by executing the assignment agreement, the assignor is giving up certain rights that could result in litigation by the assignee against the insurer; and
- Contain a provision requiring the assignee to indemnify and hold harmless the assignor from most liabilities, damages, losses, and costs should the insurance policy subject to the assignment agreement prohibit such assignment, in whole or in part.

⁵³ *Id.*

⁵⁴ The insured still owes for work performed before the rescission of the agreement.

The bill prohibits an assignment agreement from containing any fee related to administering or rescinding the agreement, such as a rescission penalty fee, a mortgage-processing fee, a cancellation fee, or an administrative fee. Additionally, the agreement may not alter any term or defense relating to a managed repair arrangement contained in the policy.⁵⁵

Assignee Duties

The bill transfers duties under the insurance contract to the assignee which, if not carried out, shift the burden to the assignee to prove why such a 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.

The bill also transfers duties to the assignee which must be performed before the assignee may file suit against the insurer. 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; and
- Appraisal or other alternative dispute resolution process under the terms of the policy.

The bill requires the assignee to provide the insurer 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.

The bill also provides that, by entering into an assignment agreement, the assignee and its subcontractors waive any claim against the assignor, including the right to claim a lien against the assignor's property or motor vehicle, 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 or determined to be invalid, or any enhancements ordered and approved by the assignor.

Enforcement; Attorney Fees

The bill requires an assignee to give an insurer and the assignor prior written notice of at least ten business days before filing suit on a claim. The notice must be sent by certified mail, return receipt requested, or by electronic delivery, and may not be served before the insurer has made a determination of coverage according to the timeframes and requirements of current law.⁵⁶ The notice must specify the damages in dispute, the amount claimed, and a pre-suit 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, the invoice must include proof the assignee is certified by an entity that requires repairs to be performed according to a standard approved by the American National Standards Institute.⁵⁷ The insurer must respond to the notice in writing within 10 days of receipt of the notice by making a settlement offer or requiring appraisal or other alternative dispute resolution.

⁵⁵ Managed repair arrangements provide an insured access to a network of professionals, maintained by the insurer, to repair covered losses. The arrangement removes the burden on an insured to get multiple quotes to determine the best option for repair work on his or her damaged property or auto glass.

⁵⁶ S. 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.

⁵⁷ The American National Standards Institute (ANSI) was founded in 1918 and is the preeminent U.S. standards and conformity assessment organization. ANSI oversees the creation, promulgation, and use of thousands of norms and guidelines for businesses and business sectors throughout the United States, accredits organizations, and determines conformance to standards; See American National Standards Institute, About ANSI, https://www.ansi.org/about_ansi/overview/overview (last visited Mar. 28, 2019).

If the parties fail to settle and subsequent litigation results in a judgment, the bill provides the exclusive means by which either party may recover attorney fees.⁵⁸ The bill allows an award of attorney fees based on the difference between the amount recovered and the amount offered during settlement negotiations. To accomplish this, the bill defines the difference between the insurer's pre-suit offer and the assignee's pre-suit demand as "the disputed amount." Fees are then awarded as follows:

- If the difference between the judgment obtained 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 obtained 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 obtained and the settlement offer is at least 50 percent of the disputed amount, the assignee is entitled to attorney fees.

The insurer waives its right to attorney fees if it fails to inspect the property or motor vehicle, or provide written or verbal authorization to begin repairs, within:

- Seven calendar days of first notice of the loss under a residential or commercial property insurance policy; or
- One calendar day of first notice of loss under a comprehensive or combined additional coverage motor vehicle insurance policy for auto glass claims.

However, the insurer does not waive its right to attorney fees if the failure to inspect the property or the motor vehicle, or to provide written or verbal authorization for the repairs, was the result of:

- An event for which the Governor had declared a state of emergency;
- Factors beyond the control of the insurer which reasonably prevented an inspection or authorization; or
- The insured's failure or inability to allow an inspection of the property or motor vehicle after a request by the insurer.

Forum Shopping

The bill attempts to disincentivize forum shopping⁵⁹ by authorizing a court to award attorney fees to a respondent in a voluntarily dismissed action when an assignee brings an identical claim against the same respondent in a subsequent action in another court. The court must stay the subsequent proceeding until the assignee pays the attorney fees from the dismissed action.

Non-Assignable Policies

The bill creates ss. 627.7153 and 627.7289, F.S., to allow insurance companies to make available a residential or commercial property insurance policy or comprehensive or combined additional coverage motor vehicle insurance policy restricting, in whole or in part, the assignment of post-loss benefits if:

- The insurer makes available the same coverage to an insured or a potential insured at the same time under a policy that does not restrict the right to assignment;
- The restricted policy is available at a lower cost than the unrestricted policy; and
- The policy prohibiting assignment in whole is available at a lower cost than the policy prohibiting assignment in part.

The restricted residential or commercial property insurance policy must include on its face the following notice in boldfaced type no smaller than 18 points:

⁵⁸ Fees and costs are also recoverable under s. 57.105, F.S., which 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.

⁵⁹ Forum shopping occurs when a party attempts to have his or her action tried in a particular court or jurisdiction where the party feels he or she will receive the most favorable judgment or verdict. Black's Law Dictionary 452 (6th ed. 1995).

THIS POLICY DOES NOT ALLOW THE UNRESTRICTED ASSIGNMENT OF POST-LOSS INSURANCE BENEFITS. BY SELECTING THIS POLICY, YOU WAIVE YOUR RIGHT TO FREELY ASSIGN OR TRANSFER THE POST-LOSS PROPERTY INSURANCE BENEFITS AVAILABLE UNDER THIS POLICY TO A THIRD PARTY OR TO OTHERWISE FREELY ENTER INTO AN ASSIGNMENT AGREEMENT AS THE TERM IS DEFINED IN SECTION 627.7153 OF THE FLORIDA STATUTES.

The restricted comprehensive motor vehicle insurance policy must include on its face the following notice in boldfaced type no smaller than 18 points:

THIS POLICY DOES NOT ALLOW THE UNRESTRICTED ASSIGNMENT OF POST-LOSS INSURANCE BENEFITS. BY SELECTING THIS POLICY, YOU WAIVE YOUR RIGHT TO FREELY ASSIGN OR TRANSFER THE POST-LOSS MOTOR VEHICLE GLASS INSURANCE BENEFITS AVAILABLE UNDER THIS POLICY TO A THIRD PARTY OR TO OTHERWISE FREELY ENTER INTO AN ASSIGNMENT AGREEMENT AS THE TERM IS DEFINED IN SECTION 627.7288 OF THE FLORIDA STATUTES.

Insurers making available policies restricting assignment must notify a policyholder at least annually of his or her options for coverage. The notice must be part of, and attached to, the notice of premium. An insured who purchases a restricted assignment policy must reject a fully assignable policy in writing on a form approved by OIR. The heading of the form must be in 18-point uppercase and bold-faced type and state:

YOU ARE ELECTING TO PURCHASE AN INSURANCE POLICY THAT RESTRICTS THE ASSIGNMENT OF BENEFITS UNDER THE POLICY IN WHOLE OR IN PART. PLEASE READ CAREFULLY.

The non-assignable and restricted policy requirements apply to policies issued or renewed on or after July 1, 2019.

Other Provisions

The bill requires insurers to report by January 30, 2022, and each year thereafter, detailed claims data to OIR. The bill directs the Financial Services Commission to adopt by rule a list of data points for insurers to report, which must include, at a minimum, specific data about claims adjustment, settlement timeframes, and trends, grouped by whether a claim was litigated or not litigated and by loss adjustment expenses.

The new assignment agreement requirements apply to agreements entered into on or after July 1, 2019. The requirements do not apply to post-loss assignments to a subsequent purchaser of the property or motor vehicle, power of attorney that grants specified parties authority to act for the insured in connection with the claim, or liability coverage under an insurance policy.

The bill also amends s. 627.422, F.S., to bar a:

- Residential or commercial property insurance policy from prohibiting the assignment of post-loss benefits, unless such policy complies with s. 627.7153, F.S.; and
- Comprehensive motor vehicle insurance policy from prohibiting the assignment of post-loss benefits to a person providing services to repair or replace motor vehicle glass unless such policy complies with s. 627.7289, F.S.

The bill provides an effective date of July 1, 2019.

B. SECTION DIRECTORY:

Section 1: Creates s. 627.7152, F.S., relating to assignment agreements.

Section 2: Creates s. 627.7153, F.S., relating to policies restricting assignment of post-loss benefits under a property insurance policy.

Section 3: Amends s. 627.7288, F.S., relating to comprehensive coverage; motor vehicle glass.

Section 4: Creates s. 627.7289, F.S., relating to policies restricting assignment of post-loss benefits under a comprehensive or combined additional coverage motor vehicle insurance policy.

Section 5: Amends s. 627.422, F.S., relating to assignment of policies or post-loss benefits.

Section 6: Creates an unnumbered section of law providing for severability.

Section 7: Provides an effective date of July 1, 2019.

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:

The bill may have a positive direct economic impact on the private sector by reducing litigation costs for insurers and lowering insurance rates for consumers.

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:

The Financial Services Commission is granted rulemaking authority to adopt rules necessary to establish a list of data required for insurers to comply with the reporting requirements regarding residential and commercial property insurance claims and motor vehicle glass insurance claims paid under assignment agreements.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 19, 2019, the Insurance & Banking Subcommittee considered the bill, adopted two amendments, and reported the bill favorably as a committee substitute. The committee substitute clarified that an assignee's waiver, by acceptance of an assignment agreement, of its right to collect money from the insured, sue the insured, claim a lien on the insured's real property or motor vehicle, or report the insured to a credit agency, does not apply to the following:

- Any deductible amount due under the policy;
- Any betterment ordered and approved by the assignor; or
- Any contracted work performed before the rescission or invalidation of the assignment agreement.

On March 28, 2019, the Judiciary Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment:

- Modified terminology to incorporate:
 - Assignees who get their rights from another assignee and vendors who become assignors through a second or subsequent AOB; and
 - AOBs styled as something else, such as a limited power of attorney.
- Modified the rescission period for an AOB under a residential or commercial property insurance policy to:
 - 7 days after execution of the agreement;
 - At least 30 days after the date the work on the property is scheduled to commence, if the assignee has not substantially performed; or
 - At least 30 days after the execution of the AOB if the AOB does not contain a commencement date and the assignee has not begun substantial work on the property.
- Revised the requisite notice of rescission rights to reflect the modified rescission period for an AOB under a residential or commercial property insurance policy.
- Required an assignee to send a notice of intent to initiate litigation by certified mail, return receipt requested, or electronic delivery.
- Clarified that an insurer has 10 business days from receipt of the notice of intent to respond to the notice in writing.
- Allowed a court to award attorney fees to a respondent in a voluntarily dismissed action when an assignee brings an identical claim against the same respondent in a subsequent action in another court.
 - Required a court to stay a subsequent action until the assignee pays the attorney fees from the dismissed action.
- Required an insured to reject a fully assignable policy in writing on a form approved by OIR if the insured purchases a restricted assignment policy.
- Made non-substantive changes to improve readability.

This analysis is drafted to the committee substitute to the committee substitute as passed by the Judiciary Committee.