
Florida Assignment of Benefits Abuse: Recent Developments



By *Fred E. Karlinsky, Richard J. Fidei, Christian Brito, Benjamin Zellner*

The debate in Florida over a controversial practice known as Assignment of Benefits, otherwise known as AOB, has ramped up in recent months as the discussion has made its way to the State's Legislature and Supreme Court. AOB — the practice of assigning one's right to receive benefits or make claims under an insurance policy — has long been a part of the health insurance industry, where insureds regularly assign their rights to make claims under health insurance policies to preapproved providers who then bill insurers directly for the cost of providing health care services to the insureds.

In recent years, the practice has expanded beyond health insurance policies and has become commonplace in the homeowners' insurance space. In a typical homeowners

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AOB claim, a policyholder assigns his or her right to file a claim under a homeowners' insurance policy to a third-party restoration contractor who is hired by the homeowner to perform restoration or other repair services to the insured residence. The contractor then files a claim directly with the insurer that issued the policy. Often, the contractor performs the repairs and then files the claim without giving the insurer a meaningful opportunity to assess the loss. Insurers argue these claims lead to unnecessary repairs, inflated repair costs, and increased litigation costs, which, in turn, has resulted in higher insurance premiums for all. Restoration contractors claim that AOBs facilitate speedy repairs and alleviate any need for the insured to be involved in the claims process.

While homeowners' insurance AOB claims are occurring with greater frequency across the country, Florida has become a hotbed for AOB abuse due to its unique legal landscape, which makes it easier for unscrupulous contractors to game the system and artificially inflate claims costs. There are two key factors that have caused Florida to become ground zero for AOB abuse:

- Florida's one-way attorneys' fee statute; and
- Florida courts have consistently held that the Florida Insurance Code permits insureds to assign their post-loss rights to make claims under insurance policies to third-parties without insurer consent.

Most states permit insureds to assign their rights under a homeowners' insurance policy after a loss has occurred without first securing the insurer's consent, which makes it difficult for insurers to assess the true extent of loss that has occurred and keep costs under control. However, Florida stands apart because of its one-way attorneys' fee statute, which is unique to the State.

In Florida, if an insured or beneficiary prevails against an insurer in a first-party lawsuit, the court may order the insurer to pay the plaintiff's reasonable attorneys' fees. The law, however, does not afford those same rights to the insurer. Thus, if the insurer succeeds in defending the lawsuit, the contractor owes the insurer nothing. This one-sided fee shifting scheme, which was intended to even the playing field between insurers and insureds, incentivizes contractors and their attorneys to aggressively file lawsuits against insurers without having to risk the possibility of paying the insurer's legal costs if they fail.

While the Florida laws described herein apply without regard to the specific kind of loss that has occurred, water loss claims have presented the greatest opportunity for abuse, as they often invoke stressful situations for a homeowner and require quick action to mitigate damages. Moreover, South Florida has seen the greatest increase in



litigation as a result of AOB. In 2000, roughly 1,300 AOB lawsuits statewide were reported. By 2013, that number grew to over 79,000, and by the end of 2018, nearly 135,000 lawsuits were filed in the state. That amounts to a 70 percent increase in five years. Water loss claims represent 75 percent of all litigation, with the tri-county area of South Florida — Miami-Dade, Broward, and Palm Beach counties — making up 96 percent.

Florida Officials and Insurance Regulators Speak Out

As unnecessary and artificially inflated claims and lawsuits have increased costs for insurers, premium rates have also risen despite loss numbers trending in the opposite direction. Insurers offering homeowners' insurance in Florida continue to seek the approval of the Florida Office of Insurance Regulation (OIR) to increase premiums, especially for those insured in South Florida. According to OIR, the indicated water loss premium per insured property in South Florida is between \$1,300 and \$2,000 on average. Compare that to the rest of the state, where the average indicated water loss premiums are between \$500 and \$700.

The continued rise of premium rates, irrespective of loss trends, has resulted in a united call to action by Florida's state officials and insurance regulators. In his State of the

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State address, Florida Governor Ron DeSantis called for meaningful AOB legislative reform. Moreover, Insurance Commissioner, David Altmaier, Citizens Property Insurance CEO, Barry Gilway, and Chief Financial Officer, Jimmy Patronis have each been active in their advocacy for AOB reform. Through media advisories and presentations before the Florida Legislature, these officials have expressed their support for legislation aimed at combatting AOB abuse. CFO Patronis has also called on the Florida Bar to investigate plaintiff's firms who are involved in excessive AOB litigation.

Florida Lawmakers Endeavor to Pass Meaningful AOB Reform

The Florida Legislature has attempted to pass legislation aimed at curbing AOB abuse in each of the past six years; however, each of those measures failed due, at least in part, to heavy opposition from contractor trade groups. AOB reform appears to have gained more traction in the



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2019 legislative session than in prior years. Two bills have been filed and are progressing through the Florida House and Senate.

Florida Senate Bill 122 was filed by Senator Doug Broxson, who chairs the Senate Banking and Insurance Committee. The original bill restricted one-way attorney fees to named insureds. However, the bill was later amended to prohibit attorney fees from being collected by service providers and limit AOB contracts signed during an emergency to only those repairs that are immediately necessary. A more expansive AOB contract may be executed after an emergency, but the agreement may not prevent or impair discussions between the insured and insurer. The amendment also provides for a "loser pays" provision if the vendor and insurer go to court, as well as additional reporting requirements. Some view the amendment as watering down the effect of the original bill.

The Florida House of Representatives also introduced a version of the bill, Proposed Committee Bill CJS 19-01, which, among other things, requires that an AOB made in connection with a homeowners' insurance policy be provided to the insurer within three business days of execution, limits the assignee-contractor's ability to recover certain costs, and requires that the assignee keep detailed records and provide itemized cost estimates. Importantly, the bill includes a formula for determining attorney fees entitlements and requires that insurers be afforded an opportunity to respond to a pre-suit demand notice before an attorney representing a third-party payee-contractor files suit to recover benefits pursuant to an AOB.

Florida Supreme Court Hears AOB Dispute

As Florida lawmakers weigh potential legislative reforms, the Florida Supreme Court has agreed to take up a closely watched AOB case out of St. Lucie County. On December 27, 2018, the Court accepted jurisdiction to resolve an apparent conflict between the State's Fourth and Fifth District Courts of Appeal (DCA). At issue is whether an insurer may restrict insureds' right to assign post-loss benefits under a

homeowners' insurance policy by requiring that all named insureds and the mortgagee sign an AOB contract before it will be recognized by the insurer. The Fourth DCA answered that question in the affirmative, while the Fifth DCA has held that insurers may not limit insureds' right to assign post-loss benefits under a homeowners' insurance policy.

Initial briefs are being filed in the case of Restoration 1 of Port St. Lucie vs. Ark Royal Insurance Company. In this case, a husband and wife contracted with a water restoration company to fix water damage to their insured home, the purchase of which had been financed through a mortgage. The wife, without the consent of her husband or the mortgagee, agreed to "an assignment of benefits agreement assigning 'any and all insurance rights, benefits, proceeds and any cause of action under any applicable insurance policies'" to the water restoration contractor.

The homeowners' insurance policy at issue contained a provision indicating that "[n]o assignment of claim benefits, regardless of whether made before a loss or after a loss, shall be valid without the written consent of all 'insureds,' all additional insureds, and all mortgagee(s) named in the policy." The Fourth DCA held that this provision was not an impermissible restriction on the right to enter into post-loss AOB contracts and ruled in favor of the insurer.

On Feb. 11, 2019, attorneys for Restoration 1 of Port St. Lucie filed an initial brief in the case, arguing that the Fourth DCA erred when it permitted insurers to require the consent of all insureds and mortgagees to assign benefits under a homeowner's insurance policy post-loss. To date, Ark Royal has yet to file a reply. Interested parties continue to closely monitor developments in this case due to the potentially far-reaching impact of the Florida Supreme Court's ultimate decision.

Conclusion

AOB abuse is a growing problem that seems to be gaining the attention of regulators, lawmakers, courts, and consumers across the nation. While most states must contend with state laws that permit assignment of rights without insurer consent, Florida lawmakers are struggling to address certain factors that have made it the epicenter of AOB abuse in the United States. The state's one-way attorneys' fee statute, coupled together with case law holding that insureds do not need to seek insurer consent before entering into AOB contracts with third-party contractors, have created a unique legal landscape that has made it far too easy for dishonest contractors and their attorneys to abuse the system.

As homeowner insurance premium rates skyrocket, insurance regulators, members of the public, and members of the property and casualty insurance industry will be watching closely to see if lawmakers in Tallahassee have

finally reached their breaking point in 2019. The Florida Supreme Court's ruling in Restoration 1 of Port St. Lucie vs. Ark Royal Insurance Company may also have a profound impact on the industry. Given the current environment in Florida and the apparent appetite for change in Tallahassee, we could be looking at a new and improved homeowners' insurance market by the end of 2019, but it is too early to tell. One thing is certain, if AOB reform does not succeed in Florida, premium rates will continue to increase and consumers will continue to suffer. 🕒

Fred E. Karlinsky is Co-Chair of Greenberg Traurig's Insurance Regulatory and Transactions Practice Group. Fred has over twenty years of experience representing the interests of insurers, reinsurers, health plans, managing general agencies, brokers, third-party administrators, claims companies and other insurance entities on their regulatory, transactional, corporate and governmental affairs matters. He is experienced in the formation, licensure and capitalization of insurers, business expansion activities, regulatory examinations, reinsurance and alternate risk transfer mechanisms and many other operational and regulatory issues. Recognized as one of the top insurance lawyers by Chambers and Partners, Fred's extensive knowledge of insurance compliance matters and insurance related legislative and regulatory initiatives is applicable nationally and internationally. Fred can be reached at 954.768.8278 or karlinskyf@gtlaw.com.

Rich J. Fidei focuses his practice on national insurance regulatory and compliance matters as well as insurance transactional matters. He represents a wide variety of insurance entities, including insurance companies, health plans, reinsurers, producers and other insurance-related entities, in connection with regulatory, corporate, compliance and transactional issues. Rich is experienced in the formation, licensure and capitalization of insurers, business expansion activities, financial and market conduct examinations, reinsurance and alternate risk transfer mechanisms, product filings, as well as many other operational issues applicable to insurance entities. Rich can be reached at 954.768.8286 or fideir@gtlaw.com.

Christian Brito is a practice group attorney in Greenberg Traurig's Insurance Regulatory and Transactions Practice Group in Fort Lauderdale. He focuses his practice on national insurance regulatory and compliance matters. Christian represents a wide variety of insurance entities, including insurance companies, reinsurers, managing general agencies, brokers, third-party administrators, claims companies, and other insurance-related entities in connection with regulatory, transactional, corporate, and governmental affairs matters. Christian advises clients on operational, regulatory, and compliance issues, including start-up initiatives, product filings, licensure and corporate

governance assessments, business expansion initiatives, and financial and market conduct examinations.

Christian received a Juris Doctor from The Pennsylvania State University Dickinson School of Law and a Bachelor of Arts from Florida International University. He is admitted to practice in Florida and Pennsylvania. He can be reached at britoc@gtlaw.com.

Benjamin “Jamey” Zellner focuses his practice on government law and policy matters. He is experienced handling a wide range of insurance regulatory and corporate transactions, including insurance company acquisition of control filings,

company formation, reinsurance transactions, and company and agent/agency compliance, throughout the country and internationally. He is a frequent author on trends and developments in insurance, and more specifically, the Florida insurance market.

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