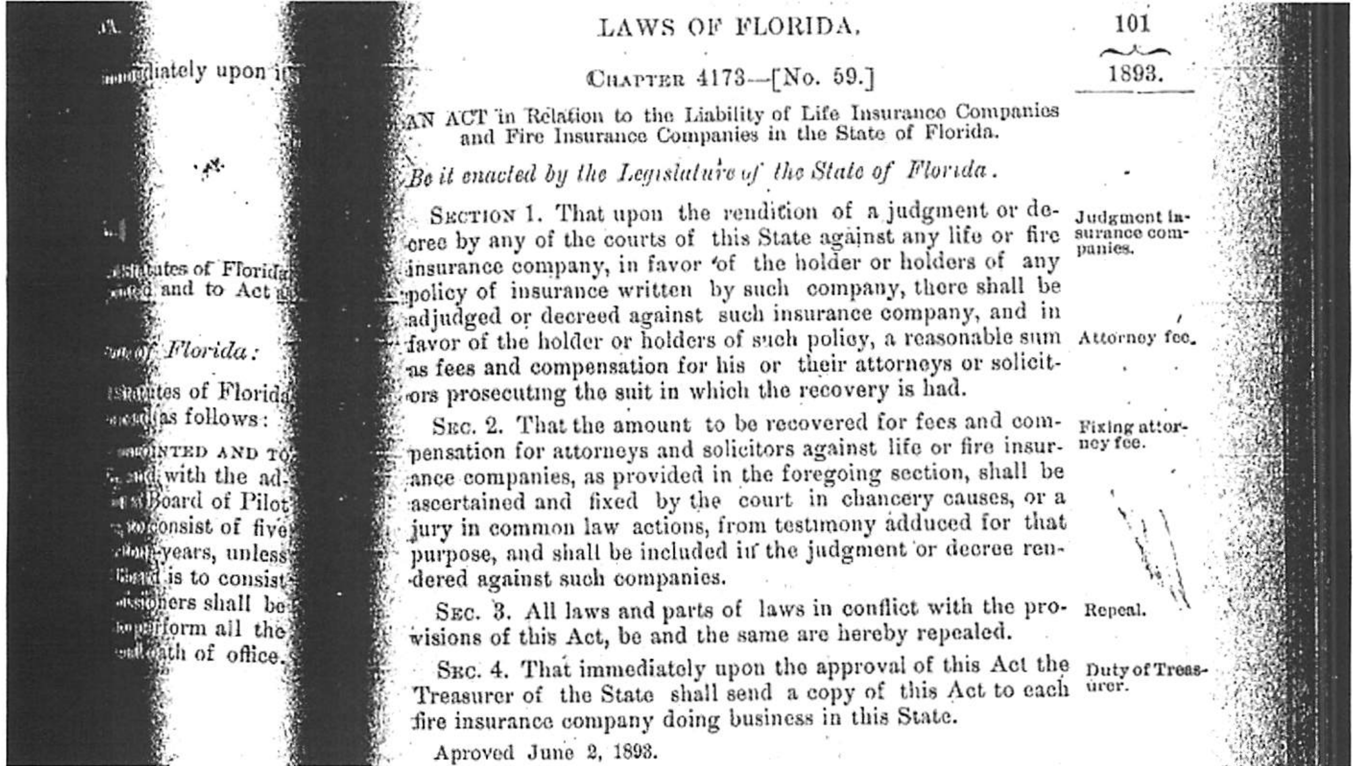
Attorneys: Restrictions to legal fees in insurance claims cases would be challenged



LAWS OF FLORIDA. 101

1893.

CHAPTER 4173—[No. 59.]

AN ACT in Relation to the Liability of Life Insurance Companies and Fire Insurance Companies in the State of Florida.

Be it enacted by the Legislature of the State of Florida.

SECTION 1. That upon the rendition of a judgment or decree by any of the courts of this State against any life or fire insurance company, in favor of the holder or holders of any policy of insurance written by such company, there shall be adjudged or decreed against such insurance company, and in favor of the holder or holders of such policy, a reasonable sum as fees and compensation for his or their attorneys or solicitors prosecuting the suit in which the recovery is had. *Judgment insurance companies. Attorney fee.*

SEC. 2. That the amount to be recovered for fees and compensation for attorneys and solicitors against life or fire insurance companies, as provided in the foregoing section, shall be ascertained and fixed by the court in chancery causes, or a jury in common law actions, from testimony adduced for that purpose, and shall be included in the judgment or decree rendered against such companies. *Fixing attorney fee.*

SEC. 3. All laws and parts of laws in conflict with the provisions of this Act, be and the same are hereby repealed. *Repeal.*

SEC. 4. That immediately upon the approval of this Act the Treasurer of the State shall send a copy of this Act to each fire insurance company doing business in this State. *Duty of Treasurer.*

Aproved June 2, 1893.

The so-called "one-way attorney fee" law targeted for the upcoming legislative session as a way to stem assignment of benefits insurance losses, was enacted in Florida in 1893. (Courtesy Broward County Law Library, Florida Supreme Court Law Library)

By **Ron Hurtibise**
Sun Sentinel

FEBRUARY 24, 2017, 6:25 PM

Even if lawmakers finally agree this year on measures aimed at curbing home insurance claims abuses, court challenges will likely follow, plaintiffs attorneys say.

The proposed reforms take aim at attorneys' income streams by seeking to revise a right that's been part of Florida law since 1893 — the right of insurance customers to collect legal fees if they sue their insurance company and win the case.

"If this statute does get passed into law, its enforceability will be litigated," says Ely R. Levy, a trial lawyer at Hollywood-based Militzok & Levy.

The new bill, filed on Feb. 17 by Sen. Dorothy Hukill, R-Ormond Beach, aims to reduce the amount of money insurance companies say they are losing in litigation stemming from water damage claims. The bill was crafted with input from state-run Citizens Property Insurance Corp., the state Office of Insurance Regulation, and industry interest groups.

Many insurers say the lawsuits — and the losses — are forcing them to raise premiums for all of their customers.

Citizens' CEO Barry Gilway blamed increases in litigation for rate hikes in the tricounty region ranging from 8.9 percent to 10 percent this year. Many private insurance companies raised rates as well on 2017 policies, and state insurance officials expect more rate hike requests this year.

In 2011, less than 15 percent of water claims against Citizens went to litigation, Gilway told the Sun Sentinel editorial board in a recent presentation. By 2016, that percentage increased to 46 percent.

Gilway and other insurers blame the increased litigation on "assignment of benefits" — when repair contractors coerce policyholders into signing over the benefits of their policies after a loss, then stand in the shoes of policyholders and file hundreds, if not thousands, of lawsuits against insurers each year.

But courts have consistently upheld assignment rights, and efforts in the Legislature to restrict assignment of benefits laws have died in each of the past four years.

Now insurers are targeting the "one-way attorney fee statute" that requires insurance companies to pay legal fees against any named "or omnibus insured" who wins a court judgment or decree in an action against the insurer.

Courts interpret "ominbus insured" as meaning any assignee of the insured, and in cases against property insurers, that usually means water repair contractors..

Armed with assignments of benefits from policyholders, the contractors and their plaintiff attorneys started realizing around 2010 that huge money could be made challenging claims denials or settlement offers, insurers say.

The one-way attorney fee statute requires insurers that agree to settle cases for any amount of money over the amount of the original settlement offer to pay legal fees incurred by the policyholder — or the policyholder's assignee.

Bombarded with lawsuits, insurers typically settle the majority of them, creating a deep revenue pool for the plaintiff attorneys, insurers say.

So this year, insurers will try to stem the losses by choking off plaintiff attorneys' revenue streams and removing their incentive to file so many suits.

Among other reforms, Hukill's bill would prevent attorneys from collecting fees from insurers if they represent any third party designated by an assignment as a beneficiary of a policy.

The idea has the support of the Florida Chamber of Commerce and its offshoot, the Consumer Protection Coalition, as well as the Personal Insurance Federation of Florida, an industry advocacy group.

Writing for the Florida-based free market think tank James Madison Institute, Christian R. Camara, senior fellow and co-founder of the libertarian R Street Institute, called for barring trial lawyers from accessing one-way attorneys fees when representing third-party vendors "especially when the policyholder has surrendered control of the policy."

Insurance Commissioner David Altmaier said last week that the bill would preserve a policyholder's right to attorneys fees if they are suing the insurance company on their own, which was the original intent of the one-way attorney fee law.

The legislative session begins March 1. This bill's first committee hearing stop will be the Senate Committee on Banking and Insurance, which is not yet scheduled. An expected House companion bill has not yet been filed.

Questioned about the bill this week, several of South Florida's most prolific plaintiff attorneys said the proposed restrictions on one-way attorneys fees would likely be challenged in court.

Joe Ligman, a Palmetto Bay-based attorney who has filed more than 1,200 suits against the top 25 insurers since 2010, predicted a law preventing assignees from collecting attorneys fees "would be an unconstitutional denial of equal protection" that would result in contractors avoiding emergency measures to protect homeowners' properties.

Hollywood-based Ely R. Levy, who has filed more than 550 suits against Citizens since 2010, said the result of an inevitable court challenge will "depend on how the statute ultimately reads."

"Reading the tea leaves, the challenge would be that there is a significant [constitutionally protected] 'access to courts' issue raised by this proposed bill," he said. In addition, "the bill would face a

constitutional challenge on grounds that the law is discriminatory insofar as it excludes a class, in this case contractors, from entitlement to prevailing party fees and costs.

"While courts do tend to defer to the Legislature when classifications are made, this may be an example of palpably arbitrary legislation that courts will strike down."

Imran Malik of Malik Law P.A. in Maitland said "case law has long been settled that any omnibus insured [i.e. assignees of insurance benefits] are entitled to recoup attorney fees" pursuant to the one-way attorney fee statute. While Hukill's bill specifies that it pertains to property insurance, Malik says it "may have far reaching consequences that affect not only contractors but other industries such as automobile repair shops that use a similar AOB to repair vehicles for insureds."

Although the current one-way attorneys fee law was enacted in 1959, it originated with an 1893 law granting "fees and compensation for attorneys and solicitors against life or fire insurance companies" to "holder or holders of any policy of insurance written by such company" upon "the rendition of a judgment or decree by any of the courts of this State."

Anthony Lopez of Coconut Grove-based Marin, Eljaiek & Lopez, P.L., said Hukill's bill "is in direct contravention with a hundred years of Florida law."

"Remember, the attorneys are only entitled to fees and costs when they prevail against the carrier [i.e. the carrier wrongly denied benefits]. Why wouldn't our legislators support such an outcome?"

A biography of Maitland-based Harvey V. Cohen on the website of his firm Cohen Grossman credits him as the go-to attorney for assignment of benefits cases. After the 2004-05 hurricanes, Cohen's biography states, he started meeting with restoration contractors and teaching them how to use assignment of benefits so they could get paid directly by insurance companies.

"Mr. Cohen has literally handled thousands of insurance claims," the site says.

Asked to comment about Hukill's bill, Cohen said its true aim was to put companies that rely on assignments of benefits out of business. "The real reason insurance companies don't like AOBs is because the insurance company loses leverage in settlement negotiations with the insured if AOBs exist.

"If the insured is forced to come out of pocket or live in a flooded moldy home, the insured is more likely to accept a low ball offer from the insurance company to stop the bleeding and not have to live in squalor. Taking way [the one-way statute] ... would allow insurers to act with complete impunity."

When a valid assignment exists, "we ARE the homeowner for purposes of these claims," Cohen said. To say the one-way fee statute is only available to homeowners who do not assign their post loss rights "means that either we are not valid assignees, or that the Legislature is trying to do the same thing the courts have routinely prohibited" — restricting assignments.

Cohen said he suspects any attempt by the Legislature to restrict assignability of post-loss benefits "would have difficulty withstanding constitutional scrutiny."

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