

## HOUSE OF REPRESENTATIVES STAFF ANALYSIS

**BILL #:** PCS for CS/HB 233 Countersignature

**SPONSOR(S):** Regulatory Affairs Committee

**TIED BILLS:** **IDEN./SIM. BILLS:**

REFERENCE	ACTION	ANALYST	STAFF DIRECTOR or BUDGET/POLICY CHIEF
Orig. Comm.: Regulatory Affairs Committee		Haston	Hamon

### SUMMARY ANALYSIS

Under current law, a property, casualty, or surety insurance policy must contain a countersignature by a Florida-licensed agent. Subject to a few exceptions, the current law provides that insurance companies are not to assume direct liability for any property, casualty, or surety insurance policy unless it contains a proper countersignature.

Prior to 2003, the law required these insurance policies to be countersigned by a Florida-licensed agent who was also a Florida resident. This served the law's intended purpose of protecting the public by ensuring a local agent was present for policyholders who previously encountered difficulties dealing with out-of-state insurance companies. However, the distinction based solely on residency between Florida-licensed resident agents and Florida-licensed non-resident agents for purposes of countersignatures was deemed unconstitutional in 2003 by the United States District Court for the Northern District of Florida in *Council of Insurance Agents and Brokers v. Gallagher*. In response to this ruling, the legislature removed the agent's residency requirement from the countersignature law, maintaining the requirement that the policy be countersigned by a Florida-licensed agent.

Though property, casualty, and surety insurance policies are required by statute to contain countersignatures, this requirement can be waived by insurance companies when they accept payment under the policy. Thus, insurance companies can be bound by a contract of insurance in the absence of a countersignature. However, it is currently unclear whether policyholders can similarly be bound by a contract of insurance in the absence of a countersignature.

The bill provides that the absence of a countersignature does not affect the validity of the insurance policy. The bill clarifies that an omission from a third party to the contract (the Florida-licensed agent) does not impact the validity of the contract of insurance as between the insurance company and the policyholder. Despite this change, the bill does not remove the statutory requirement that insurance companies seek countersignatures for their property, casualty, and surety insurance policies. As such, insurance companies could still be subject to review and potential penalties from the Office of Insurance Regulation (OIR) for failure to comply with the countersignature requirement.

The bill also makes a grammatical change to the language of the countersignature statute.

This bill has no fiscal impact on the public sector. The bill may have an indeterminate impact on the private sector.

This bill provides an effective date of July 1, 2015.

## FULL ANALYSIS

### I. SUBSTANTIVE ANALYSIS

#### A. EFFECT OF PROPOSED CHANGES:

##### Background Information on Countersignatures

A countersignature is a “signature attesting to the authenticity of a document already signed.”<sup>1</sup> Subject to a few exceptions,<sup>2</sup> Florida law requires a countersignature by a Florida-licensed agent for any property, casualty, or surety insurance policies.<sup>3</sup>

In 2004, following a constitutional ruling on s. 624.425, F.S., the Florida Legislature removed a requirement in the statute that the countersigning agent be a Florida resident. Prior to this change, s. 624.425, F.S., required a countersignature by a Florida-licensed agent who was also a Florida resident. This distinction based solely on residency was overturned on constitutional grounds in *Council of Insurance Agents and Brokers v. Gallagher*.<sup>4</sup> In that decision, the United States District Court for the Northern District of Florida declared that s. 624.425, F.S., “violate[d] the Privileges and Immunities Clause and Equal Protection Clause of the United States Constitution to the extent that [it denied] to Florida-licensed nonresident insurance agents the same rights and privileges [afforded] to Florida-licensed resident agents.”<sup>5</sup>

Shortly after the *Gallagher* decision, the Department of Financial Services (DFS) released an informational bulletin advising that as a result of the holding, “[p]roperty, casualty and surety policies written through Florida-licensed nonresident agents are no longer required by law to be countersigned by a Florida resident insurance agent. Policies must be signed by the insurer and by a properly licensed resident or nonresident agent.”<sup>6</sup>

In 2004, the legislature amended s. 624.425, F.S., removing the language that required the countersigning agent to be a Florida resident, but maintaining the requirement that the policy be countersigned by a Florida-licensed agent.<sup>7</sup> This amendment marked the most recent change to s. 624.425, F.S.

The original purpose of the countersignature requirement was to “assure the presence of local agents to serve the needs of policyholders who had previously encountered difficulties in dealing with insurance companies headquartered out of state.”<sup>8</sup> However, since the countersigning agent is no longer required to be a Florida resident, it is less clear whether this purpose is being served today.<sup>9</sup>

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<sup>1</sup>See Countersign, MERRIAM-WEBSTER DICTIONARY (11th ed. 2003), available at <http://www.merriam-webster.com>.

<sup>2</sup> Excepted from the countersignature requirement are: contracts of reinsurance, policies of insurance on the rolling stock of railroad companies doing a general freight and passenger business; United States Customs surety bonds that are issued by a corporate surety approved by the United States Department of Treasury and that name the United States as the beneficiary; policies of insurance issued by insurers whose agents represent only one company or group of companies under common ownership if a company within one group is transferring policies to another company within the same group and the agent of record remains the same; and policies of insurance issued by insurers whose agents represent, as to property, casualty, and surety insurance, only one company or group of companies under common ownership and for which the application has been lawfully submitted to the insurer. s. 624.426, F.S.

<sup>3</sup> s. 624.425, F.S.

<sup>4</sup> 287 F. Supp. 2d 1302, 1304 (N.D. Fla. 2003).

<sup>5</sup> *Id.* at 1313.

<sup>6</sup> DFS-03-004, “Policy Countersignature – To All Property, Casualty and Surety Insurers and General Lines Insurance Agents” (Nov. 12, 2003), <http://www.myfloridacfo.com/Division/Agents/Industry/Bulletins-Memos/default.htm#.VMZuh2xOncs>.

<sup>7</sup> See SB 2588 (2004).

<sup>8</sup> *Colonial Penn Communities, Inc. v. Crosley*, 443 So. 2d 1030, 1032 (Fla. 5th DCA 1983); see also *Wolfe v. Aetna Ins. Co.*, 463 So. 2d 997, 999 (Fla. 5th DCA 1983) (noting purpose of countersignature requirement was to “protect the public in purchasing insurance policies by requiring such policies to be issued by resident, licensed agents over whom the state can exercise control and thus prevent abuses.”).

<sup>9</sup> Information obtained through telephone conversation with FCCI Insurance Group, 1/28/2015 (notes on file with Insurance & Banking Subcommittee).

DFS is responsible for licensing and regulating insurance agents.<sup>10</sup> The agent's countersignature on the policy provides DFS with a responsible party to contact in the event of non-compliance or any other issues that may arise.<sup>11</sup> The countersignatures also establish that someone familiar with Florida insurance law has attested to the specific policy's validity.<sup>12</sup>

The Office of Insurance Regulation (OIR) is responsible for licensing and regulating insurance companies.<sup>13</sup> As often as it deems necessary, OIR conducts Market Conduct Examinations where it determines whether insurance companies are complying with Florida law.<sup>14</sup> One factor surveyed in these Market Conduct Examinations is whether insurance companies are complying with the countersignature requirement.<sup>15</sup>

### Current Situation

Currently, Florida law provides that insurers are not to assume direct liability unless the insurance policy contains a proper countersignature.<sup>16</sup> The relevant portion of the statute reads as follows:

Except as stated in s. 624.426, no authorized property, casualty, or surety insurer shall assume direct liability as to a subject of insurance resident, located, or to be performed in this state unless the policy or contract of insurance is issued by or through, and is countersigned by, an agent who is regularly commissioned and licensed currently as an agent and appointed as an agent for the insurer under this code.<sup>17</sup>

Though the policy is statutorily required to be countersigned by a Florida-licensed agent, the countersignature requirement can be waived.<sup>18</sup> Currently, if an insurer collects payment on a policy that lacks a countersignature, the insurer has waived the countersignature requirement and cannot then raise as a defense to a claim the invalidity of the policy due to the absence of a countersignature.<sup>19</sup> Thus, an insurer can presently be bound by a contract of insurance in the absence of a countersignature.

However, it is currently unclear whether policyholders can be similarly bound by contracts of insurance in the absence of a countersignature. There are cases currently pending in which a defendant policyholder has raised an invalidity defense to policies that were not countersigned in response to an insurance company's breach of contract claim seeking collection from the policyholder.<sup>20</sup>

### Effect of the Bill on Countersignatures

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<sup>10</sup> s. 626.013, F.S.

<sup>11</sup> Information confirmed through e-mail communication with DFS, 1/29/2015 (e-mail on file with Insurance & Banking Subcommittee).

<sup>12</sup> Information confirmed through e-mail communication with DFS, 1/29/2015 (e-mail on file with Insurance & Banking Subcommittee).

<sup>13</sup> s. 20.121(3)(a)1., F.S.

<sup>14</sup> s. 624.3161, F.S.

<sup>15</sup> Rule 69O-142.011(11)(a)11, F.A.C.

<sup>16</sup> s. 624.425(1), F.S.

<sup>17</sup> s. 624.425(1), F.S.

<sup>18</sup> See *Wolfe v. Aetna Ins. Co.*, 463 So. 2d 997, 1000 (Fla. 5th DCA 1983) (holding that the absence of a countersignature on a policy of insurance "does not, as a matter of law, invalidate it, because the absence of a countersignature may be waived [by the insurer], and does not, in and of itself, control the effectiveness of the insurance."); *Meltsner v. Aetna Cas. & Sur. Co. of Hartford, Conn.*, 233 So. 2d 849, 850 (Fla. 3d DCA 1969) (noting that there can be a "waiver of the requirement that the insurance policy be countersigned by a local producing agent"); see also 30B Fla. Jur. 2d Insurance s. 1546 (2014).

<sup>19</sup> Information confirmed through telephone conversation with FCCI Insurance Group, 1/28/2015 (notes on file with Insurance & Banking Subcommittee).

<sup>20</sup> See *FCCI Ins. Co. v. Gulfwind Companies, LLC*, 2013 CC 003056 NC (Fla. Sarasota Cty. Ct.); *FCCI Ins. Co. v. Zareth Metal Framing, Inc.*, 2013 CA 002540 (Fla. Sarasota Cty. Ct.).

This bill affects property, casualty, and surety insurance policies that have not been countersigned, adding the following language to s. 624.425(1), F.S.: “However, the absence of a countersignature does not affect the validity of the policy or contract.”

The bill would give insurance companies the same rights as policyholders to enforce an otherwise valid policy in the event the policy or contract lacks a countersignature. The contract of insurance is between the insurance company and the policyholder. Thus, the effect of this bill is such that the omission of a countersignature by a licensed agent – a third party to the insurance contract – would not impact the validity of the insurance policy as between the insurer and the policyholder.<sup>21</sup>

Under the proposed law, insurance companies would still be required to obtain countersignatures, despite the fact that the absence of a countersignature would not invalidate the policy.<sup>22</sup> Those insurance companies that do not obtain countersignatures on their policies would still be subject to review and possible penalties from OIR through Market Conduct Examinations.<sup>23</sup> Such penalties range from reprimands to fines to the suspension or revocation of an insurance license.<sup>24</sup>

This bill also does not relieve the agent of their obligation to countersign insurance policies.<sup>25</sup> Though DFS has the statutory authority to sanction agents,<sup>26</sup> it typically does not fine agents for failing to countersign policies.<sup>27</sup> DFS believes that agents have enough incentive to comply with the countersignature law through the possibility of commissions or additional face time with consumers.<sup>28</sup>

This bill also makes a grammatical change to the language of s. 624.425(1), F.S.

#### B. SECTION DIRECTORY:

**Section 1.** Amends s. 624.425(1), F.S., relating to agent countersignature required, property, casualty, surety insurance.

**Section 2.** Provides an effective date of July 1, 2015.

## II. FISCAL ANALYSIS & ECONOMIC IMPACT STATEMENT

#### A. FISCAL IMPACT ON STATE GOVERNMENT:

##### 1. Revenues:

None.

##### 2. Expenditures:

None.

#### B. FISCAL IMPACT ON LOCAL GOVERNMENTS:

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<sup>21</sup> Information obtained through telephone conversation with FCCI Insurance Group, 1/28/2015 (notes on file with Insurance & Banking Subcommittee).

<sup>22</sup> Information confirmed through telephone conversation with FCCI Insurance Group, 1/28/15 (notes on file with Insurance & Banking Subcommittee); Information confirmed through e-mail communication with OIR, 1/29/15 (e-mail on file with Insurance & Banking Subcommittee).

<sup>23</sup> Rule 69O-142.011(11)(a)11, F.A.C.; Information confirmed through e-mail communication with OIR, 1/29/15 (e-mail on file with Insurance & Banking Subcommittee).

<sup>24</sup> Rule 69O-142.011, F.A.C.

<sup>25</sup> Information confirmed through e-mail communication with DFS, 1/29/2015 (e-mail on file with Insurance & Banking Subcommittee).

<sup>26</sup> s. 624.307, F.S.

<sup>27</sup> Information confirmed through e-mail communication with DFS, 1/29/2015 (e-mail on file with Insurance & Banking Subcommittee).

<sup>28</sup> Information confirmed through e-mail communication with DFS, 1/29/2015 (e-mail on file with Insurance & Banking Subcommittee).

1. Revenues:

None.

2. Expenditures:

None.

C. DIRECT ECONOMIC IMPACT ON PRIVATE SECTOR:

Uncertain. To the extent that there may be less of an incentive for an insurance company to seek a countersignature, some Florida-licensed agents may no longer receive the economic or social benefit of being a counter-signatory. However, even though the lack of a countersignature would not affect the validity of the policy, insurers would still have to seek countersignatures in order to comply with the letter of the law.

D. FISCAL COMMENTS:

None.

### III. COMMENTS

A. CONSTITUTIONAL ISSUES:

1. Applicability of Municipality/County Mandates Provision:

Not applicable. This bill does not appear to: require counties or municipalities to spend funds or take an action requiring the expenditure of funds; reduce the authority that counties or municipalities have to raise revenues in the aggregate; or reduce the percentage of a state tax shared with counties or municipalities.

2. Other:

None.

B. RULE-MAKING AUTHORITY:

None.

C. DRAFTING ISSUES OR OTHER COMMENTS:

None.

### IV. AMENDMENTS/ COMMITTEE SUBSTITUTE CHANGES

On February 4, 2015, the Insurance & Banking Subcommittee adopted one amendment and reported the bill favorably as a committee substitute. The amendment replaced the words "that may be insured" with the words "proper to insure" and the word "the" with the word "any," thereby reinstating current law. The amendment also corrected a scrivener's error by replacing "of" with "or."

The staff analysis is drafted to reflect the committee substitute as passed by the Insurance & Banking Subcommittee.