

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 Appropriations

BILL: CS/CS/SB 1248

INTRODUCER: Appropriations Committee; Banking and Insurance Committee; and Senator Diaz de la Portilla

SUBJECT: Prohibited Insurance Practices

DATE: March 1, 2016

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Billmeier</u>	<u>Knudson</u>	<u>BI</u>	<u>Fav/CS</u>
2.	<u>Betta</u>	<u>DeLoach</u>	<u>AGG</u>	<u>Recommend: Favorable</u>
3.	<u>Betta</u>	<u>Kynoch</u>	<u>AP</u>	<u>Fav/CS</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/SB 1248 expands the prohibition against a licensed contractor adjusting claims unless the contractor is a licensed public adjuster to include a person that performs emergency remediation or restoration services under an insurance policy and subcontractors to a licensed contractor.

The bill creates requirements for repair, mitigation, and restoration services which apply to personal lines residential coverage and commercial lines residential coverage. The bill provides that a person or entity may not directly or indirectly offer, deliver, receive, or accept any compensation, inducement, or reward greater than \$25 for the referral of any business for the repair, mitigation, or restoration of property for which property insurance proceeds are payable. The bill requires that a person or entity that provides emergency remediation or restoration services for an insured under a property insurance policy must provide the insured with a scope of services and materials to be provided for repairs undertaken pursuant to a property insurance claim before the agreement authorizing repairs is executed and provides that the scope of services may be supplemented. The bill also requires notice that any assignment is limited to the scope of the work and that the insured may have claims under the insurance policy. The bill specifies that the requirements related to prohibited practices do not prohibit the use of post-loss, partial assignments in homeowner's insurance claims.

The bill provides that the Department of Financial Services (DFS) will enforce the provisions prohibiting referral fees and the provisions requiring notifications. The DFS may seek a cease

and desist order and may impose, if the cease and desist order is violated, a fine no greater than \$10,000 per violation. The DFS may recommend to the appropriate licensing board that disciplinary action be taken if the violator is a licensee.

This bill creates s. 627.717, F.S., to provide that a policyholder who assigns the right to receive the benefit of payment under a property insurance policy is not liable to the assignee for services and materials for which the insurer is liable. It provides that the assignee may not collect or attempt to collect money from, maintain an action at law against, or report a policyholder to a credit agency for payment for which the insurer is liable. An assignee may take action against a policyholder for payment of the amount of the insurance deductible or any amount attributable to upgrades ordered by the policyholder which are not covered under the insurance policy.

The bill has an indeterminate fiscal impact to state funds related to the newly created fines.

The bill takes effect July 1, 2016.

II. Present Situation:

Public Adjusters

A public adjuster is hired and paid for by the policyholder to act on his or her behalf in a claim the policyholder files against an insurance company. Public adjusters can represent a policyholder in any type of insurance claim, not just property insurance claims. Public adjusters, unlike company employee adjusters, operate independently and are not affiliated with any insurance company. Independent and company employee adjusters work for insurance companies. The Department of Financial Services (DFS) regulates all types of adjusters. Section 626.854, F.S., defines “public adjuster” and contains provisions relating to the practice of public adjusting. For example, an insured has the right to rescind a contract within three days of execution.¹

Assignment of Benefits

In recent years, insurers have complained of abuse of the assignment of benefits process by companies that perform emergency remediation and restoration services. An insurance company recently described the issue in a court filing:

The typical scenario surrounding the use of an “assignment of benefits” involved vendors and contractors, mostly water remediation companies, who were called by an insured immediately after a loss to perform emergency remediation services, such as water extraction. The vendor came to the insured’s home and, before performing any work, required the insured to sign an “assignment of benefits” – when the insured would be most vulnerable to fraud and price-gouging. Vendors advised the insured, “We’ll take care of everything for you.” The vendor then submitted its bill to the insurer that was, on average, nearly 30 percent higher than comparative estimates from vendors without an assignment of benefits.

¹ See s. 626.854(7), F.S.

Some vendors added to the invoice an additional 20 percent for “overhead and profit,” even though a general contractor would not be required or hired to oversee the work. Vendors used these inflated invoices to extract higher settlements from insurers. This, in turn, significantly increases litigation over the vendors’ invoices.²

Some of the vendors in litigation involving assignment of benefits are contractors regulated by the Department of Business and Professional Regulation. Water remediation companies are not regulated.

The Public Adjuster Statute and Assignment of Benefits Litigation

Subsection 626.854(16), F.S., prohibits licensed contractors or subcontractors from adjusting claims unless they are licensed as public adjusters. Contractors are allowed to discuss or explain a bid for construction or repair of covered property but are not allowed to adjust the claim. In recent litigation over assignment of benefits, insurers have argued that vendors such as contractors or water remediation companies have acted as public adjusters in violation of the law.³ Section 626.854, F.S., does not contain an explicit prohibition on vendors such as water remediation companies adjusting claims.

Payment for Referrals

Insurers have complained of practices where water remediation companies pay plumbers referral fees if the plumbers refer business to the water remediation companies.⁴ Chapter 455, F.S., the licensing statute for many construction professionals, does not prohibit such arrangements.⁵ Subsection 626.854(13), F.S., prohibits public adjusters from paying referral fees.

III. Effect of Proposed Changes:

Section 1 amends s. 626.854, F.S., to prohibit a person that performs emergency remediation or restoration services from adjusting a claim on behalf of the insured unless the person is licensed as a public adjuster. The bill provides that subcontractors have the same prohibition against adjusting claims as contractors.

Section 2 creates s. 627.716, F.S., which provides that a person or entity may not directly or indirectly offer, deliver, receive, or accept any compensation, inducement, or reward greater than

² See *Security First Insurance Company v. State of Florida, Office of Insurance Regulation*, Case 1D14-1864 (Fla. 1st DCA), Appellant’s Initial Brief at pp. 3-4. (Appellate record citations omitted).

³ See *Bioscience West, Inc. v. Gulfstream Property and Casualty Insurance Co.*, Case No. 2D14-3946 (Fla. 2^d DCA February 5, 2016)(rejecting the insurer’s argument that the vendor unlawfully acted as a public adjuster); *One Call Property Services, Inc. v. Security First Ins. Co.*, 165 So.3d 749 (Fla. 4th DCA 2015)(declining to address the insurer’s argument that the vendor acted as a public adjuster); *Restoration 1 CFL A/A/O I. Joy White v. State Farm Florida Insurance Company*, Case No. 5D15-1049 (Fla. 5th DCA) and *Start to Finish Restoration, LLC v. Homeowners Choice Property & Casualty Ins. Co.*, Case No. 2D-2206 (Fla. 2nd DCA)(appellees argue in briefs that the vendors engaged in illegal public adjusting; cases are pending before the courts).

⁴ See, e.g. <http://piff.net/assignment-of-benefits-insurance-reform-2015-legislative-proposals-fact-sheet/> (last accessed February 10, 2016).

⁵ Referral fees are prohibited for some professionals, such as mold remediates. See s. 468.8419(1), F.S.

\$25 for the referral of any business for the repair, mitigation, or restoration of property for which property insurance proceeds are payable. Both the person offering the prohibited compensation, inducement, or reward and the person receiving such prohibited payment would be in violation of the statute.

The bill provides that an entity or person, including a contractor licensed under part I of ch. 489, F.S., or a subcontractor to the contractor, that provides emergency remediation or restoration services for an insured under a property insurance policy in this state must:

- Provide an insured with a scope of services and materials to be provided for repairs undertaken pursuant to a property insurance claim before the agreement authorizing such repairs is executed. The bill provides that providing a supplement to the original scope of work does not violate the provision of the bill;
- Notify the insured in writing that any assignment accepted by the person or entity is limited to the scope of the work and that the insured may have other claims under their homeowner's insurance policy that are not covered by the assignment.

The bill provides that it does not prohibit the use of post-loss assignments or partial assignments in homeowner's insurance claims.

The bill gives the DFS enforcement authority over contractors, subcontractors, and other persons that perform repair, mitigation, or restoration of property for which property insurance proceeds are payable regarding the requirements created by this section regarding referrals and notice to policyholders. It provides that the DFS may, in a proceeding initiated pursuant to chapter 120, F.S. (the Administrative Procedures Act), seek a cease and desist order against persons who violated s. 627.716, F.S. The bill provides that if a cease and desist order is violated, the DFS may impose an administrative fine of not more than \$10,000 per violation against any person found in violation. Any cease and desist order or administrative fine levied by the DFS may be enforced by appropriate proceedings in the circuit court of the county in which the person resides. The bill provides that the DFS may recommend to the appropriate licensing agency or board that disciplinary action be taken against persons licensed by other agencies or boards.

The bill provides that the provisions of s. 627.716, F.S., apply to personal lines residential coverage and commercial lines residential coverage.⁶

Section 3 of the bill creates s. 627.717, F.S., to provide that a policyholder who assigns the right to receive the benefit of payment under a property insurance policy is not liable to the assignee for services and materials for which the insurer is liable. It provides that the assignee may not collect or attempt to collect money from, maintain an action at law against, or report a policyholder to a credit agency for payment for which the insurer is liable. An assignee may take action against a policyholder for payment of the amount of the insurance deductible or any amount attributable to upgrades ordered by the policyholder which are not covered under the insurance policy.

⁶ Personal lines residential coverage consists of the type of coverage provided by homeowner, mobile home owner, dwelling, tenant, condominium unit owner, cooperative unit owner, and similar policies. Commercial lines residential coverage consists of the type of coverage provided by condominium association, cooperative association, apartment building, and similar policies, including policies covering the common elements of a homeowners association. *See* s. 627.4025(1), F.S.

Section 4 provides an effective date of July 1, 2016.

IV. Constitutional Issues:

A. Municipality/County Mandates Restrictions:

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

CS/CS/SB 1248 creates a \$10,000 fine per violation against a person that directly or indirectly offers, delivers, receives, or accepts any compensation, inducement, or reward greater than \$25 for the referral of any business for the repair, mitigation, or restoration of property for which property insurance proceeds are payable. Both the person offering the prohibited compensation, inducement, or reward and the person receiving such prohibited payment would be in violation of the statute.

B. Private Sector Impact:

Water remediation companies and contractors working on property covered by property insurance will have to comply with new contractual provisions created by the bill. The fiscal impact is not known.

Section 3 of the bill will benefit a policyholder who assigns the right to receive the benefit of payment under a property insurance policy by specifying the policyholder is not liable to the assignee for services and materials for which the insurer is liable, except for deductibles and upgrades ordered by the policyholder that are not covered by the insurance policy. Thus, if the assignee receives compensation from the insurer, the assignee cannot subsequently seek redress from the policyholder if the insurer paid less than the assignee was seeking. However, the assignee does not receive from the insurer compensation for work that is performed, the assignee will be able to seek compensation from the policyholder for payment of the insurance deductible or for upgrades ordered by the policyholder which are not covered by the insurance policy.

C. Government Sector Impact:

The bill provides the DFS with regulatory authority over contractors, subcontractors, and other persons performing repairs, mitigations, or restoration of property for which

property insurance proceeds are payable. The DFS does not anticipate a fiscal impact from the bill.⁷

VI. Technical Deficiencies:

Section 2 of the bill inconsistently refers to all “property insurance” and “homeowner’s insurance.” The provisions of Section 2 apply to services for property covered by “property insurance” on lines 58, 62, and 66. The bill on line 72 requires any person providing emergency remediation or restoration services under a property insurance policy to provide a notice that the insured “may have other claims under their homeowner’s insurance policy...” The bill also contains language in line 75 specifying Section 2 does not prohibit the use of post-loss, partial assignments in “homeowner’s insurance claims.” The inconsistent use of terms could be remedied by referring to residential coverage, as defined in s. 627.4025, F.S., throughout the section. Lines 87-88 of the bill indicate intent that Section 2 only applies to residential coverage, which is defined by s. 627.4025, F.S., to include both personal lines residential property insurance and commercial lines residential property insurance.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill substantially amends section 626.854 of the Florida Statutes.

This bill creates sections 627.716 and 627.717 of the Florida Statutes.

IX. Additional Information:

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

CS/CS by Appropriations on March 1, 2016:

The committee substitute:

- Adds a provision providing that a policyholder who assigns the benefit of payment under a property insurance policy is not liable for services and materials for which the insurer is liable;
- Provides that a vendor may provide a supplement to the original scope of work;
- Removes a provision informing consumers that they may wish to contact a public adjuster or attorney;
- Provides that Section 2 of the bill only applies to residential coverage.

CS by Banking and Insurance on February 16, 2016:

The CS added provisions requiring a person or entity performing emergency remediation or restoration services under a property insurance policy to provide the insured with a

⁷ See Department of Financial Services, *Bill Analysis Senate Bill 1248* (January 13, 2016) (on file with the Committee on Banking and Insurance).

scope of services to be performed before the agreement authorizing repairs is executed. It also added provisions requiring notice relating to assignment of benefits and notice that an insured may wish to contact an attorney or public adjuster. The CS removes provisions relating to a right of rescission and a written estimate.

The CS provides that the DFS may not impose a fine until a person or entity has violated a cease and desist order.

B. Amendments:

None.