

The Florida Senate
BILL ANALYSIS AND FISCAL IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

Prepared By: The Professional Staff of the Committee on Judiciary

BILL: CS/SB 1064

INTRODUCER: Banking and Insurance Committee and Senator Hukill

SUBJECT: Insurance Claims

DATE: April 14, 2015

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Billmeier</u>	<u>Knudson</u>	<u>BI</u>	<u>Fav/CS</u>
2.	<u>Caldwell</u>	<u>Cibula</u>	<u>JU</u>	<u>Pre-meeting</u>
3.	_____	_____	<u>RC</u>	_____

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/SB 1064 amends s. 627.422, F.S., to provide that a property insurance policy may prohibit the post-loss assignment of benefits except that a policyholder may assign the benefit of payment:

- Up to \$3,000, to an entity that provides services or materials to mitigate or repair damage that directly arises from a covered loss. The assignment, however, is limited solely to designating that entity as a copayee for the benefit of payment. Additionally, the policyholder retains the exclusive right to enforce payment of the post-loss benefits under the policy and may not assign that right to another person or entity.
- To compensate a public adjuster. The assignment may only be for compensation due to the public adjuster by the policyholder and may not include any assignment of other benefits under the policy.
- To an attorney who represents the policyholder only if the assignment provides that the benefits are to be paid to the attorney for disbursement of the funds by the attorney to repair the property at the direction of the policyholder.

The bill provides that a post-loss assignment in violation of provisions of the bill is void.

The bill provides that an insurable interest does not survive an assignment except to a subsequent purchaser who acquires an insurable interest following a loss.

The bill amends s. 626.8651, F.S., relating to the licensure of public adjuster apprentices. It expands the ability of a public adjuster apprentice to solicit contracts for the services of the supervisory public adjuster. The bill allows public adjuster apprentices to solicit contracts while under the “general supervision” of a supervisory public adjuster rather than the “direct supervision and guidance” of the supervisory public adjuster. The bill, however, maintains the direct supervision requirement in two situations: (1) the public adjuster apprentice has appears at a residence without a prior appointment; and (2) the public adjuster apprentice solicits contracts for natural disaster claims within 30 days after the declaration of the natural disaster.

II. Present Situation:

Background on Assignment of Benefits

An assignment is the transfer of the rights of one party under a contract to another party. Current law generally allows an insurance policyholder to assign the benefits of the policy, such as the right to be paid, to another party. Once an assignment is made, the assignee can take action to enforce the contract. Accordingly, if the benefits are assigned and the insurer refuses to pay, the assignee can file a lawsuit against the insurer to recover the benefits. Section 627.422, F.S., governs assignability of insurance contracts and provides that a policy may or may not be assignable according to its terms. In *Lexington Insurance Company v. Simkins Industries*,¹ the court held that a provision in an insurance contract prohibiting assignment was enforceable under the plain language of s. 627.422, F.S. The court explained that the purpose of a provision prohibiting assignment was to protect an insurer against unbargained-for risks.² However, Florida courts have held that an assignment made after a loss is valid even if the contract states otherwise.³ In *Continental Casualty Company v. Ryan Incorporated*,⁴ the court noted that it is a “well-settled rule that [anti-assignment provisions do] not apply to an assignment after loss. A court recently explained that the rationale for post-loss assignments is that “[a]n assignment of the policy, or rights under the policy, before the loss is incurred transfers the insurer’s contractual relationship to a party with whom it never intended to contract, but an assignment after loss is simply the transfer of the right to a claim for money” and “has no effect upon the insurer’s duty under the policy.”⁵

Assignments have been prohibited by statute in other insurance contexts. In *Kohl v. Blue Cross Blue Shield of Florida, Inc.*,⁶ the court found anti-assignment language was sufficiently clear and upheld language prohibiting the assignment of a health insurance claim. The court explained that anti-assignment clauses “prohibiting an insured’s assignments to out-of-network medical

¹ 704 So. 2d 1384 (Fla. 1998).

² *Id.* at 1386.

³ See *West Florida Grocery Company v. Teutonia Fire Insurance Company*, 77 So. 209 (Fla. 1917); *Better Construction, Inc. v. National Union Fire Insurance Company of Pittsburgh*, 651 So. 2d 141 (Fla. 3d DCA 1995) (reversal a dismissal based on a no-assignment provision because “a provision against assignment of an insurance policy does not bar an insured’s assignment of an after-loss claim”); *Gisela Investments v. Liberty Mutual Ins. Co.*, 452 So.2d 1056 (Fla. 3d DCA 1984) (holding that a “provision in a policy of insurance which prohibits assignment thereof except with consent of the insurer does not apply to prevent assignment of the claim or interest in the insurance money then due, after loss”).

⁴ 974 So.2d 368, 377 n. 7 (Fla. 2008).

⁵ *Wehr Constructors, Inc. v. Assurance Company of America*, 384 S.W.3d 680, 683 (Ky. 2012).

⁶ 955 So.2d 1140 (Fla. 4th DCA 2007).

providers are valuable tools in persuading health [care] providers to keep their costs down and as such override the general policy favoring the free alienability of choses in action.”⁷

Assignment of Benefits in Property Insurance Cases

Assignment of benefits is becoming increasingly common in property insurance claims, especially in water damage claims where a homeowner assigns his or her right to receive benefits under their property insurance policy to a contractor or vendor who repairs the damaged property. In a recent presentation to the Florida House of Representatives Insurance and Banking Subcommittee, Citizens Property Insurance Company (“Citizens”) provided its 2013 litigation study statistics. Water claims represented 50 percent of all new reported claims and 75 percent of all litigation.⁸ Citizens reported that during accident years 2007-2010, the percentage of water cases in which there was an assignment of benefits was less than 1 percent each year. In 2011, the percentage of water cases in which there was an assignment of benefits was 2.32 percent. In 2012, it was 8.26 percent and in 2013, it was 10.93 percent.⁹ Citizens reported that its loss adjustment expense in a litigated claim involving assignment of benefits is 60 percent higher than a litigated claim without an assignment of benefits.¹⁰

Ongoing Litigation Involving Assignment of Benefits

At least three cases are pending in state appellate courts relating to assignment of benefits. In *Security First Insurance Company v. Florida Office of Insurance Regulation*,¹¹ an insurer is appealing the Office of Insurance Regulation’s denial of policy language that would prohibit the assignment of “any benefit or post-loss right” without the consent of the insurer. On March 24, 2015, the Fourth District Court of Appeal heard oral arguments in three cases relating to assignment of benefits to water remediation companies. In those cases, the water remediation companies argued that post-loss benefits are freely assignable, and the insurers are arguing that the assignments of benefits to water remediation companies are invalid.¹²

On April 10, 2015, the Fifth District Court of Appeals issued a decision to construe s. 627.504, F.S., “to require the property owner who holds the policy to have an insurable interest at the time of loss” and that “insurable interest is imputed to a post-loss assignee.” The assignee does not need to have an insurable interest in the homeowner’s home at the time of loss. The interest imputed on a post-loss assignee allows the assignee to sue the insurance provider for breach of contract for failing to pay the full amount owed under the policy.¹³

⁷ *Id.* at 1144-1145.

⁸ See PowerPoint presentation by Citizens Property Insurance Company to the Florida House of Representatives Insurance and Banking Subcommittee, February 9, 2015 (on file with the Florida Senate Banking and Insurance Committee).

⁹ See *Id.*

¹⁰ See *Id.*

¹¹ Case No. 1D14-1865 (Fla. 1st DCA). Briefing is complete and oral argument is not scheduled. The court will likely decide the case on the briefs.

¹² *ASAP Restoration and Construction, Inc. v. Tower Hill Signature Inc. Co.*, Case No. 4D13-4174 (Fla. 4th DCA), *One Call Property Services, Inc. v. Security First Insurance Company*, Case No. 4D14-424 (Fla. 4th DCA), *Emergency Services 24, Inc. v. United Property Casualty Ins. Co.*, Case No. 4D14-576 (Fla. 4th DCA).

¹³ *Accident Cleaners, Inc. v. Universal Ins. Co.*, Case No. 5 D14-352 (Fla. 5th DCA), April 10, 2015.

Insurable Interest

Section 627.405, F.S., provides that no contract of insurance of property or of any interest in property or arising from property shall be enforceable as to the insurance except for the benefit of persons having an insurable interest in the things insured as at the time of the loss. “Insurable interest” means any actual, lawful, and substantial economic interest in the safety or preservation of the subject of the insurance free from loss, destruction, or pecuniary damage or impairment.¹⁴ There is ongoing litigation over whether an assignee water remediation company has an insurable interest in the property. For example, in *ASAP Restoration and Construction, Inc. v. Tower Hill Signature Inc. Co.*, Case No. 4D13-4174 (Fla. 4th DCA), the insurer is arguing that the water remediation company cannot bring a lawsuit to enforce the assigned insurance post-loss benefits because the company had no insurable interest in the property at the time of loss.¹⁵ The water remediation company argues that s. 627.405, F.S., does not prohibit the action because the company, as assignee, “stands in the shoes of the insured” and can bring the same actions the insured can bring.¹⁶

Public Adjusters

Public adjusters are required to be qualified and licensed by the Department of Financial Services (DFS). A public adjuster is a person “who, for money, commission, or any other thing of value, prepares, completes, or files an insurance claim form for an insured or third-party claimant or who, for money, commission, or any other thing of value, acts on behalf of, or aids an insured or third-party claimant in negotiating for or effecting the settlement of a claim or claims for loss or damage covered by an insurance contract or who advertises for employment as an adjuster of such claims.”¹⁷ There are currently other limitations and regulations regarding public adjusting. For example, a licensed contractor or subcontractor may not adjust a claim on behalf of an insured unless licensed and compliant as a public adjuster under ch. 626, F.S.¹⁸ However, the contractor may discuss or explain a bid for construction or repair of covered property with the residential property owner who has suffered a loss or damage covered by a property insurance policy, or the insurer of such property, if the contractor is doing so for the usual and customary fees applicable to the work to be performed as stated in the contract between the contractor and the insured.¹⁹ Current law also contains a public adjuster conflict of interest section that prohibits public adjusters from participating, directly or indirectly, in the reconstruction, repair, or remediation of the insured property that is the subject of the claim or engaging in any other activity that could reasonably be construed as a conflict of interest.

Public Adjuster Apprentices

Section 626.8541, F.S., defines a “public adjuster apprentice” as any person who is not a licensed public adjuster, who is employed by or has a contract with a licensed and appointed public

¹⁴ See s. 627.405(2), F.S.

¹⁵ See *ASAP Restoration and Construction, Inc. v. Tower Hill Signature Inc. Co.*, Case No. 4D13-4174 (Fla. 4th DCA), Answer Brief of Appellee at p. 36.

¹⁶ See *ASAP Restoration and Construction, Inc. v. Tower Hill Signature Inc. Co.*, Case No. 4D13-4174 (Fla. 4th DCA), Reply Brief of Appellant at p. 13.

¹⁷ See s. 626.854(1), F.S.

¹⁸ See s. 626.854(16), F.S.

¹⁹ *Id.*

adjuster in good standing with the DFS or a public adjusting firm that employs at least one licensed and appointed public adjuster in good standing with the DFS to assist a public adjuster in conducting business under the license. A public adjuster apprentice must work with a licensed and appointed public adjuster for a period of 12 months prior to being eligible for appointment as a licensed public adjuster.²⁰

Section 626.8651(11), F.S., prohibits a public adjuster apprentice from executing contracts for the services of a public adjuster. The statute also provides that a public adjuster apprentice may not solicit contracts for the services except under the direct supervision and guidance of the supervisory public adjuster. “Direct supervision and guidance” and “solicit” are not defined in s. 626.8651(11), F.S. On at least two occasions, the DFS has attempted to define “direct supervision” and “solicitation” by rule, but has been subject to a rule challenge proceeding.²¹

According to the DFS, there are 1,422 licensed public adjusters (1,133 appointed) and 93 licensed public adjuster apprentices (65 appointed).²²

III. Effect of Proposed Changes:

Assignment of Benefits

The bill provides that a property insurance policy may prohibit the post-loss assignment of benefits, rights, causes of action, or other contractual rights under the policy, except that a policyholder may assign the benefit of payment:

- Up to \$3,000, to a person or entity that provides services or materials to mitigate or repair damage that directly arises from a covered loss. Such assignment is limited solely to designating the person or entity as a copayee for the benefit of payment for the reasonable value of services or materials provided. The policyholder, however, retains the exclusive right to enforce payment of the post-loss benefits under the policy and may not assign that right to another person or entity.
- To compensate a public adjuster for services authorized by s. 626.854(11), F.S. The assignment may only be for compensation due to the public adjuster by the policyholder and may not include any assignment of other benefits under the policy. The bill does not change the obligations, if any, of the insurer to issue to the policyholder a check for payment in the name of the policyholder or mortgageholder.
- To an attorney who represents the policyholder only if the assignment provides that the benefits are to be paid to the attorney for disbursement of the funds by the attorney to repair the property at the direction of the policyholder.

The bill provides that a post-loss assignment in violation of provisions of the bill is void.

²⁰ See s. 626.8541(2), F.S.

²¹ See *Florida Association of Public Insurance Adjusters, Inc. v. Department of Financial Services, Division of Agent and Agency Services*, Division of Administrative Hearings Case No. 13-1633RP (association argued that the DFS did not have the authority to define “direct supervision” as physical presence) and *Florida Association of Public Insurance Adjusters, Inc. v. Department of Financial Services, Division of Agent and Agency Services*, Division of Administrative Hearings Case No. 14-4196RP (association argued that the DFS did not have the authority to limit solicitation by public adjuster apprentices to those “under the direct supervision of the supervising public adjuster”).

²² Email from the DFS staff dated March 24, 2015 (on file with the Banking and Insurance Committee).

The bill provides that an insurable interest does not survive an assignment except to a subsequent purchaser who acquires an insurable interest following a loss. It is not clear whether the policyholder will retain an insurable interest in the policy if an assignment is made and later determined to be void.

Public Adjusters

This bill provides that any assignment or agreement purporting to transfer the authority to adjust, negotiate, or settle any portion of a claim to a contractor or subcontractor, or that is otherwise in derogation of the public adjuster contractor prohibition section is void. The bill appears to have the effect of prohibiting a vendor from disputing the amount of payment with the insurer under an assignment of benefits. Thus, if a property insurance policy permitted a post-loss assignment, the assignment would be limited to payment of a fixed amount presumably dictated by the policy to the vendor.

Public Adjuster Apprentices

This bill amends s. 626.8651, F.S., relating to the licensure of public adjuster apprentices. The bill expands the ability of a public adjuster apprentice to solicit contracts for the services of the supervisory public adjuster. The bill allows public adjuster apprentices to solicit contracts while under the “general supervision” of a supervisory public adjuster rather than the “direct supervision and guidance” of the supervisory public adjuster. The bill maintains the direct supervision requirement in two situations: (1) the public adjuster apprentice appears at a residence without a prior appointment; and (2) the public adjuster apprentice solicits contracts for natural disaster claims within 30 days after the declaration of the natural disaster.

The bill does not define “general supervision” or “direct supervision.” Current law does not define “natural disaster claims” or “declaration of the natural disaster.” The Insurance Adjusters Law does impose specified requirements on public adjusters based on “events that are the subject of a declaration of a state of emergency by the Governor.”

This bill takes effect on July 1, 2015.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. Other Constitutional Issues:

Article I, s. 2, Fla. Const., provides that all persons have the right to acquire, possess and protect property. Opponents of the bill may argue that an insurance claim is chose in action and therefore is a property interest.²³ Accordingly, it could be argued that the assignment of a post-loss insurance claim cannot be prohibited. The Florida Supreme Court has held that property rights are not absolute:

Of course, even constitutionally protected property rights are not absolute, and are held subject to the fair exercise of the power inherent in the State to promote the general welfare of the people through regulations that are reasonably necessary to secure the health, safety, good order, and general welfare.²⁴

The court weighs whether the statute is reasonably necessary to accomplish the asserted state goals at the cost of offending property interests protected by the Florida Constitution. If this bill is challenged, the court would have to determine whether its provisions are reasonably necessary to justify the limitation on the property rights.²⁵

V. Fiscal Impact Statement:**A. Tax/Fee Issues:**

None.

B. Private Sector Impact:

The bill removes some restrictions on the activities of public adjuster apprentices. Removal of these restrictions may allow apprentices to solicit more business for the supervisory public adjuster.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

The bill amends s. 627.405, F.S., to state that “an insurable interest does not survive an assignment, except to a subsequent purchaser of the property who acquires insurable interest following a loss.” The intent of the language is to specify that the recipient of an assignment will not have an insurable interest. The bill, however, simply states that insurable interest does not

²³ See *Castellanos v. Citizens Property Insurance Corp.*, 98 So. 3d 1180, 1183 (Fla. 3d DCA 2012) (explaining that an “insurance claim is a chose in action” because personal property is an asset) (citations omitted); *Sunspan Engineering & Const. Co. v. Spring-Lock Scaffolding Co.*, 310 So. 2d 4, 8 (Fla. 1975) (noting that “it has been held that a vested cause of action, or ‘chose in action’ is personal property entitled to protection from arbitrary laws”).

²⁴ *Shriners Hospitals for Crippled Children v. Zrillic*, 563 So. 2d 64 (Fla. 1990).

²⁵ *Id.*

survive an assignment. It is not clear whether the policyholder will retain an insurable interest in the policy if an assignment is made and later determined to be void.

The first exception in s. 626.8651(11), F.S., requiring direct supervision of a supervisory public adjuster of the apprentice is confusing by its structure and wording. It appears to allow an apprentice to solicit a contract at a residence on a subsequent visit with general supervision if the apprentice has first visited a residence without a prior appointment (also known as cold calling) under the direct supervision of a supervisory public adjuster.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends the following sections of the Florida Statutes: 627.422, 626.854, 626.8651, and 627.405

IX. Additional Information:

- A. **Committee Substitute – Statement of Substantial Changes:**
(Summarizing differences between the Committee Substitute and the prior version of the bill.)

CS by Banking and Insurance on March 23, 2015:

The CS is a delete-all amendment that substantially changes the bill. Changes include:

- Adding a provision to void an assignment if it transfers the authority to adjust a claim to a contractor or subcontractor.
- Changing the supervision requirements for public adjuster apprentices.
- Providing that an insurable interest does not survive an assignment.

Allowing a property insurance contract to prohibit post-loss assignment of benefits with three exceptions and provide an invalid assignment is void.

- B. **Amendments:**

None.