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 Banking and Insurance

BILL:	SB 596
INTRODUCER:	Senator Hukill
SUBJECT:	Assignment or Transfer of Property Insurance Rights
DATE:	January 25, 2016 REVISED: 1/29/16

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Billmeier	Knudson	BI	**Pre-meeting**
2.			JU	
3.			RC	

I. Summary:

SB 596 provides that an agreement that purports to assign or transfer the right to enforce post-loss benefits in a property insurance policy is void. This provision would prevent the assignee from filing an action against the insurance company to enforce payment. This bill does not change current law regarding the right of insured to file an action against the insurance company and does not change current law regarding the rights of those who perform home repairs filing actions against homeowners.

The bill further provides that the assignment agreement is void if:

- It imposes a cancellation fee, a mortgage processing fee, or adds an amount for overhead and profit;
- The final invoice issued under the agreement exceeds the estimated cost for work performed and the increase was not authorized by the insurer;
- It prevents or inhibits an insurer from communicating with the insured at any time; or
- It purports to transfer or create any authority to adjust, negotiate, or settle any portion of a claim to a person not authorized to adjust, negotiate, or settle a claim.

This bill provides that for an assignment agreement to be valid all the following conditions must be met:

- The agreement must authorize a person or entity to be named as a payee or copayee for the benefit of payment for services rendered and materials provided to mitigate or repair covered damage only.
- The agreement must limit payment to $2,500 per occurrence for work performed to mitigate or repair covered damage.
- The agreement must be provided to the insured's property insurer within 3 business days after execution.

- The agreement must allow the insured to cancel the agreement within the later of 3 business days after the agreement is executed or submitted to the insurer. If the assignment agreement is for work resulting from a state of emergency declared by the Governor and is executed within 1 year of the declaration, the insured may cancel the assignment within 5 business days of its execution.
- The agreement must contain an estimate for proposed services and materials to be provided.

The bill provides that an agreement to assign post-loss benefits must contain a specific notice warning the insured that he or she is giving up certain rights and informing the insured of the right to rescind the agreement.

The bill does not apply to property insurance policy provisions relating to liability coverage.

This bill is effective upon becoming a law and its provisions apply to assignments executed after the effective date.

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 the 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

[1] 704 So2d 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. 2000).

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 contract 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 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]

Section 627.428, F.S., provides, in part:

> Upon the rendition of a judgment or decree by any of the courts of this state against an insurer and in favor of any named or omnibus insured or the named beneficiary under a policy or contract executed by the insurer, the trial court or, in the event of an appeal in which the insured or beneficiary prevails, the appellate court shall adjudge or decree against the insurer and in favor of the insured or beneficiary a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had.

This statute allows the insured to recover attorney's fees if the insured prevails in an action against an insurer. A person who takes an assignment of benefits is entitled to attorney's fees if that assignee prevails in an action against an insurer.[8]

Assignment of Benefits in Property Insurance Cases

In recent years, insurers have complained of abuse of the assignment of benefits process. 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. 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

[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).
[7] *Id.* at 1144-1145.
[8] *See All Ways Reliable Bldg. Maint., Inc. v. Moore*, 261 So.2d 131 (Fla. 1972); *Allstate Insurance Co. v. Regar*, 942 So.2d 969 (Fla.2d DCA 2006).

> settlements from insurers. This, in turn, significantly increases litigation over the vendors' invoices.[9]

In a court filing in a different case, a company that provides emergency repair and construction services explained the rationale behind assignments of insurance benefits:

> As a practical matter, a homeowner often will not be able to afford or hire a contractor immediately following a loss unless the contractor accepts an assignment of benefits to ensure payment. A homeowner may be unable to comply with the… provision requiring the homeowner to protect and repair the premises unless the remediation contractor accepts an assignment of benefits, however, contractors will become unwilling to accept payments by assignment if court decisions render the assignments unenforceable…
>
> Whether the repair invoice is routed through the insured or submitted by the service provider directly by assignment, the service provider's repair invoice is submitted to the insurer for coverage and reviewed by an adjuster. The only difference an assignment makes is that, if an insurance company wishes to partially deny coverage or contest an invoice as unreasonable, the insured policyholder is not mired in litigation in which he or she has no stake.[10]

It is argued that in most cases, assignment of benefits works to the homeowner's advantage because the contractor is in a better position that most homeowners to discuss costs and repair requirements with insurance adjusters.[11]

Proponents of changing the law relating to assignment of benefits argue that the ability to recover attorney's fees under s. 627.428, F.S., leads to more litigation in cases involving assignment of benefits because an assignee can recover full attorney's fees even if the award is small.[12] However, courts have explained that the purpose of s. 627.428, F.S., is to encourage the prompt payment of valid claims and place the insured in the same position he or she would have been had the insurer paid the claim.[13]

Recent Litigation in Cases Involving Assignment of Benefits

Several recent cases have addressed the assignment of post-loss benefits. In *Accident Cleaners, Inc. v. Universal Ins. Co.,*[14] the Fifth District Court of Appeal rejected a claim that s. 627.405, F.S., provided that only a person with an insurable interest at the time of loss could enforce an

---

[9] *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).
[10] *See One Call Property Services, Inc. v. Security First Insurance Company*, Case No. 4D14-0424 (Fla. 4th DCA), Appellant's Initial Brief at 46-48.
[11] Memorandum to Members of the House Insurance and Banking Subcommittee from Dale S. Dobuler, Florida Justice Association (October 26, 2015)(on file with the Committee on Banking and Insurance).
[12] *See* Florida Justice Reform Institute, White Paper: *Restoring Balance in Insurance Litigation***,** (2015) at pp. 9-10. (on file with the Committee on Banking and Insurance.
[13] *See e.g. Travelers Indemnity Insurance Company of Illinois v Meadows MRI, LLP*, 900 So.2d 676, 678-679 (Fla. 4th DCA 2005).
[14] Case No. 5D14-352 (5th DCA April 10, 2015).

insurance contract and held that the right to recover post-loss insurance benefits could be assigned. The court explained that nothing in the statute indicated the Legislature intended to change the "well-settled" law of assignability of contractual rights" or the "inability of insurers to restrict post-loss assignments."

In *One Call Property Services, Inc. v. Security First Ins. Co.*,[15] the Fourth District Court of Appeal explained that even "when an insurance policy contains a provision barring assignment of a policy, an insured may assign a post-loss claim." The court rejected arguments that the insured had nothing to assign at the time the assignment was executed because benefits were not yet due under the policy.[16]

The court explained the competing policy arguments raised by the assignment of benefits issue:

> Turning to the practical implications of this case, we note that this issue boils down to two competing public policy considerations. On the one side, the insurance industry argues that assignments of benefits allow contractors to unilaterally set the value of a claim and demand payment for fraudulent or inflated invoices. On the other side, contractors argue that assignments of benefits allow homeowners to hire contractors for emergency repairs immediately after a loss, particularly in situations where the homeowners cannot afford to pay the contractors up front.[17]

The court noted that if "studies show that these assignments are inviting fraud and abuse, then the legislature is in the best position to investigate and undertake comprehensive reform."[18]

In *Security First Ins. Co. v. State of Florida, Office of Ins. Regulation*,[19] an insurer sought approval from the Office of Insurance Regulation to amend its policy forms to prohibit assignment unless the insurer agreed to the assignment. The Office of Insurance Regulation disapproved the form filing based on Florida court cases holding post-loss benefits are freely assignable.[20] The First District Court of Appeal affirmed the Office of Insurance Regulation's order but noted evidence of abuse of the assignment of benefit process.[21] The court concluded "it is for the legislative branch to consider this public policy problem" and noted that "legislative review provides a more detailed inquiry into the current situation in the industry and greater flexibility in achieving meaningful reform, if deemed necessary."[22]

In *One Call Property Services, Inc., A/A/O Carl and June Schlanger v. St. Johns Insurance Company*,[23] the circuit court granted summary judgment in an assignment of benefits case. A homeowner executed an assignment of benefits to One Call Property Services (One Call) after a

[15] 165 So.3d 749, 753 (4th DCA 2015).
[16] *Id.* at 754.
[17] *Id*. at 755.
[18] *Id*.
[19] 177 So.3d 627 (Fla. 1st DCA 2015).
[20] *Id.* at 628.
[21] *Id*.
[22] *Id. at* 630.
[23] Case No. 13-000868-CA (Fla. 19th Circuit November 20, 2014).

water loss. When the insurer did not pay the amount demanded, One Call sued for breach of contract. The court ruled that One Call did not have standing to bring the action and granted the insurer's motion for summary judgment. The court explained that the "proceeds of any insurance recovery from homestead property are constitutionally protected to the same extent as the property itself, and a homeowner cannot be divested of those proceeds through an unsecured agreement" and ruled that the assignment was invalid. The court held the assignment of benefits "impermissibly seeks to divest the homeowners of these constitutionally protected insurance proceeds and, therefore, the assignment is invalid." The court said this was "particularly true where, as here, the contract was [only executed by one spouse]." The court further ruled that One Call was unlawfully acting as a public adjuster.

One Call appealed the case the Fourth District Court of Appeal. In the briefs, the parties argued whether the provision of the state constitution prohibiting the forced sale of a homestead[24] prohibited the assignment of insurance proceeds. The briefs also addressed whether both spouses were required to agree to the assignment and whether One Call was unlawfully acting as a public adjuster. The court affirmed without issuing a written opinion[25] so the exact reasoning behind the court's affirmance is not known.[26] The opinion is not final until the disposition of any motion for rehearing.[27]

There are at least three other cases pending the district courts of appeal relating to assignment of benefits in water mitigation cases.[28] In one of the cases, both the homeowner and the assignee filed suit against the insurer. The trial court granted the insurer's motion for summary judgment after finding that the homeowner never intended to assign her right to sue the insurance company. In other cases, there are disputes over whether the assignee unlawfully acted as public adjuster, whether the assignment is prohibited under article X, s. 4, Fla. Const., and whether the assignment at issue is an invalid partial assignment. There is no timetable for the courts to decide these pending cases.

Data Provided by Insurers

On October 6, 2015, the Insurance Consumer Advocate issued a data call to gather information relating to assignment of benefits. On October 23, 2015, the Office of Insurance Regulation issued a data call to gather information from insurance companies relating to assignment of benefits and its relationship to property insurance rates. Most insurers did not respond to the Insurance Consumer Advocate data call due to concerns about disclosure of trade secrets. Insurance companies submitted information to the Office of Insurance Regulation during December and January. The office is currently reviewing the information submitted.

[24] Article X, s. 4, Fla. Const.
[25] Case No. 4D14-4585 (Fla. 4th DCA January 28, 2016).
[26] In Florida appellate courts, most cases are decided with a "per curiam affirmed" opinion. Such an opinion is binding on the parties to the litigation but is not binding precedent for other cases. *See Department of Legal Affairs v. District Court of Appeal, 5th District*, 434 So.2d 310 (Fla. 1983).
[27] Motions for rehearing must be filed within 15 days of the opinion unless another time is set by the court.
[28] *Biosciene West, Inc. v. Gulfstream Property & Casualty Insurance Co.*, Case No. 2D14-3946 (Fla. 2d DCA)(briefs have been filed; oral argument was held August 18, 2015); *Start to Finish Restoration, LLC v. Homeowners Choice Property & Casualty Insurance*, Case No. 2D15-2206 (Fla. 2d DCA)(briefs have been filed; oral argument set for February 24, 2016); *Restoration 1 CFL a/a/o I. Joy White v. State Farm Florida Insurance Company*, Case No. 5D15-1049 (Fla. 5th DCA)(briefs have been filed; oral argument set for April 5, 2016).

Citizens Property Insurance Corporation ("Citizens") provided a summary of information it provided in response to the OIR data call. Citizens randomly sampled 983 claims reported in 2015 that were settled without a lawsuit being filed. The statewide average that Citizens paid for the loss and loss adjustment expense was $15,822 if the claim had an assignment of benefits but $8,507 if the claim did not have an assignment of benefits. If a lawsuit was filed, Citizens paid an average of $37,677 per claim if the claim had an assignment of benefits and $30,526 if the claim did not. In South Florida (Miami-Dade, Broward, and Palm Beach counties), the percentage of claims litigated increased from 15.8 percent in 2010 to 38.4 percent in 2014. Citizens also reported that 31.9 percent of its claimants had representation either by an attorney or public adjuster at the first notice of loss in 2014. That percentage increased to 45.6 percent through the first 9 months of 2015.

III. Effect of Proposed Changes:

This bill creates a new section of law to provide that an agreement that purports to assign or transfer the right to enforce post-loss benefits in a property insurance policy is void. This provision would prevent the assignee from filing an action against the insurance company to enforce payment. Since the assignee could not file an action to enforce payment, the assignee could not collect attorney's fees under s. 627.428, F.S. This bill does not change current law regarding the right of insured to file an action against the insurance company and does not change current law regarding the rights of those who perform home repairs filing actions against homeowners.

This bill requires that all of the following conditions must be met for an assignment agreement to be valid:

- The agreement must authorize a person or entity to be named as a payee or copayee for the benefit of payment as provided in the policy for services rendered and materials provided to mitigate or repair covered damage only.
- The agreement must limit payment to $2,500 per occurrence for work performed to mitigate or repair covered damage.
- The agreement must be provided to the insured's property insurer within 3 business days after execution.
- The agreement must contain an estimate for proposed services and materials to be provided.
- The agreement must allow the insured to cancel the agreement within 3 business days[29] after the agreement is executed or submitted to the insurer, whichever is later. The assignee is entitled to be reimbursed for work already performed before cancellation of the agreement.

In addition to providing that an agreement that purports to transfer the right to enforce payment is void, the bill provides that an agreement is void if any of the following conditions are met:

- The agreement imposes an agreement cancellation fee, a mortgage processing fee, or adds an amount for overhead and profit. This addresses concerns that some vendors are inflating the costs and overcharging consumers.[30]

[29] The bill extend this period to 5 days if the agreement is executed to perform work resulting from an event for which the Governor has declared a state of emergency and is within 1 year of the declaration.

[30] *See* Florida's Assignment of Benefits Problem prepared by American Strategic Insurance (on file with the Committee on Banking and Insurance). It provides examples of charges for mortgage processing fees ranging from $300-$1,500, examples of charges of 10 percent of the total bill for "overhead" and "profit," and cancellation charges of 15 percent-30 percent.

- The final invoice issued under the agreement exceeds the estimated cost for work performed and the increase was not authorized by the insurer.
- The agreement prevents or inhibits an insurer from communicating with the insured at any time. This addresses the problem, reported by some insurers, that assignees are preventing insureds from discussing the claim with the insurance company.
- The agreement purports to transfer or create any authority to adjust, negotiate, or settle any portion of a claim to a person not authorized to adjust, negotiate, or settle a claim under part VI of ch. 626, F.S. This provision prevents a person not licensed as an insurance adjuster from acting as an adjuster.

The agreement must contain the following notice, in 14-point type:

> WARNING: YOU ARE AGREEING TO GIVE UP CERTAIN RIGHTS YOU HAVE UNDER YOUR INSURANCE POLICY TO A THIRD PARTY. PLEASE READ AND UNDERSTAND THIS DOCUMENT BEFORE SIGNING IT. YOU HAVE THE RIGHT TO CANCEL THIS AGREEMENT WITHOUT PENALTY WITHIN 3 BUSINESS DAYS AFTER THE DATE THIS AGREEMENT IS EXECUTED OR WITHIN 3 BUSINESS DAYS AFTER YOUR PROPERTY INSURANCE COMPANY HAS RECEIVED A COPY OF THIS AGREEMENT, WHICHEVER IS LATER. IF WORK IS BEING PERFORMED AS A RESULT OF DAMAGES CAUSED BY AN EVENT FOR WHICH THE GOVERNOR HAS DECLARED A STATE OF EMERGENCY AND IS WITHIN 1 YEAR AFTER SUCH DECLARATION, YOU HAVE 5 DAYS AFTER THE DATE OF EXECUTION TO CANCEL. THIS AGREEMENT DOES NOT CHANGE YOUR DUTIES UNDER YOUR PROPERTY INSURANCE POLICY, SUCH AS PROMPTLY NOTIFYING YOUR INSURANCE COMPANY OF A LOSS AND MITIGATING YOUR PROPERTY FROM FURTHER DAMAGE.

The bill does not apply to a power of attorney granted to a management company, family member, guardian, or similarly situated person which may include the authority to act in place of the principal on property insurance claims. The bill also does not apply to assignments relating to liability coverage in the property insurance policy.

This bill is effective upon becoming a law and its provisions apply to assignments executed after the effective date. The provisions do not apply to agreements entered into before the bill's effective date.

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:

Access to Courts

The bill provides that any assignment that purports to transfer the right to enforce payment for post-loss benefits is void. It could argue that the effect of this bill is to remove the right for an assignee to sue for breach of the insurance contract. The Florida Supreme Court addressed the ability to limit an assignee's access to courts in *Nationwide Mut. Fire Ins. Co. v. Pinnacle Medical Inc.*[31] In that case, Pinnacle, a medical provider, provided medical services to a person injured in an automobile accident. The injured person assigned his rights to receive benefits to Pinnacle. When the insurer refused to pay, Pinnacle, as assignee, brought suit against the insurer for breach of contract. A statute required that a medical provider who had accepted an assignment of benefits must submit to binding arbitration so the insurer argued that Pinnacle could not bring the action.[32]

The court held that the statute prohibiting an assignee from bringing an action to enforce payment violated the Access to Courts[33] provision of the state constitution. The court explained that the right of an assignee to sue for breach of contract to enforce assigned rights predates the Florida Constitution. If a right to seek redress in the courts predates the Florida Constitution, the Legislature cannot abolish that right without providing a reasonable alternative or commensurate benefit unless the Legislature can show an overpowering public necessity for its abolishment and no alternative means of meeting the public necessity.[34]

However, it could be argued that the bill is not impairing access to courts and is a statute restricting assignments. "Generally, causes of action derived from a contract are assignable and contract rights can be assigned unless forbidden by the terms of the contract itself, or unless the assignment would violate some rule of public policy or some statute, or the contract rights involve obligations of a personal nature.[35] Since statutes or public policy are valid reasons for limiting or prohibiting assignments and this bill declares an assignment "void" if it purports to transfer the right to enforce, it can be argued that there is no impairment of access to courts and that the bill is an example of the Legislature declaring by statute the public policy of this state relating to the assignment of benefits of property insurance contracts.

[31] 753 So.2d 55 (2000).
[32] *Id.* at 56.
[33] Art. 1, s. 21, Fla. Const.
[34] *See Pinnacle Medical*, 753 So.2d at 57; *Kluger v. White*, 281 So.2d 1, 4 (Fla. 1973); *Smith v. Department of Insurance*, 507 So.2d 1080, 1088 (Fla. 1987).
[35] 3A Fla.Jur.2d Assignments §6; Restatement 2d Contracts 317. *See Kohl v. Blue Cross and Blue Shield of Florida*, 955 So.2d 1140, 1143 (Fla. 4th DCA 2007)(upholding language prohibiting assignments to out of network medical providers).

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

B. Private Sector Impact:

The data provided by Citizens Property Insurance Company indicates that the bill may be effective in lowering property insurance claim costs that are currently associated with an executed post-loss assignment of benefits.

C. Government Sector Impact:

Indeterminate. It is not known whether the changes in this bill will reduce litigation.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates section 627.70133 of the Florida Statutes.

IX. Additional Information:

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

None.

B. Amendments:

None.