

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 Rules

BILL: CS/CS/CS/SB 122

INTRODUCER: Rules Committee; Judiciary Committee; Banking and Insurance Committee; and Senator Broxson and others

SUBJECT: Agreements Between Service Providers and Consumers

DATE: April 19, 2019

REVISED: _____

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	<u>Billmeier</u>	<u>Knudson</u>	<u>BI</u>	<u>Fav/CS</u>
2.	<u>Davis</u>	<u>Cibula</u>	<u>JU</u>	<u>Fav/CS</u>
3.	<u>Billmeier</u>	<u>Phelps</u>	<u>RC</u>	<u>Fav/CS</u>

Please see Section IX. for Additional Information:

COMMITTEE SUBSTITUTE - Substantial Changes

I. Summary:

CS/CS/CS/SB 122 makes various changes to address issues arising from the assignment of post-loss benefits from a property insurance policy. The bill eliminates the “one way” attorney fee for assignees. The bill requires the assignee to give the insurer notice prior to the filing of a lawsuit and make a presuit demand. The insurer must respond with a presuit settlement offer. To award fees, the court must compare the difference between the demand and the offer with the judgment obtained and award fees based on a formula.

The bill allows insurers to make available a property insurance policy that prohibits or restricts the assignment of benefits. If an insurer offers a policy that prohibits or restricts assignments, it must offer a policy with benefits that are assignable. When purchasing a policy that prohibits or restricts assignments, the named insured must reject the fully assignable policy. Policies prohibiting or restricting assignment of benefits must be at a lower cost.

The bill requires assignees to comply with some of the policyholder’s duties under the insurance policy. Insurance policies generally require insureds to cooperate with the claims investigation, sit for examinations under oath by the insurance company, and participate in appraisal. This bill applies those duties to the assignees as well.

The bill:

- Gives the insured 14 days to rescind the assignment.
- Gives the insured 30 days to rescind the assignment if the assignee has not begun substantial work during that 30 days.
- Requires the assignee to provide a copy of the AOB to the insurance company within 3 days.
- Limits AOBs to \$3,000 or 1 percent of Coverage A during emergency situations.
- Prohibits assignees from charging mortgage processing or rescission fees to the insured.
- Limits the ability of assignees to collect payment from insureds.
- Requires insurers to report information about assignments to the Office of Insurance Regulation.
- Provides that Citizens Property Insurance Corporation cannot implement rate changes unless the rate filing reflects projected savings from the bill.

II. Present Situation:

Attorney Fees in Insurance Litigation

In general, parties to a lawsuit each pay their own attorney fees unless statutes or contractual provisions provide otherwise. 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.¹

This statute allows an insured to recover his or her own attorney fees if the insured prosecutes a lawsuit to enforce an insurance policy. Some version of this statute has been the law in Florida since at least 1893.²

The Florida Supreme Court recently explained the purpose of the statute:

The need for fee and cost reimbursement in the realm of insurance litigation is deeply rooted in public policy. Namely, the Legislature recognized that it was essential to "level the playing field" between the economically-advantaged and sophisticated insurance companies and the individual citizen. Most assuredly, the average policyholder has neither the finances nor the expertise to single-handedly take on an insurance carrier. Without the funds necessary to compete with an insurance carrier, often a concerned policyholder's only means to take protective

¹ Section 626.9373, F.S., contains substantially similar language but it applies to surplus lines insurers. Florida courts have interpreted the statutes to have the same meaning.

² See *Tillis v. Liverpool & London & Globe Insurance Company*, 35 So. 171 (1903)(rejecting an insurance company argument that the 1893 law providing that an insured may recover attorney fees in actions against an insurance company to enforce a policy violates due process and equal protection).

action is to hire that expertise in the form of legal counsel... For this reason, the Legislature recognized that an insured is not made whole when an insurer simply grants the previously denied benefits without fees. The reality is that once the benefits have been denied and the plaintiff retains counsel to dispute that denial, additional costs that require relief have been incurred. Section 627.428, F.S., takes these additional costs into consideration and levels the scales of justice for policyholders by providing that the insurer pay the attorney's fees resulting from incorrectly denied benefits.³

Florida courts have interpreted the statute broadly to allow recovery of fees when the insurer ultimately settles the case before trial.⁴ The court awards fees pursuant to the statute even if the insurer does not act in bad faith.⁵

There must be a dispute over the amount owed before attorney fees can be recovered pursuant to s. 627.428, F.S. In *Goldman v. United Services Automobile Association*,⁶ homeowners sustained water damage due to a plumbing leak. The homeowners reported the claim to their insurance company. The insurance company investigated and paid the claim. The homeowners filed a lawsuit without informing the insurance company that they disputed the amount of the claim. The insurance company demanded appraisal and paid the disputed amount after the appraisal award.⁷ The court held the homeowners were not entitled to attorney fees because the insurance company was not aware of a dispute over the amount of the claim until the filing of the lawsuit. The court said that attorney fees may only be recovered when the claims process breaks down and the parties are no longer working to resolve the claim.⁸

Assignments of Post-Loss Insurance Benefits

An assignment is the voluntary 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. This assignment is often called an “assignment of benefits” or “AOB.” 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 may file a lawsuit against the insurer to recover the insurance benefits.⁹

³ *Johnson v. Omega Ins. Co.*, 200 So.3d 1207, 1215-1216 (Fla. 2016)(internal citations omitted).

⁴ *Johnson v. Omega Ins. Co.*, 200 So.3d 1207, 1215 (Fla. 2016)(noting that it is “well settled that the payment of a previously denied claim following the initiation of an action for recovery, but prior to the issuance of a final judgment, constitutes the functional equivalent of a confession of judgment”).

⁵ *Insurance Co. of North America v. Lexow*, 602 So.2d 528, 531 (Fla. 1992)(“We reject the argument that attorney's fees should not be assessed against INA because this dispute involved a type of claim which reasonably could be expected to be resolved by a court. INA's good faith in bringing this suit is irrelevant. If the dispute is within the scope of s. 627.428, F.S., and the insurer loses, the insurer is always obligated for attorney's fees”).

⁶ 244 So.3d 310 (Fla. 4th DCA 2018).

⁷ *Goldman*, 244 So.3d at 311.

⁸ *Goldman*, 244 So.3d at 312. See also *Hill v. State Farm Florida Insurance Company*, 35 So.3d 956, 961 (Fla. 2d DCA 2010)(stating that “fees should normally be limited to the work associated with filing the lawsuit after the insurance carrier has ceased to negotiate or has breached the contract and the additional legal work necessary and reasonable to resolve the breach of contract); *Lewis v. Universal Property and Casualty Insurance Co.*, 13 So.3d 1079 (Fla. 4th DCA 2009).

⁹ *Nationwide Mutual Insurance Company v. Pinnacle Medical, Inc.* 753 So.2d 55, 57 (Fla. 2000)(“The right of assignee to sue for breach of contract to enforce assigned rights predates the Florida Constitution”).

The Florida Supreme Court Applies Section 627.428, F.S., to AOB Cases

Section 627.428, F.S., provides that “any named or omnibus insured or the named beneficiary under a policy” may be entitled to attorney fees. In 1961, the First District Court of Appeal held that an assignee of the proceeds of a life insurance policy could recover attorney fees when the assignee had to sue to enforce payment.¹⁰

In 1971, the Fourth District Court of Appeal considered whether the insured’s assignee of benefits from a property insurance policy was entitled to attorney fees and held the assignee was not entitled to fees because the assignee was not a named insured or beneficiary.¹¹ The Fourth District’s opinion was appealed to the Florida Supreme Court and the Florida Supreme Court reversed. In 1972, the Florida Supreme Court held that an insured’s assignee is entitled to attorney fees under s. 627.0127, F.S., the predecessor statute to s. 627.428, F.S. The court said “an assignee of an insurance claim stands to all intents and purposes in the shoes of the insured and logically should be entitled to an attorney’s fee when he sues and recovers on the claim.”¹²

The court reaffirmed the holding in 2008:

[S]ection 627.428 authorizes an award of attorney's fees only to “the named or omnibus insured or named beneficiary” under an insurance policy and to other third parties who obtain coverage based on an assignment from an insured.¹³

Anti-Assignment Provisions in Insurance Contracts Do Not Prevent AOB in Property Insurance or Motor Vehicle Insurance

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*,¹⁴ the court held that a provision in an insurance contract prohibiting assignment of the policy 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.¹⁵

An assignment made after the loss is valid even if the contract states otherwise.¹⁶ In *Continental Casualty Company v. Ryan Incorporated Eastern*,¹⁷ the court noted that it is a “well-settled rule that [anti-assignment provisions do] not apply to an assignment after loss.” A court explained that a rationale for post-loss assignments is that “assignment of the policy, or rights under the policy, before the loss is incurred transfers the insurer’s contractual relationship to a party with

¹⁰ *Travelers Insurance Company v. Tallahassee Bank and Trust Company*, 133 So.2d 463 (Fla. 1st DCA 1961).

¹¹ *Southern American Fire Insurance Company v. All Ways Reliable Building Maintenance, Inc.*, 251 So.2d 11 (Fla. 4th DCA 1971), *reversed*, *All Ways Reliable Building Maintenance, Inc. v. Moore*, 261 So.2d 131 (Fla. 1972).

¹² *All Ways Reliable Bldg. Maintenance, Inc. v. Moore*, 261 So.2d 131 (1972).

¹³ *Continental Cas. Co. v. Ryan, Inc. Eastern*, 974 So.2d 368, 379 (Fla. 2008).

¹⁴ 704 So.2d 1384 (Fla. 1998).

¹⁵ *Id.* at 1386.

¹⁶ *West Fla. Grocery Co. v. Teutonia Fire Ins. Co.*, 74 Fla. 220, 77 So. 209 (1917); *Gisela Inv., N.V. v. Liberty Mut. Ins. Co.*, 452 So.2d 1056 (Fla. 3^d DCA 1984).

¹⁷ 974 So.2d 368, 377 n. 7 (Fla. 2000).

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.”¹⁸

Assignments have been prohibited by contract in other insurance contexts. In *Kohl v. Blue Cross Blue Shield of Florida, Inc.*,¹⁹ 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.”²⁰

AOB in Property Insurance Cases

In recent years, insurers have complained of abuse of the assignment of benefits process. An insurance company 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 settlements from insurers. This, in turn, significantly increases litigation over the vendors’ invoices.²¹

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 ...

¹⁸ *Wehr Constructors, Inc. v. Assurance Company of America*, 384 S.W.3d 680, 683 (Ky. 2012). The Florida courts’ interpretation of s. 627.422, F.S., appears to be the position of a majority of states that have considered the issue.

¹⁹ 955 So.2d 1140 (Fla. 4th DCA 2007).

²⁰ *Id.* at 1144-1145.

²¹ *Security First Insurance Company v. State of Florida, Office of Insurance Regulation*, Case No. 1D14-1864 (Fla. 1st DCA), Appellant’s Initial Brief at pp. 3-4 (appellate record citations omitted).

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.²²

There have been a number of cases in recent years where courts have held that post-loss benefits are assignable.²³

Data and Recommendations for Reform

According to the Department of Financial Services,²⁴ the number of AOB lawsuits for water claims has increased in recent years:

Year	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Water	8	35	87	184	483	989	1,603	2,083	2,786	5,328	8,488	10,937	16,890

This chart shows the percentage of lawsuits with an AOB for water claims or for windshield glass:

Year	Lawsuits	AOB	AOB Percentage
2018	278,739	34,289	12.3%
2017	229,188	36,601	16.0%
2016	192,598	28,183	14.6%
2015	161,062	18,145	11.3%
2014	148,003	11,804	8.0%
2013	141,320	6,414	4.5% ²⁵

In 2015, the Office of Insurance Regulation (OIR) did a data call to attempt to determine the effect of assignment of benefits in the insurance market.²⁶ The OIR found that water losses alone could require rate increases of 10 percent per year.²⁷ The Insurance Commissioner showed that

²² *One Call Property Services, Inc. v. Security First Insurance Company*, Case No. 4D14-0424 (Fla. 4th DCA), Appellant’s Initial Brief at 46-48.

²³ See, e.g., *Security First Ins. Co. v. State of Florida Office of Insurance Regulation*, 177 So.3d 627, rehearing denied (Fla. 1st DCA 2015); *Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co.*, 185 So.2d 638 (Fla.2d DCA 2016); *One Call Property Services, Inc. v. Security First Ins. Co.*, 165 So.3d 749 (Fla. 4th DCA 2015); *Accident Cleaners, Inc. v. Universal Ins. Co.*, 186 So.3d 1 (Fla. 5th DCA 2015).

²⁴ Data presented to the Senate Committee on Banking and Insurance on January 22, 2019 (on file with the Senate Committee on Banking and Insurance).

²⁵ The number of lawsuits was determined by entering a start date of January 1 and an end date of December 31 for each year as selection criteria into the Florida Department of Financial Services Service of Process reports site <https://apps.fldfs.com/LSOPReports/Reports/Report.aspx> (last visited February 5, 2019). The number of AOB lawsuits was provided the Florida Department of Financial Services.

²⁶ <http://www.floir.com/Sections/PandC/AssignmentofBenefits.aspx> (last accessed February 5, 2019).

²⁷ Office of Insurance Regulation, *2015 Report on Review of the 2015 Assignment of Benefits Data Call* (February 8, 2016) at p 8. The report can be accessed at <https://www.floir.com/siteDocuments/AssignmentBenefitsDataCallReport02082016.pdf> (last visited on February 5, 2019).

the OIR has approved a greater percentage of rate increases in personal residential insurance in recent years:

Year	Percentage of Filings with a Rate Increase
2017	91.9%
2016	72.0%
2015	44.9%
2014	37.6% ²⁸

In 2017, the OIR conducted another data call on AOB. The OIR found that water losses (a combination of the frequency of water claims and the severity of the claims) increased 14.2 percent per year from January 1, 2010, to September 30, 2015.²⁹ From January 1, 2015, to June 30, 2017, water losses increased by 42.1 percent per year.³⁰ In 2015, almost 13 percent of the water claims utilized an AOB. In 2017, that percentage was approximately 17 percent.³¹

Citizens Property Insurance Company (Citizens) reports an increase in both litigation and litigation where the claimant has an AOB:³²

Year	Lawsuits	AOB	AOB Percentage
2018	13,363	3,631	27.2%
2017	7,624	2,718	35.6%
2016	10,061	3,242	32.2%
2015	7,653	1,250	16.3%
2014	9,525	1,062	11.1%
2013	9,146	860	9.4%

The current average actuarial rate indication for multiperil homeowners policies for policies issued by Citizens Property Insurance Corporation (Citizens) is 25.2 percent. Citizens anticipates an actuarial rate indication on the same policies of 10.1 percent if AOB reform is successful.³³ Citizens reports that 70 percent of its homeowners multiperil customers received rate decreases in 2015 while 97 percent of those customers will see rate increases in 2019.³⁴

²⁸ Presentation by David Altmaier to the Senate Committee on Banking and Insurance on January 22, 2019 (on file with the Senate Committee on Banking and Insurance).

²⁹ Office of Insurance Regulation, *Report of the 2017 Assignment of Benefits Data Call*, January 8, 2018, at page 1. The report can be accessed at <https://www.floir.com/siteDocuments/AssignmentBenefitsDataCallReport02082017.pdf> (last visited on February 5, 2019).

³⁰ *Id.*

³¹ *Id.* at p. 3.

³² Presentation by Barry Gilway to the Senate Committee on Banking and Insurance on January 22, 2019 (on file with the Senate Committee on Banking and Insurance).

³³ Presentation by Barry Gilway to the Senate Committee on Banking and Insurance on January 22, 2019 (on file with the Senate Committee on Banking and Insurance).

³⁴ *Id.*

A restoration contractor testified that issues arise between assignees and insurers because insurers wrongly deny claims and adjusters are poorly trained.³⁵ The contractor suggested the following solutions:

- Regulation of restoration contractors;
- Increased training for insurance company claims staff;
- Increased penalties for insurance fraud committed by contractors; and
- Penalties against insurers for underpayment and delayed claims.³⁶

Nebraska AOB Reform

In *Mallard Gutter Company v. Farm Bureau Property and Casualty Insurance Company*,³⁷ the Nebraska Supreme Court held that assignment of post-loss benefits from an insured to a roofing contractor is allowed under Nebraska law. In 2018, the Nebraska Legislature adopted a statute to deal with perceived issues in Nebraska. The statute:

- Allows an assignment to authorize a contractor to be named as a copayee;
- Requires the assignment to be provided to the insurer within five business days after execution;
- Requires the following notice on an assignment:

YOU ARE AGREEING TO ASSIGN CERTAIN RIGHTS YOU HAVE UNDER YOUR INSURANCE POLICY. WITH AN ASSIGNMENT, THE RESIDENTIAL CONTRACTOR SHALL BE ENTITLED TO PURSUE ANY RIGHTS OR REMEDIES THAT YOU, THE INSURED HOMEOWNER, HAVE UNDER YOUR INSURANCE POLICY. PLEASE READ AND UNDERSTAND THIS DOCUMENT BEFORE SIGNING;

- Provides that the assignment shall not impair the interest of a mortgagee; and
- Provides that the assignment shall not prevent or inhibit an insurer from communicating with the named insured or mortgagee.³⁸

Florida Courts Say if Policy Changes Are Needed, They Should be Made by the Legislature

The First District Court of Appeal recently noted:

[W]e are not unmindful of the concerns that Security First expressed in support of [limiting assignment of benefits], providing evidence that inflated or fraudulent post-loss claims filed by remediation companies exceeded by thirty percent comparable services; that policyholders may sign away their rights without understanding the implications; and that a "cottage industry" of "vendors, contractors, and attorneys" exists that use the "assignments of benefits and the

³⁵ Presentation by Josh Reynolds to the Senate Committee on Banking and Insurance on February 4, 2019 (on file with the Senate Committee on Banking and Insurance).

³⁶ *Id.*

³⁷ 889 N.W.2d 596 (Neb. 2016).

³⁸ Neb.Rev.St. s 44-8605.

threat of litigation" to "extract higher payments from insurers." These concerns, however, are matters of policy that we are ill-suited to address.³⁹

The Fourth District Court of Appeal 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.⁴⁰

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.”⁴¹

III. Effect of Proposed Changes:

CS/CS/CS/SB 122 makes numerous changes to the law relating to assignment of post-loss benefits. The bill:

- Requires assignees of post-loss benefits from a property insurance policy to give presuit notice to the insurer before filing suit;
- Provides that “one way” attorney fees do not apply to suits brought by such assignees and creates a formula to determine entitlement to attorney fees;
- Allows property insurers to offer a policy which prohibits or restricts assignments of post-loss benefits;
- Creates requirements for assignment agreements;
- Requires assignees to comply with certain duties under the insurance policy;
- Provides protections for the insured;
- Places requirements on Citizens;
- Requires reporting to the OIR; and
- Provides for severability.

Presuit Notice and Attorney Fees

Presuit Notice by Assignee

An assignee must provide the named insured, insurer, and the assignor with a written notice of intent to initiate litigation before filing suit under the policy. The notice must be served at least 10 business days before filing suit. It may not be served before the insurer has made a coverage

³⁹ *Security First Ins. Co. v. State of Florida Office of Insurance Regulation*, 177 So.3d 627, 628, rehearing denied (Fla. 1st DCA 2015).

⁴⁰ *One Call Property Services, Inc. v. Security First Ins. Co.*, 165 So.3d 749, 755 (Fla. 4th DCA 2015).

⁴¹ *Id.*

determination pursuant to s. 627.70131, F.S.⁴² The notice must specify that damages in dispute and the amount claimed and contain a presuit settlement demand. The assignee must also provide the insurer, named insured and assignor a detailed written invoice or estimate of services, including itemized information on equipment, materials, and supplies and the number of labor hours; and in the case of work performed, proof that the work has been performed in accordance with accepted industry standards.

Response by the Insurer

The insurer must respond within 10 business days by making a presuit settlement offer or requiring appraisal. The bill requires the insurer to have a procedure in place for the prompt investigation, review, and evaluation of claims contained in the presuit notice.

Attorney Fee Calculation

“One way” attorney fees do not apply in litigation between assignees and insurers. Instead, attorney fees are calculated by determining the difference between the assignee’s presuit demand and the insurer’s presuit offer. This number is called the “disputed amount.” Once the court reaches a decision, the judgment obtained is compared to the disputed amount. If the difference between the judgment obtained by the assignee and the insurer’s presuit settlement offer is:

- Less than 25 percent of the disputed amount, the insurer is entitled to an award of reasonable attorney fees.
- At least 25 percent but less than 50 percent of the disputed amount, no party is entitled to an award of attorney fees.
- At least 50 percent of the disputed amount, the assignee is entitled to an award of reasonable attorney fees.

The bill provides that the only way an assignee can obtain attorney fees is pursuant to the provisions of the bill or under s. 57.105, F.S.⁴³

An insurer waives its right to attorney fees if the insurer fails to inspect the property or provide authorization for repairs within 7 calendar days after the first notice of loss. The insurer does not waive its right to fees if the failure to inspect the property or provide authorization for repairs is the result of:

- An event for which the Governor had declared a state of emergency.
- Factors beyond the control of the insurer which reasonably prevented an inspection or written or oral authorization for repairs.
- The named insured's failure or inability to allow an inspection of the property after a request by the insurer, the insurer does not waive its right to an award of attorney fees.

Insurers May Offer a Non-Assignable Policy

⁴² Section 627.70131, F.S., requires an insurer to make a coverage determination and pay or deny a claim within 90 days of receipt of the claim.

⁴³ Section 57.105, F.S., allows a party to obtain attorney fees if the opposing party raises frivolous claims or defenses.

The bill allows an insurer to make available a policy that restricts in whole or in part an insured's right to execute an assignment agreement⁴⁴ if all of the following conditions are met:

- The insurer makes available to the insured or potential insured at the same time the same coverage under a policy that does not restrict the right to execute an assignment agreement;
- Each restricted policy is available at a lower cost than the unrestricted policy; and
- The policy prohibiting assignment in whole is available at a lower cost than any policy prohibiting assignment in part.

Each restricted policy must include on its face the following notice in 18-point uppercase and boldfaced type:

THIS POLICY DOES NOT ALLOW THE UNRESTRICTED ASSIGNMENT OF POST-LOSS INSURANCE BENEFITS. BY SELECTING THIS POLICY, YOU WAIVE YOUR RIGHT TO FREELY ASSIGN OR TRANSFER THE POST-LOSS PROPERTY INSURANCE BENEFITS AVAILABLE UNDER THIS POLICY TO A THIRD PARTY OR TO OTHERWISE FREELY ENTER INTO AN ASSIGNMENT AGREEMENT AS THE TERM IS DEFINED IN SECTION 627.7152 OF THE FLORIDA STATUTES.

The insurer must notify the insured at least annually of the coverage options the insurer makes available under this section. Such notice must be part of and attached to the notice of premium. A named insured must reject a fully assignable policy in writing or electronically. The rejection of a fully assignable policy shall be made on a form approved by the OIR. The form must state that the policy restricts the assignment of benefits. The heading of the form shall be in 18-point uppercase and boldfaced type and state:

YOU ARE ELECTING TO PURCHASE AN INSURANCE POLICY THAT RESTRICTS THE ASSIGNMENT OF BENEFITS UNDER THE POLICY IN WHOLE OR IN PART. PLEASE READ CAREFULLY.

The bill requires an assignee to indemnify and hold harmless the assignor from all liabilities resulting from the assignment of a policy that prohibits or restricts assignment of benefits.

Requirements in an Assignment Agreement

The bill requires that an assignment agreement must:

- Be in writing;
- Be executed by both the assignor and assignee;
- Allow the assignor to rescind the assignment agreement without a penalty or fee within 14 days after the execution of the agreement;

⁴⁴ Under the bill, an assignment agreement is any instrument which transfers post-loss benefits under a property insurance policy.

- Allow the assignor to rescind the assignment agreement without a penalty or fee within at least 30 days after the date work on the property is scheduled to commence if the assignee has not substantially performed;
- Allow the assignor to rescind the assignment agreement without a penalty within or at least 30 days after the execution of the agreement if the agreement does not contain a commencement date and the assignee has not begun substantial work on the property;
- Contain a provision requiring the assignee to provide a copy of the executed assignment agreement to the insurer within 3 business days after the date on which the assignment agreement is executed or the date on which work begins, whichever is earlier;
- Contain a written, itemized, per-unit cost estimate of the services to be performed by the assignee;
- Relate only to work to be performed by the assignee for services to protect, repair, restore, or replace a dwelling or structure or to mitigate against further damage to such property.

The assignment agreement must contain a notice in 18-point uppercase and boldfaced type that provides notice of the policyholder's rights of rescission, obligation to pay for contracted work performed before the agreement is rescinded, and continuing obligation to perform the duties required under the property insurance policy. The notice includes the following warning:

YOU ARE AGREEING TO GIVE UP CERTAIN RIGHTS YOU HAVE UNDER YOUR INSURANCE POLICY TO A THIRD PARTY, WHICH MAY RESULT IN LITIGATION AGAINST YOUR INSURER. PLEASE READ AND UNDERSTAND THIS DOCUMENT BEFORE SIGNING IT.

An assignment agreement may not contain:

- A penalty or fee for rescission;
- A check or mortgage processing fee;
- A penalty or fee for cancellation of the agreement; or
- An administrative fee.

If an assignor acts under an urgent or emergency circumstance to protect property from damage and executes an assignment agreement to protect, repair, restore, or replace property or to mitigate against further damage to the property, an assignee may not receive an assignment of post-loss benefits under a residential property insurance policy in excess of the greater of \$3,000 or 1 percent of the Coverage A limit under such policy.

An assignment agreement that does not comply with the conditions is invalid and unenforceable.

Assignee Must Comply with Certain Duties

Many property insurance policies contain duties that the insured must fulfil in order for policy to provide coverage. Many policies require the insured to cooperate with the insurer during the claims investigation or sit for an examination under oath. Compliance with those duties can be a condition precedent to the filing of a lawsuit under the policy. Under current law, AOBs give

assignees policy benefits but do not require assignees to fulfill important duties.⁴⁵ The bill requires that an assignee:

- Must provide the assignor with accurate and up-to-date revised estimates of the scope of work to be performed as supplemental or additional repairs are required;
- Must perform the work in accordance with accepted industry standards;
- May not seek payment from the assignor exceeding the applicable deductible under the policy unless the assignor has chosen to have additional work performed at the assignor's own expense;
- Must submit to examinations under oath conducted by the insurer that are reasonably necessary, based on the scope of the work and the complexity of the claim. The examinations must be limited to matters related to the services provided, the cost of the services, and the assignment agreement; and
- Must participate in appraisal or other alternative dispute resolution methods in accordance with the terms of the policy.

The bill requires an assignee to demonstrate that the insurer is not prejudiced by the assignee's failure to:

- Maintain records of all services provided under the assignment agreement;
- Cooperate with the insurer in the claim investigation;
- Provide the insurer with requested records and documents related to the services provided, and permit the insurer to make copies of such records and documents; and
- Deliver a copy of the executed assignment agreement to the insurer within 3 business days after executing the assignment agreement or work has begun, whichever is earlier.

Current law requires an insurer to plead and prove that an insured's failure to cooperate in a claims investigation substantially prejudiced the insurer.⁴⁶ This bill requires the assignee to demonstrate the insurer was not prejudiced by an assignee's failure to cooperate.

Provisions Regarding Managed Repair Arrangements and Insurance Adjusting

The bill provides that an assignment agreement does not modify or eliminate any term, condition, or defense relating to any managed repair arrangement provided in the policy.

The bill provides that an assignment agreement does not transfer or create any authority to adjust a claim to a person or entity not authorized to adjust a claim under part VI, ch. 626.

Protections for the Insured

The bill provides that if a vendor accepts an AOB, the vendor waives claims against a named insured for payments arising from the assignment agreement. A named insured is responsible for the payment of all of the following:

- Any deductible amount due under the policy.
- Any betterment ordered and performed that is approved by the named insured.

⁴⁵ See *Shaw v. State Farm Fire & Cas. Co.*, 37 So.3d 329, 332 (Fla. 5th DCA 2010) (en banc), *overruled on other grounds by Nunez v. Geico Gen. Ins. Co.*, 117 So.3d 388, 396–97 (Fla.2013).

⁴⁶ See *Bankers Ins. Co. v. Macias*, 475 So.2d 1216 (1985); *Ramos v. Northwestern Mut. Ins. Co.*, 336 So.2d 71 (1976).

- Any contracted work performed before the assignment agreement is rescinded.

The waiver remains in effect even if the assignment is rescinded or found invalid and the insured is not responsible for any damages if a non-assignable policy is assigned.

The bill does not change some traditional assignments. The conditions placed on assignments by the bill do not apply to assignments such as those given to family members or assignments to persons who purchase property after the loss.

Reports to the Office of Insurance Regulation

The bill requires the OIR to require each insurer to report by January 30, 2022, and each year thereafter data on each residential and commercial property insurance claim paid in the prior calendar year under an assignment agreement. The Financial Services Commission, the rulemaking entity for the OIR, must adopt by rule a list of the data required. The data must include specific data about claims adjustment and settlement timeframes and trends, grouped by whether litigated or not litigated and by loss adjustment expenses.

Citizens Property Insurance Corporation

The bill provides that Citizens Property Insurance Corporation may not implement rate changes in 2019 for DP-3 and HO-3 policies unless the rate filing reflects projected rate savings. Such rate filing must include an exhibit demonstrating the impact of the bill on indicated rates for DP-3 and HO-3 policies. Citizens Property Insurance Corporation must provide policyholders with details on the projected rate savings.

Severability

The amendment contains a severability provision. It provides that if a provision of the bill is held invalid, that invalidity does not affect the remaining provisions of the bill which can be given effect without the invalid provision.

Penalties for Filing and Dismissing Actions

The bill provides that if an assignee commences an action in any court based upon or including the same claim against the same adverse party that such assignee has previously voluntarily dismissed, the court may order the assignee to pay the attorney fees and costs of the adverse party of the action previously voluntarily dismissed.

Effective Date

The effective date of the bill is July 1, 2019. The provisions relating to assignment agreements and attorney fees apply to assignment agreements entered into on or after July 1, 2019. The provisions of the bill relating to policies that restrict or prohibit assignments are effective July 1, 2019.

IV. Constitutional Issues:**A. Municipality/County Mandates Restrictions:**

None.

B. Public Records/Open Meetings Issues:

None.

C. Trust Funds Restrictions:

None.

D. State Tax or Fee Increases:

None.

E. Other Constitutional Issues:**Due Process**

The Florida Supreme Court has explained that in order to determine whether a statute violates due process, it must determine whether the statute bears a reasonable relationship to a legitimate legislative objective and is not discriminatory, arbitrary, or oppressive.⁴⁷ In *Nationwide Mutual Fire Insurance Company v. Pinnacle Medical Inc.*,⁴⁸ the court considered a challenge to a provision in the Florida Motor Vehicle No-Fault law that created a prevailing party standard for awarding attorney fees to medical provider assignees, rather than the standard applied to insureds under s. 627.428, F.S. The court held that the prevailing party standard for awarding attorney fees to medical provider assignees violated the due process⁴⁹ rights of medical providers.

In 1998, the Motor Vehicle No-Fault Law required motor vehicle insurance policies to contain a provision requiring providers who accepted an assignment of personal injury protection benefits to provide medical services or supplies to resolve any dispute with the insurance company via binding arbitration. It provided the prevailing party could recover attorney fees but did not define prevailing party.⁵⁰ In 1998, the Legislature amended the No-Fault Law to create a prevailing party definition.⁵¹ Under s. 626.736, F.S., providers who accepted assignments and had a dispute were not entitled to attorney fees under

⁴⁷ 753 So.2d 55, 59 (Fla. 2000).

⁴⁸ 753 So.2d 55, 59 (Fla. 2000).

⁴⁹ Article 1, section 9 of the Florida Constitution provides that no person shall be deprived of life, liberty, or property without due process of law.

⁵⁰ See Section 627.736(5), F.S. (Supp. 1998).

⁵¹ See ch. 98-270, L.O.F. The definition provides that the claimant prevails if the PIP award at arbitration exceeds the sum of the insurer's offer at arbitration plus 50 percent of the difference between the insurer's demand at arbitration and the insurer's offer. The insurer prevails if the PIP award is less than the insurer's offer at arbitration plus 50 percent of the difference between the insurer's demand at arbitration and the insurer's offer. The formula can be expressed as PIP BENEFITS DETERMINED BY ARBITRATION < or > INSURER OFFER + .5(CLAIMANT DEMAND – INSURER OFFER).

s. 627.428, F.S. Instead, they could only recover fees if they prevailed at arbitration under the statutory formula.

The court said that an objective of No-Fault Law was to provide persons injured in an accident with prompt payment of benefits and that the legislative objective of s. 627.428, F.S., was to discourage insurance companies from contesting valid claims and to reimburse successful insureds for their attorney fees when they are compelled to sue to enforce their insurance contracts. The court explained that the prevailing party attorney fee formula replaced s. 627.428, F.S., attorney fees with an award of attorney fees based on who was the prevailing party. Therefore, medical provider-assignees were subject to attorney fees while insureds suing to enforce the exact same contract could obtain one-way imposition of attorney fees against insurers. The court held that this distinction does nothing to further the prompt payment of benefits or to discourage insurers' denial of valid claims and that the effect of the attorney-fee provision was to delay insureds from receiving medical benefits by encouraging medical providers to require payment from insureds at the time the services are rendered. Therefore, the court said the prevailing party attorney-fee provision arbitrarily distinguished between medical providers and insureds and violated medical providers' due process rights.⁵²

Opponents may argue that the provisions of this bill that prohibit an assignee from using s. 627.428, F.S., to collect attorney fees when the assignee prevails in an action against an insurance company similarly violates the assignee's due process rights. They could argue that the assignee, like the medical providers in *Pinnacle*, are suing to enforce the same contract as a named insured and the distinction between assignees and named insureds is arbitrary and does nothing to encourage the prompt payment of valid claims. Similarly, opponents could argue that the bill's requirement that an assignee demonstrate that an insurer was not prejudiced by the assignee's failure to cooperate with a claims investigation violates due process because the insured is not held to that standard if the insured is bringing the case.

Proponents could argue that this bill's distinction is not arbitrary. Proponents could argue that the distinction was drawn because: (1) there has been a large increase in AOB litigation in recent years; (2) claims with an AOB are often higher cost than claims without an AOB; (3) AOB claims are more likely to be inflated; and (4) the one-way attorney fee statute limits the insurers' ability to litigate smaller claims. Proponents could argue that the Legislature is drawing this distinction to prevent further increases in insurances rates because higher rates harm the state's economy.

V. Fiscal Impact Statement:

A. Tax/Fee Issues:

None.

⁵² 753 So.2d 55, 59 (Fla. 2000).

B. Private Sector Impact:

None.

C. Government Sector Impact:

None.

VI. Technical Deficiencies:

None.

VII. Related Issues:

None.

VIII. Statutes Affected:

This bill creates the following sections of the Florida Statutes: 627.7152 and 627.7153.

This bill substantially amends section 627.422 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/CS by Rules on April 17, 2019:

- Removes provisions relating to automobile windshield glass from the bill.
- Provides that insurers must make available a property insurance policy that does not restrict AOB. Insurers may also offer a policy that entirely or partially restricts AOB. When purchasing a policy that restricts AOB, the named insured must reject the fully assignable policy and receive a notice that the policy restricts AOB. The policy restricting AOB must be at a lower cost.
- Eliminates “one way” attorney fees for assignees. The bill requires the assignee to give the insurer notice prior to the filing of a lawsuit and make a presuit demand. The insurer must respond with a presuit settlement offer. To award fees, the court must compare the difference between the demand and the offer with the judgment obtained and award fees based on a formula.
- Requires assignees to comply with some of the policyholder’s duties under the insurance policy.
- Provides that Citizens cannot implement rate changes unless the rate filing reflects projected savings from the bill.

CS/CS by Judiciary on March 18, 2019:

In addition to stylistic and clarifying changes, the following provisions are added:

- Agreements made under urgent or emergency circumstances must be in writing and identify the work to be performed and the applicable changes.

- All post-loss agreements must be in writing and identify the work to be performed and the applicable charges and the dates by which the work will begin and be completed.
- Consumers may rescind an agreement, not 30 days after execution, but 30 days after the scheduled commencement date if the service provider has not substantially performed.
- Language is added to clarify that, whether a contract was made under urgent circumstances or otherwise, a service provider retains the right to payment for services performed before the rescission.
- The Legislative Findings and Intent section of the underlying bill are moved from the end of the bill and placed as “whereas” clauses at the beginning of the bill.

CS by Banking and Insurance on March 4, 2019:

- Establishes standards for a valid assignment of post-loss benefits under property insurance policies and motor vehicle insurance policies for coverage of windshield damage under comprehensive or combined additional coverage.
- Limits the scope of an AOB in urgent or emergency circumstances and requires the assignee service provider to waive all claims against a consumer other than for payment of the deductible and betterment ordered by the consumer.
- Provides that the prevailing party in litigation between an assignee service provider and insurer may be awarded attorney fees and establishes standard for the court to apply when determining the prevailing party.
- Prohibits “judge shopping” by authorizing judges to order assignees to pay attorney fees and cost to the other party when an assignee service provider files suit, voluntarily dismisses the action, and then refiles in hopes of being assigned a different judge.
- Contains legislative findings and intent.

B. Amendments:

None.