

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCB JDC 18-01 Property Insurance Assignment Agreements

**SPONSOR(S):** Judiciary Committee

**TIED BILLS:** None **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Judiciary Committee		Tuszynski	Poche

### SUMMARY ANALYSIS

Property insurance provides financial reimbursement to an insured property owner to cover repairs or replacement of damaged or stolen property. The insured pays a premium for such coverage. An insured may sign over the rights to the benefits of an insurance policy to a third party through an assignment of benefits. This allows the third party, or assignee, such as a water extraction company, a roofer, or a plumber, to stand in the shoes of the insured and seek direct payment from the insurance company for repairs made to the covered property. The Office of Insurance Regulation reports concerning trends in the use of assignments of benefits in property insurance and projects recurring significant annual rate increases of as much as 10% and the potential for insurers to discontinue writing policies within certain areas of the state.

PCB JDC 18-01 defines "assignment agreement" and establishes requirements related to the execution, validity, and effect of such an agreement. Specifically, the PCB requires an agreement to:

- Be written;
- Include a 7-day period within which the insured may rescind the agreement;
- Include an estimate of services;
- Require notice to the insurer upon execution of an assignment agreement; and
- Require notice to the insured regarding the legal implications of an assignment agreement.

The PCB prohibits certain fees and the altering of policy provisions related to managed repairs in an assignment agreement.

The PCB transfers certain duties under the insurance contract to the assignee that are a prerequisite for filing a lawsuit, and duties that shift the burden to the assignee to prove why any failure to carry out such duties has not limited the insurer's ability to perform under the contract. The PCB also limits an assignee's ability to recover certain costs directly from the insured. These new requirements apply to assignment agreements executed after July 1, 2018.

If an assignee intends to file suit against an insurer based on a claim filed pursuant to an assignment agreement, the PCB requires the assignee give the insurer notice at least 10 business days before filing suit, but not before the insurer has made a determination of coverage.

If the parties fail to settle and litigation results in a judgment, the PCB provides the exclusive means for either party to recover attorney fees. The PCB defines the difference between the insurer's pre-suit settlement offer and the assignor's pre-suit settlement demand as "the disputed amount." The award of fees are as follows:

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

Each insurer must report to the Office of Insurance Regulation specified data on claims paid in the prior year pursuant to an assignment agreement by January 30, 2021, and each year thereafter.

The PCB also prohibits a residential property insurance policy from restricting the assignment of post-loss benefits.

The PCB does not have a fiscal impact on the state or on local governments and has an indeterminate fiscal impact on the private sector.

The PCB provides an effective date of July 1, 2018.

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

**STORAGE NAME:** pcb01.JDC

**DATE:** 11/9/2017

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background

##### Assignment Agreements

An assignment of insurance contract benefits allows a third party, or assignee, to stand in the shoes of an insured and collect insurance proceeds directly from the insurance company. This type of assignment of benefits agreement (AOB) is commonly used in health insurance where an insured assigns his or her benefits for a covered medical service to the health care provider and the insurer pays the health care provider directly. AOBs are becoming more common in property insurance claims, particularly in water damage claims, where an insured homeowner assigns his or her benefits from a property insurance policy to a contractor, water remediation company, or roofer who repairs the damaged property.

In property insurance, an insured's loss is often an emergency, like a burst water pipe or a damaged roof allowing water into a home. In Florida's humid environment, water damage can quickly turn from 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 property insurance policy. In claims that do not involve an AOB, the homeowner 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 to verify the cause and the extent of the damage and, as a result, the scope of coverage and the appropriate amount of the claim.

Insurance policies typically impose certain duties on an insured in order to receive coverage under the policy, such as requiring an insured to file proofs of loss, produce records, and submit to examination under oath. However, some 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.<sup>1</sup>

Some assignees attempt to transfer broad rights under the policy and combine the AOB with authorization to perform services described only in general terms.<sup>2</sup> When an insured assigns a contract, they assign all equitable and legal interest in the contract to the assignee, placing the assignee in the shoes of the insured to enforce the contract against the insurer.<sup>3</sup> An AOB to receive payment under an insurance contract necessarily assigns the right to enforce payment. An unqualified assignment transfers all of the interest the insured has under the contract and the insured has no right to make any claim on the contract once the assignment is complete, unless authorized to do so by the assignee.<sup>4</sup> An insured who enters into an AOB may unknowingly assign his or her right to determine whether to file suit on the claim.

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<sup>1</sup> *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).

<sup>2</sup> Erickson's, *Contract for Services, Assignment of Benefits*, <http://ericksonsdrying.com/contact-us/contract-for-services-assignment-of-benefits/> (last visited 11/2/17) (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 ....").

<sup>3</sup> 3A Fla. Jur 2d *Assignments* § 34 (Nov. 2015).

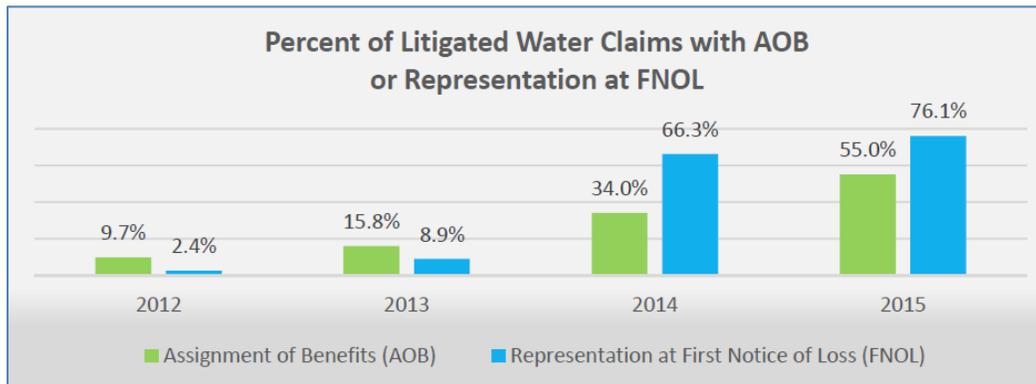
<sup>4</sup> *State Farm Fire and Casualty Co. v. Ray*, 556 So. 2d 811, 813 (Fla. 5th DCA 1990) (citing 4 Fla. Jur. 2d, *Assignments*, § 23 (1978)).

## Reported 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.<sup>5</sup> Of concern is a substantial decrease in the net underwriting gains and net income of domestic insurers, which he attributed to rising loss and loss adjustment expense ratios.<sup>6</sup> He indicated this reduces a company's ability to build policyholder surplus; procure reinsurance; and, lower rates. Some of the concerning trends from 2010 to 2016 are:

- A 28 percent increase in the average severity of domestic property insurance claims;<sup>7</sup>
- A 46 percent increase in the frequency per 1,000 policies of water loss claims associated with personal residential insurance policies,<sup>8</sup> and
- An increase from 5.7 percent to 15.9 percent in the use of AOBs.<sup>9</sup>

The Commissioner also shared data from Citizens Property Insurance Corporation (Citizens). Citizens reports that the percent of litigated water claims has increased from 20.7 percent in 2012 to 34 percent in 2015. During this same period, the percent of litigated water claims with an assignment agreement increased from 9.7 percent to 55 percent, and the percent of litigated water claims with representation at first notice of loss increased from 2.4 percent to 76.1 percent.



In 2015, Citizens reports the average cost of litigated water claims was \$33,918; the average cost of non-litigated water claims was \$5,857.<sup>10</sup> 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.<sup>11</sup> The reduction in available insurance combined with the widening gap between rates in the private market and rates available from Citizens,<sup>12</sup> he indicated, jeopardizes the depopulation of Citizens that has occurred during the last 5 years.<sup>13</sup>

<sup>5</sup> Commissioner David Altmaier, *The Florida Property Insurance Market and Assignment of Benefits (AOB)*, Presented to: The Financial Services Commission, Feb. 7, 2017, available at: <https://www.flor.com/siteDocuments/FSCAOBPresentation02072017.pdf> (last accessed 11/4/17).

<sup>6</sup> 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 Nov. 14, 2017).

<sup>7</sup> *Supra*, FN 5, at pg. 4.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*; See also Florida Office of Insurance Regulation, *2015 Report on Review of the 2015 Assignment of Benefits Data Call*, at 6, <http://www.flor.com/siteDocuments/AssignmentBenefitsDataCallReport02082016.pdf>

<sup>10</sup> *Supra*, FN 5, at 5.

<sup>11</sup> The percent of approved rate filings requesting a rate increase increased from 37.6 percent in 2014 to 72.3 percent in 2016.

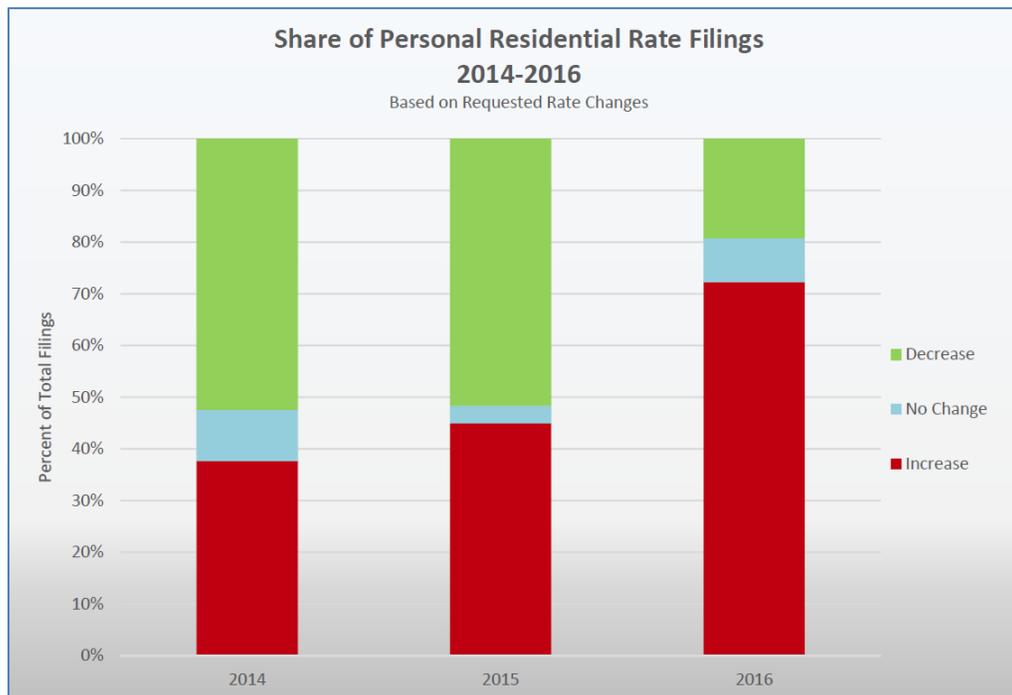
<sup>12</sup> Citizens' rates may not increase more than 10 percent per year, except for sinkhole coverage and increases due to coverage changes and surcharges. s. 627.351(6)(n)6., F.S.

<sup>13</sup> 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.

## Form Filing and Approval for Property and Casualty 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.<sup>14</sup> As a result, residential property insurance policies are subject to oversight by the OIR.

OIR data shows the trends in property insurance AOB use are having an impact on 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.<sup>15</sup>



## Assignability of Insurance Policies

Florida law provides that a policy may be assignable, or not assignable, as provided by its terms.<sup>16</sup> 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.<sup>17</sup> However, courts have also held that an insurance company may not include language in the policy prohibiting post-loss assignments.<sup>18</sup>

<sup>14</sup> Commercial property insurance forms are among the exceptions.

<sup>15</sup> Supra, FN 5, at pg. 6.

<sup>16</sup> S. 627.422, F.S.

<sup>17</sup> Id.

<sup>18</sup> *Security First Ins. Co. v. Fla. Office of Ins. Reg.*, 177 So. 3d 627 (Fla. 1st DCA 2015).

Florida case law provides that an insurance company can include a provision in a property insurance policy that prohibits an insured from assigning his or her policy to a third party.<sup>19</sup> However, the courts have consistently rejected attempts by insurance companies to limit or prohibit an insured from assigning his or her rights under the policy once a claim arises. The purpose of prohibiting assignment of the policy is to protect an insurer against unbargained-for risks.<sup>20</sup> One reason a post-loss AOB is valid despite a provision prohibiting assignment without consent of the insurance company is that once a loss occurs, the financial exposure of the insurance company does not change. If a post-loss AOB is executed, the third party cannot assert new rights of his or her own that did not belong to the insured. However, the AOB can undermine 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

Section 627.428(1), F.S., awards attorney fees against an insurer in a court proceeding "in which the insured or beneficiary prevails ...." This "one-way" attorney fee provision serves to level the playing field between an insurance company and an insured, thereby creating a disincentive for an insurance company to improperly deny or delay coverage. The Florida Supreme Court has interpreted the statute as making an award of attorney fees available to an insured, the insured's estate, specifically named policy beneficiaries, and "third parties who claim policy coverage by assignment from the insured."<sup>21</sup> The insured typically sues to be made whole for damages incurred and covered by the policy. An assignee, pursuant to an AOB, could use litigation and the threat of attorney fees to maximize profit from an insurance claim. This combination of a broad assignment of rights, no assignment of duties, open-ended authorization to perform work, authority to enforce transferred rights to the exclusion of the insured's authority to enforce, and the potential for attorney fees has created an environment of escalating concern to insurance companies.

OIR reports that there has been an exponential increase in AOB-related lawsuits; in 2006, there were **406** AOB related lawsuits, in 2011, there were **1,406**, and in 2016, that number had reached **28,183**, with no corresponding increase in consumer complaints.<sup>22</sup>

### **Effect of Proposed Changes**

#### Assignability of Insurance Policies

PCB JDC 18-01 creates s. 627.7152, F.S., establishing requirements applicable to the assignment of post-loss benefits. The provisions regulating assignment agreements are divided between the execution, validity, and effect, and enforcement of assignment agreements.

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<sup>19</sup> *Gisela Invs., N.V. v. Liberty Mut. Ins. Co.*, 452 So. 2d 1056 (Fla. 3d DCA 1984); see also *West Florida Grocery Co. v. Teutonia Fire Ins. Co.*, 77 So. 209, 224 (Fla. 1917) ("[I]t is a well-settled rule that the provision in a policy relative to the consent of the insurer to the transfer of an interest does not apply to an assignment after loss."); *Better Construction, Inc. v. National Union Fire Ins. Co.*, 651 So. 2d 141, 142 ("[A] provision against assignment of an insurance policy does not bar an insured's assignment of an after-loss claim."); *Highlands Ins. Co. v. Kravencas*, 719 So. 2d 320, 321 (Fla. 3d DCA 1998); *One Call Prop. Serv, Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749 (Fla. 4th DCA 2015); *Security First Ins.*, at 628 (prohibiting an insurance company from including language in a property insurance policy that prohibits a policyholder from assigning a post-loss claim).

<sup>20</sup> *Lexington Ins. Co. v. Simkins Industries, Inc.*, 704 So. 2d 1384, 1386 (Fla. 1998).

<sup>21</sup> *Roberts v. Carter*, 350 So. 2d 78, 79 (Fla. 1977).

<sup>22</sup> Commissioner David Altmaier, Testimony on HB 1421 (2017), Presented to: House Insurance & Banking Subcommittee, March 14, 2017. Available at: <http://thefloridachannel.org/videos/31417-house-insurance-banking-subcommittee/> (last accessed 11/9/17).

## Execution, Validity, and Effect

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

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

The PCB 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. Managed repair arrangements provide an insured access to a network of professionals, maintained by the insurer, to repair covered losses. This kind of 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.

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

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

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

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

## Enforcement

The PCB requires an assignee to give an insurer and the insured prior written notice before filing suit on a claim at least 10 business days before filing the complaint. The notice to sue may not be served before the insurer has made a determination of coverage according to the timeframes and requirements of current law.<sup>23</sup> The notice must specify the damages in dispute, the amount claimed, the 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 possesses certification from an entity that requires repairs be performed according to a standard that is approved by the American National Standards Institute.<sup>24</sup> The insurer must respond in writing within the 10 day timeframe by making a settlement offer or requiring appraisal or other alternative dispute resolution.

If the parties fail to settle and litigation results in a judgment, the PCB provides the exclusive means for either party to recover attorney fees.<sup>25</sup> The PCB allows an award of attorney fees based on how much the litigation improved recovery over the amount offered during settlement negotiations. To accomplish this, the PCB 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 and the insurer's settlement offer is less than 25 percent of the disputed amount, then the insurer is entitled to attorney fees.
- If the difference between the judgment and the insurer's settlement offer is at least 25 percent but less than 50 percent of the disputed amount, neither party is entitled to fees.
- If the difference between the judgment and the settlement offer is at least 50 percent of the disputed amount, the assignee is entitled to attorney fees.

If the insurer fails to inspect the property or provide written or verbal authorization to begin repairs within 7 calendar days of first notice of the loss, the insurer waives its right to attorney fees.

## Other Provisions

The PCB requires insurers to report by January 30, 2021, and each year thereafter, detailed data related to claims to OIR, including, at a minimum, specific data about claims adjustment and settlement timeframes and trends, detailing whether a claim was litigated or not litigated; by loss adjustment expenses; and by amount and type of attorney fees incurred or paid.

The new assignment agreement requirements are applicable to agreements entered into after July 1, 2018. The requirements do not apply to post-loss assignments to a subsequent purchaser of the property, power of attorney that grants specified parties authority to act for the insured in connection with the claim, or the liability coverages under a property insurance policy.

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

The PCB provides an effective date of July 1, 2018.

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<sup>23</sup> 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.

<sup>24</sup> 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, available at: [https://www.ansi.org/about\\_ansi/overview/overview](https://www.ansi.org/about_ansi/overview/overview) (last accessed 11/9/17).

<sup>25</sup> 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.

**B. SECTION DIRECTORY:**

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

**Section 2:** Amends s. 627.422, F.S., relating to assignment of policies.

**Section 3:** Provides an effective date of July 1, 2018.

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

**D. FISCAL COMMENTS:**

None.

**III. COMMENTS**

**A. CONSTITUTIONAL ISSUES:**

1. Applicability of Municipality/County Mandates Provision:

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

2. Other:

None.

**B. RULE-MAKING AUTHORITY:**

None.

**C. DRAFTING ISSUES OR OTHER COMMENTS:**

None.

#### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES