

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCS for HB 1097 Assignment of Post-loss Property Insurance Claims

**SPONSOR(S):** Insurance & Banking Subcommittee

**TIED BILLS:** **IDEN./SIM. BILLS:** SB 596

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Insurance & Banking Subcommittee		Peterson	Luczynski

### SUMMARY ANALYSIS

Generally, an assignment of benefits allows a third party to collect insurance proceeds owed to the policyholder directly from the insurance company. Consequently, the proceeds are not paid to the policyholder.

Assignment of benefits are becoming more common in property insurance claims, particularly in water damage claims where a homeowner assigns his or her benefits from the property insurance policy to a contractor or water remediation company who repairs the damaged property. Insurers now report experiencing a higher percentage of litigated claims that involve an assignment agreement and these claims generally are resulting in higher payouts and higher litigation costs than claims not involving an assignment agreement. The PCS regulates the claims process to clarify the rights and responsibilities of the insured, the insurer, and the assignees.

Current law provides that an insurance policy may be assignable, or not assignable, as provided by its terms. The law allows for an insurance policy to prohibit a pre-loss assignment of benefits, but an insurance policy may not prohibit a post-loss assignment of claims.

- The PCS prohibits an assignment, except for emergency repairs, until the insured has notified the insurer of the loss; provides the insured with a right to cancel the agreement; requires notice to the insured of the right to cancel; requires the assignee to accept duties of the policy relevant to the claim; and prohibits an assignee from attempting to recover payment from an insured for work that is covered by the insurance policy. The insured retains the right to determine the scope of repairs and is also liable for relevant duties under the policy.

Current law prescribes various timeframes an insurer must comply with when processing property insurance claims.

- This PCS shortens the timeframes associated with property insurance claims, requiring insurers to fulfill certain duties related to property insurance claims more quickly.

In addition, the PCS gives insurers specific authority to require notice of loss to be reported as soon as practicable after the loss occurred and to limit the scope of repairs that may be undertaken before the insurer inspects the property.

The PCS does not have a fiscal impact on the state or on local governments. It may have a positive but indeterminate fiscal impact on the private sector.

The PCS provides an effective date of July 1, 2016.

# FULL ANALYSIS

## I. SUBSTANTIVE ANALYSIS

### A. EFFECT OF PROPOSED CHANGES:

#### Background on Issue

Generally, an agreement assigning contract benefits allows a third party to collect insurance proceeds owed to the policyholder directly from the insurance company. Consequently, the proceeds are not paid to the policyholder. Assignment agreements are commonly used in health insurance and personal injury protection insurance. In health insurance, a policyholder typically assigns his or her benefits for a covered medical service to the health care provider. Thus, the treating physician gets paid directly from the insurer. Assignment agreements are becoming more common in property insurance claims, particularly in water damage claims where a homeowner assigns his or her benefits from the property insurance policy to a contractor or water remediation company who repairs the damaged property (hereinafter collectively referred to as a “vendor”).

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

Assignment agreements used by some vendors attempt to transfer broad rights under the policy and combine the assignment with authorization to perform services described only in general terms.<sup>3</sup> “When a party assigns a contract, the party assigns all equitable and legal interest in the contract to the assignee. The assignee thereafter stands in the shoes of the assignor and may enforce the contract against the original obligor in the assignee’s own name.”<sup>4</sup> Thus, assignment of the right to receive payment under an insurance contract necessarily assigns the right to enforce payment. An unqualified assignment transfers to the assignee all of the interest the assignor has under the assigned contract and the assignor has no right to make any claim on the contract once the assignment is complete, unless authorized to do so by the assignee.<sup>5</sup> Thus, a homeowner who enters into an agreement may unknowingly be assigning away his or her right to determine whether or not to bring suit on the claim. Some industry representatives have reported that some homeowners have been unaware litigation was pending on their claim until they, themselves, were deposed or subpoenaed by one of the parties. In these cases, the suit may be proceeding against the homeowner’s wishes.

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<sup>1</sup> Insurers report an increasing number of assignment agreements in connection with roof replacement and repair claims, as well.

<sup>2</sup> See, e.g., *Citizens Property Insurance Corporation v. Ifergane*, 114 So. 3d 190 (Fla. 3d DCA 2012); *Shaw v. State Farm Fire and Casualty, Co.*, 37 So. 3d 329, 332 (Fla. 5th DCA 2010).

<sup>3</sup> See, e.g., ERICKSON’S, *Contract for Services, Assignment of Benefits*, <http://ericksonsdrying.com/contact-us/contract-for-services-assignment-of-benefits/> (last visited Jan. 21, 2016) (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>4</sup> 3A Fla. Jur 2d *Assignments* § 34 (Nov. 2015).

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

Section 627.428(1), F.S., provides for an award of attorney's fees against an insurer in a court proceeding "in which the insured or beneficiary prevails ...." This "one-way" attorney fee provision, as it is commonly described, serves to level the playing field between an insurer and an insured, thereby creating a disincentive for an insurance company to improperly deny or delay coverage. The Florida Supreme Court has construed the statute as making an award of attorney's 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>6</sup> The insured typically sues to be made whole for damages incurred and covered by the policy. Some vendors, however, may be motivated to use litigation and the threat of attorney's 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 assignee's authority to enforce, and the potential for attorney's fees has created an environment of escalating concern to insurers.

In testimony before the Insurance & Banking Subcommittee, Citizens Property Insurance Company ("Citizens") reported that 70 percent of the property insurance claims in 2014 were caused by water damage, 56 percent of which were caused by non-weather water damage.<sup>7</sup> Water damage claims appear to be highest in the counties of Miami-Dade, Broward, and Palm Beach (collectively referred to as the "Tri-County").<sup>8</sup> Citizens reported that of the volume of water damage claims from 2014, 72 percent were from the Tri-County.<sup>9</sup> Further, the results of a Citizens 2013 litigation study revealed that 75 percent of all 2013 litigation involved water claims.<sup>10</sup> In a more recent and exhaustive analysis of claims files, Citizens found:

- An increase in the percentage of water claims that have an assignment agreement;
- An increase in assigned claims as a percentage of total litigated claims; and
- Higher average litigated losses and loss adjust expenses per claim than litigated claims without assignment of benefits.<sup>11</sup>

## **Assignability of Insurance Policies**

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

The Office of Insurance Regulation (OIR) has primary responsibility for regulation, compliance, and enforcement of statutes related to the business of insurance and the admission of new insurers to the market. The OIR oversees insurance company solvency, policy forms and rates, market conduct performance, and new companies entering the Florida market. With limited exceptions,<sup>12</sup> s. 627.410(1), F.S., requires every insurance policy form to be filed with the OIR and approved by the OIR before the form can be used by the insurance company. Thus, residential property insurance policies are not only contracts executed between an insured and insurer, but contracts whose terms are subject to oversight by the OIR.

### Background on Assignability of Insurance Policies

Currently, Florida law provides that "a policy may be assignable, or not assignable, as provided by its terms."<sup>13</sup> An assignment can occur in two circumstances: pre-loss assignments and post-loss assignments. A pre-loss assignment occurs before a policyholder experiences a loss, and a post-loss assignment occurs after a policyholder experiences a loss. Florida law allows an insurance company to

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<sup>6</sup> *Roberts v. Carter*, 350 So.2d 78, 79 (Fla. 1977)

<sup>7</sup> CITIZENS PROPERTY INSURANCE CORPORATION, *Citizens Presentation on Assignment of Benefits* (Feb. 9, 2015) (on file with Insurance & Banking Subcommittee).

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

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> CITIZENS PROPERTY INSURANCE CORPORATION, *Non-Catastrophic Homeowners Water Claims* (Jan. 2016) (on file with the House Insurance & Banking Subcommittee).

<sup>12</sup> Commercial property insurance forms are among the exceptions.

<sup>13</sup> s. 627.422, F.S.

include language in the policy prohibiting pre-loss assignments,<sup>14</sup> but bars an insurance company from including language in the policy prohibiting post-loss assignments.<sup>15</sup>

Florida case law provides that “a provision in a policy of insurance which prohibits assignment thereof except with the consent of the insurer does not apply to prevent assignment of the claim or interest in the insurance money then due, after loss.”<sup>16</sup> In other words, an insurer can include a provision in a property insurance policy that prohibits a policyholder from assigning his or her policy to a third party. Such a prohibition does not prohibit the policyholder from assigning his or her rights under the policy once a claim arises. Nor may an insurer include language in a property insurance policy that prohibits a policyholder from assigning a post-loss claim.<sup>17</sup> The purpose of a provision that prohibits assignment of the policy is to protect an insurer against unbargained-for risks.<sup>18</sup> One reason a post-loss assignment is valid despite a provision prohibiting assignment without consent of the insurer is that once a loss occurs, the financial exposure of the insurance company does not change. If a post-loss assignment agreement is executed, the assignee cannot assert new rights of his or her own that did not belong to the assignor.

### Effect of the PCS on Assignability of Insurance Policies

The PCS creates s. 627.4225, F.S., which establishes requirements applicable to the assignment of post-loss property insurance claims not involving issues of liability. An insured may not assign a claim, except for emergency repairs necessary to mitigate further damage, until the insured has notified the insurer of the loss. An assignee has three days after an assignment agreement is executed to provide a copy of the assignment agreement to the insurer. The insured may cancel the assignment for a period of three days after the assignment agreement is executed or received by the insurer, whichever is later. The agreement must contain a notice to the insured of the cancellation period. By executing the agreement, the assignee accepts relevant duties under the contract. An assignment may not divest an insured of the duty to comply with relevant duties under the policy or the right to determine the scope of repairs. Likewise, it may not itself authorize work or reimbursement greater than what is provided in the policy. The PCS prohibits an assignee from attempting to recover from the insured the difference between the payment received from the insurance company and the amount claimed by the assignee for work performed. The assignee is not prohibited from pursuing a claim against the insured for money owed for deductibles or work performed at the insured’s request that is not covered by the policy.

### **Insurer’s Duties and Timeframes with Respect to Property Insurance Claims**

#### Background on Insurer’s Duties and Timeframes with Respect to Property Insurance Claims

Current law prescribes various timeframes that insurers are required to comply with regarding property insurance claims. Current law provides that when an insurer receives initial communication with respect to a claim, the insurer must review and acknowledge receipt of the communication within 14 calendar days, unless payment is made within that period of time or unless the failure to acknowledge is caused by factors beyond the control of the insurer which reasonably prevent such acknowledgment.<sup>19</sup> If the acknowledgment is not in writing, a notification indicating acknowledgment must be made in the insurer’s claim file and dated.<sup>20</sup> The acknowledgement must be responsive to the communication.<sup>21</sup> If the communication is a notification of a claim, the acknowledgment must provide necessary claim

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<sup>14</sup> *Id.*

<sup>15</sup> *Security First Ins. Co. v. Fla. Office of Ins. Reg.*, 177 So. 3d 627 (Fla. 1st DCA 2015)

<sup>16</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. Kravecas*, 719 So. 2d 320, 321 (Fla. 3d DCA 1998); *One Call Prop. Serv. Inc. v. Sec. First Ins. Co.*, 165 So. 3d 749 (Fla. 4th DCA 2015).

<sup>17</sup> *Security First Ins.*, at 628.

<sup>18</sup> *Lexington Ins. Co. v. Simkins Industries, Inc.*, 704 So. 2d 1384, 1386 (Fla. 1998).

<sup>19</sup> s. 627.70131(1)(a), F.S.

<sup>20</sup> *Id.*

<sup>21</sup> s. 627.70131(2), F.S.

forms and instructions, including an appropriate telephone number, unless the acknowledgment reasonably advises the claimant that the claim appears not to be covered by the insurer.<sup>22</sup>

Unless otherwise provided by the policy or law, the insurer must begin such investigation as is reasonably necessary within 10 working days after receiving proof of loss statements, unless the failure to begin the investigation is caused by factors beyond the control of the insurer which reasonably prevent the commencement of such investigation.<sup>23</sup> Upon written request, within 30 days after submitting a complete proof-of-loss statement to the insurer, the policyholder has the right to receive confirmation that his or her claim is covered in full, partially covered, or denied, or receive a written statement that his or her claim is being investigated.<sup>24</sup> Further, Florida law currently provides that a residential property insurer must pay or deny the property insurance claim or a portion of the claim within 90 days after receiving notice of the claim from the policyholder, unless the failure to pay is caused by factors beyond the control of the insurer which reasonably prevent such payment.<sup>25</sup>

Current law codifies a Homeowner Claims Bill of Rights, describing some of the rights held by insurance policyholders.<sup>26</sup> The insurer is required to provide the policyholder with a copy of the Homeowner Claims Bill of Rights within 14 days of a claim; however, the bill of rights does not create a new civil cause of action.<sup>27</sup>

Currently, there are protections in place for situations in which an insurer would be unable to meet such timeframes due to situations outside of their control, such as when there is a hurricane. As noted above, most of the provisions excuse an insurer from fulfilling its obligation within the prescribed timeframe when the failure to do so is “caused by factors beyond the control of the insurer which reasonably prevent” strict compliance.<sup>28</sup> Further, current law bestows certain powers to the Commissioner of Insurance (the “Commissioner”) and the Governor in the case of a declared emergency:

- When the Governor declares a state of emergency, s. 252.63, F.S., provides the Commissioner with the authority to issue general orders applicable to all Florida insurance companies, entities, and persons,<sup>29</sup>
- When the Governor declares a state of emergency, s. 252.36(5)(a), F.S., provides the Governor with the authority to suspend the provisions of any regulatory statute prescribing procedures for conduct of state business or the orders or rules of any state agency, if strict compliance with the provisions of any such statute, order, or rule would in any way prevent, hinder, or delay necessary action in coping with the emergency.

#### Effect of the PCS on Insurer’s Duties and Timeframes with Respect to Property Insurance Claims

This PCS shortens the timeframes that insurers must comply with regarding property insurance claims. The changes apply to all claims, not just claims involving an assignment. This PCS may have the effect of requiring some insurers to alter some of their claims practices in order to meet the new statutory timeframes. Below is a table illustrating the various changes the PCS provides to the statutory timeframes:

	<b>Current Timeframe</b>	<b>PCS Timeframe</b>
Upon receiving communication with respect to a claim, insurer must review and acknowledge receipt of communication within:	14 calendar days	10 calendar days
Upon receiving communication with respect to a claim, insurer	14 days	10 days

<sup>22</sup> *Id.*

<sup>23</sup> s. 627.70131(3), F.S.

<sup>24</sup> s. 626.9541(1)(i)3.e., F.S.

<sup>25</sup> s. 627.70131(5)(a), F.S.

<sup>26</sup> s. 627.7142, F.S.

<sup>27</sup> *Id.*

<sup>28</sup> s. 627.70131, F.S.

<sup>29</sup> Such orders remain in effect for 120 day unless terminated sooner by the Commissioner, and can be extended for an additional 120 days. By concurrent resolution, the Legislature may terminate any order issued by the Commissioner under this section. s. 252.63(2), F.S.

must provide policyholder with Homeowner Claims Bill of Rights within:		
Upon receiving proof of loss statements, insurer must begin such investigation as is reasonably necessary within:	10 working days	7 working days
After insurer receives proof of loss, upon written request, insurer must provide policyholder with confirmation that claim is covered in full, partially covered, or denied, or provide written statement that the claim is being investigated, within:	30 days	20 days
Upon initial notice of claim, insurer must pay or deny such claim or part of such claim within:	90 days	60 days

The PCS does not change the statutory safeguards in place for exigent circumstances in which an insurer would be unable to meet the timeframe, such as a hurricane. The PCS does not change the language in the statutes excusing the insurer from strict compliance with the timeframe when the failure to do so “is caused by factors beyond the control of the insurer which reasonably prevent” the insurer from performing such duties. Further, the powers bestowed upon the Commissioner and the Governor during a state of emergency would remain in place.

In addition, the PCS expands the Homeowners Bill of Rights to add cautionary language regarding assignment agreements. The PCS also gives insurers specific authority to require notice of loss to be reported as soon as practicable after the loss occurred and to limit the scope of repairs that may be undertaken before the insurer inspects the property.

**B. SECTION DIRECTORY:**

**Section 1:** Creates s. 627.4225, F.S., relating to assignment of post-loss claims.

**Section 2:** Amends s. 626.9541, F.S., relating to unfair methods of competition and unfair or deceptive acts or practices.

**Section 3:** Amends s. 627.70131, F.S., relating to notice of loss; insurer’s duty to acknowledge communications regarding claims; investigations.

**Section 4:** Amends s. 627.7142, F.S., relating to Homeowner Claims Bill of Rights.

**Section 5** Provides an effective date of July 1, 2016.

**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:**

Indeterminate.

D. FISCAL COMMENTS:

None.

**III. COMMENTS**

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. The PCS 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**