HOUSE OF REPRESENTATIVES STAFF ANALYSIS

BILL #: CS/HB 375 Insurance
SPONSOR(S): Regulatory Affairs Committee; Santiago
TIED BILLS: **IDEN./SIM. BILLS:** SB 870

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
1) Insurance & Banking Subcommittee	13 Y, 0 N	Emmanuel	Cooper
2) Regulatory Affairs Committee	16 Y, 0 N, As CS	Emmanuel	Hamon

SUMMARY ANALYSIS

Under current law, a Florida-licensed agent is required to countersign a property, casualty, or surety insurance policy in order to validate it. This signature is in addition to the signature of the insurance company representative and the signature of the insured.

Prior to 2003, the law required a countersignature from an agent that was also a Florida resident. In 2003, any distinction based solely on residency was overturned on constitutional grounds by the Northern District of Florida in *Council of Insurance Agents and Brokers v. Gallagher*. The court held that distinctions based on knowledge, skill, or certification level may be permissible in a licensed industry, but pure residency requirements run afoul of the U.S. Constitution. To comply with the federal court's ruling, the legislature changed the law to require a countersignature from "Florida-licensed" agents.

These countersignatures are proof that a Florida-licensed agent has reviewed the policy for conformance to Florida law. Insurance companies are not to assume direct liability for any policy unless it has been countersigned. An agent may delegate the power to countersign a policy to the issuing insurance company.

Frequently, the insurer will send the signed policy to the agent and then the agent will give the policy to the insured. In some cases, the insurer cannot be certain that the policy has been signed by the agent.

Under current case law, insurance companies waive any defense regarding a policy's invalidity due to the lack of a countersignature if the company accepts payment for that policy from the policy holder. Because of this, the insured are typically protected from an insurance company claiming a disputed policy is invalid based solely on the lack of a countersignature. Currently, it is unclear whether insurance companies enjoy the same protection if the consumer claims a similar defense.

House Bill 375 allows otherwise invalid insurance policies to be valid in the absence of a statutorily required countersignature. To the extent there is uncertainty in the current law, this bill clarifies that insurance companies will receive the same rights as consumers when a policy lacks a countersignature. It also lessens the statutory ramifications for the lack of a countersignature.

This bill also allows nonforfeiture benefits of a long-term care insurance policy, certificate, or rider to be offered in the form of a return of premiums paid. Florida law currently requires nonforfeiture benefits for long-term care insurance policies in the form of reduced paid-up insurance, extended term, shortened benefit period, or "any other benefits approved" by the Office of Insurance Regulation.

This bill has no fiscal impact on the public sector. To the extent that there may be less of an incentive to seek a countersignature, some Florida-licensed agents may not receive the economic and business practice benefit of being a counter-signatory.

This bill provides an effective date of July 1, 2014.

FULL ANALYSIS

I. SUBSTANTIVE ANALYSIS

A. EFFECT OF PROPOSED CHANGES:

Background of Countersignatures

A countersignature is a "signature of a subordinate officer to any writing signed by the principal or superior to vouch for the authenticity of it".[1] Florida law requires a countersignatures from a Florida-licensed agent for certain property (which includes automobile), casualty, and surety insurance policies.[2]

The Department of Financial Services (DFS) licenses and regulates Florida insurance agents. The countersignatures allow DFS to have a responsible party in Florida to contact in the event of non-compliance or any other issues that may arrise. These countersignatures also establish that someone familiar with Florida insurance law has attested to the specific policy's validity.

The Office of Insurance Regulation (OIR) licenses and regulates insurance companies. OIR conducts Market Conduct Surveys which include whether or not an insurance company is following the law by having countersignatures on such policies.[3]

Council of Insurance Agents and Brokers v. Gallagher and Subsequent Changes to the Law

In 2003, the language of s. 624.425(1) F.S., included a provision that policies must be "countersigned by, a local producing agent who is a resident of the state".[4] This pre-2004 countersignature requirement of s. 624.425, F.S., placed a distinct difference between Florida licensed non-resident agents and Florida licensed resident agents. Under the pre-2004 legal regime, non-resident companies were forced to have all policies countersigned by Florida resident agents, who were to have been paid at least 25% of the commission.[5]

This distinction based only on residency was overturned on constitutional grounds in *Council of Insurance Agents and Brokers v. Gallagher*.[6] In that decision, the North District of Florida declared that s. 624.425, F.S., "violate[d] the Privileges and Immunities Clause and Equal Protection Clause of the United States Constitution to the extent that [it denied] to Florida-licensed nonresident insurance agents the same rights and privileges [afforded] to Florida-licensed resident agents."[7] The court noted that distinctions based on knowledge, skill, or certification level can be permissible in a licensed industry, but pure residency requirements run afoul of the U.S. Constitution. For example, the Florida Bar may permissibly require all lawyers to be certified or knowledgeable in a certain area of law, but may not require that all Florida Bar attorneys live in Florida.

Shortly after the *Gallagher* decision, the DFS released an informational bulletin, noting that the holding applied "to all Florida-licensed non-resident general lines agents, including those working for Risk Retention Groups and Risk Purchasing Groups."[8]

In 2004, the Legislature kept the countersignature requirement, but changed the residency requirement to a licensure requirement.[9] To have a valid policy, the document must now be countersigned by a Florida-licensed agent rather than a Florida-resident agent.

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[1] See Countersignature, Black's Law Dictionary (9th ed. 2009), available at Westlaw Blacks
[2] s. 624.425, F.S.
[3] Information obtained from a telephone conversation with OIR, 1/29/2014. On file with the Insurance & Banking Subcommittee staff.
[4] s. 625.425, F.S. (2003).
[5] 287 F. Supp. 2d 1302 (N.D. Fla. 2003) at 1304.
[6] 287 F. Supp. 2d 1302 at 1313.
[7] 287 F. Supp. 2d 1302 at 1313.
[8] DFF-03-004, "Policy Countersignature – To All Property, Casualty and Surety Insurers and General Lines Insurance Agents" (Feb 26, 2003) http://www.myfloridacfo.com/agents/industry/Bulletins-Memos/docs/DFS-03-004-11-12-03.pdf.

Though not subject to the *Gallagher* ruling, Florida law continues to have additional requirements for those nonresident agents who seek to sell life[10] and health[11] insurance.

Current Situation of Countersignatures

Currently, the law explicitly states that insurers may not assume direct liability unless the contract is countersigned. The relevant section reads as follows:

> "Except as stated in 624.426, no authorized property, casualty, or surety insurer shall assume direct liability as to a subject of insurance resident, located, or to be performed in this state unless the policy or contract of insurance is issued by or through, an is countersigned by, an agent who is regularly commissioned and licensed currently as an agent and appointed as an agent for the insurer under this code."[12]

There are very few exceptions to this countersignature requirement.[13]

The current law allows agents to give written power of attorney to the issuing insurance company in order to countersign policies on the agent's behalf.[14]

Although there is a statutory requirement for insurers to have a Florida-licensed agent to countersign the policy, not all policies are signed in practice. Insurers send completed policies to agents who then turn over the policies to the insured, leaving the insurers at a disadvantage in determining whether or not their policies are countersigned.[15] This situation does not arise if the agents exercised their rights under s. 624.425(3), F.S., delegating to the insurance company the authority to countersign a policy on behalf of the agent.

Insurance providers have litigated whether these unsigned policies are valid contractual agreements for the purposes of insurers seeking collection from policyholders.[16]

Effect of the Bill on Countersignatures

This bill targets the policies that have not been countersigned, adding the language "[n]otwithstanding the requirements of this section, the absence of a countersignature does not affect the validity of a policy or contract" to s. 624.425(1), F.S.

The bill would give the insurance companies the same rights as consumers in the event a policy lacks a countersignature. Currently, insurance companies can be bound to a contract that lacks a countersignature.[17] Generally, insurance companies waive any defense based on the validity of a

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[9] See SB 2588 (2004).
[10] s. 626.792, F.S.
[11] s. 626.835, F.S.
[12] s. 624.425 (1), F.S.
[13] As laid out in s. 624.426, F.S., exceptions to the countersignature law are limited to contracts of reinsurance, policies of insurance on the rolling stock of railroad companies doing general freight and passenger business, U.S. Customs surety bonds, and company-to-company transfers of policies under the same ownership umbrella where the agent remains the same or the application has been lawfully submitted.
[14] s. 624.425 (3), F.S.
[15] Information obtained from call with OIR, 1/29/2014. On file with the Insurance & Banking Subcommittee staff.
[16] Information obtained from conference call with FCCI Mutual Insurance, 1/28/2014. On file with the Insurance & Banking Subcommittee staff.
[17] Information obtained from conference call with FCCI Mutual Insurance, 1/28/2014. On file with the Insurance & Banking Subcommittee staff.

contract when they accept payment in conformance with the contract.[18] Therefore, consumers are able to enforce un-countersigned policies on insurance companies. It is less clear whether consumers can be similarly bound. In the event that a policy lacks a counter signature, the proposed law would allow insurers to enforce an otherwise valid policy on the consumer.

Under the proposed law, insurance companies will still be required to seek countersignatures, despite the fact that the lack of a countersignature no longer could invalidate a policy. Those companies that do not have countersignatures on their policies would still be subject to review and possible penalties from the Office of Insurance Regulation through their market conduct surveys.[19] The penalties of a market conduct survey infraction range from reprimands to fines to the revocation of an insurance license.

This bill does not relieve the agent of their obligation to countersign insurance policies. The Department of Financial Services has the statutory authority to sanction agents, but typically does not fine agents for failing to countersign policies.[20] DFS believes that agents have enough incentive with the possibility of commissions or additional face time with consumers to follow the law.

Background of Long-term Care, Nonforfeiture Benefits and Long-term Care Insurance

The term "long-term care" encompasses a wide range of both medical and nonmedical services, ranging from basic custodial care to specialized medical attention for extended periods of time. Long-term care can be provided at home, in assisted living facilities, or in nursing homes. Most that use long-term care arrangements are elderly; however those suffering from certain chronic disabilities may need similar prolonged medical attention not found in hospitals.

Long-term care insurance is an insurance product that provides coverage for the cost of certain long-term care, as determined in the contract. Typically, these policies are not for a predetermined period. In some cases, the coverage of long-term care is bundled with another type of insurance, such as a term life insurance policy. Therefore, there are instances where an individual has paid premiums for long-term care insurance policy on a life insurance policy that has a term.

In Florida, long-term care insurance policies, certificates, and riders must offer a nonforfeiture protection provision. Nonforfeiture protection provisions are contractual arrangements that are triggered when a policy ends, leaving the policy holder with some benefit from paying into the policy but never using it. A policy can end for a variety of reasons, such as the expiration of the term or nonpayment. Once the policy lapses, the nonforfeiture benefit is triggered as specified in the contract. Currently, the statute requires insurance companies to offer a nonforfeiture benefit in the form of reduced paid-up insurance, extended term, shortened benefit period, or "any other benefits approved by [OIR] if all or part of a premium is not paid".[21]

Effect of the Bill on Long-term Care Benefits

Section 2 of the bill clarifies that current law allows the return of premiums paid as a nonforfeiture benefit as defined in Ch. 627 for long-term care insurance. This addition expressly authorizes OIR to allow the return of premiums paid as a nonforfeiture benefit.

B. SECTION DIRECTORY:

[18] See *Meltsner v. Aetna Causality and S. Co. of Hartford*, Conn., 233 So. 2d 849 (Fla. 3d DCA 1969) (holding that there was a "waiver of the requirement that the insurance policy be countersigned by a local producing agent" and the policy was valid), *Wolfe v. Aetna Ins. Co.*, 436 So. 2d 997 (Fla. 5th DCA 1983) (holding that "failure to countersign the endorsement does not, as a matter of law, invalidate because the absence of a countersignature may be waived")
[19] Information obtained from call with OIR, 1/29/2014. On file with the Insurance & Banking Subcommittee staff.
[20] Information obtained from call with DFS, 1/27/2014. On file with the Insurance & Banking Subcommittee staff.
[21] s. 627.94072(2), F.S.

Section 1. Amends s. 624.425(1), F.S., relating to agent countersignature required, property, casualty, surety insurance.

Section 2. Amends s. 627.94072(2), F.S., relating mandatory offers of long-term care insurance.

Section 3. Provides an effective date of July 1, 2014.

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:

Uncertain. To the extent that there may be less of an incentive for an insurance company to seek a countersignature, some Florida-licensed agents may no longer receive the economic or social benefit of being a counter-signatory. However even though the lack of a countersignature would not affect validity, insurers would still have to seek countersignatures to follow the letter of the law.

D. FISCAL COMMENTS:

None.

III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

   Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

   Yes.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On March 12, 2014, the Regulatory Affairs Committee adopted one amendment and reported the bill favorably as a committee substitute. The amendment authorizes a long-term care insurer to offer a nonforfeiture benefit in the form of a return of premiums paid if the insured dies or surrenders the policy.

The staff analysis is drafted to reflect the committee substitute as passed by the Regulatory Affairs Committee.