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Emerging Issues Within the Assignment
of Benefits Clause

Jamie Anderson-Parson, J.D.
Karen Epermanis, Ph.D.



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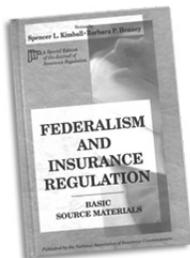
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Emerging Issues Within the Assignment of Benefits Clause

Jamie Anderson-Parson, J.D.*

Karen Epermanis, Ph.D.**

Abstract

The Assignment of Benefits (AOB) clause under an insurance contract has been recognized for quite some time and until recently has been of little consequence to homeowner's insurance. Over the past decade, however, the clause in homeowner's coverage is coming under fire. Attorneys and water remediation contractors are using Florida's attorney fee-shifting statute in conjunction with an AOB under the Insurance Services Office (ISO) (1999) Homeowners 3 (HO3) – Special Form policy in filing claims for reimbursement of services rendered subsequent to the insured's executed AOB. As a result, insurer claims costs in Florida are escalating to a crisis point.

This paper discusses the challenges within the homeowner's assignment of benefits clause as applied to water mitigation claims in the state of Florida since 2005. We analyze legal and regulatory arguments used to curtail rising litigation in this area. We draw specific attention to Florida's Homestead Exemption as an insurer defense to deflect mounting litigation efforts to pay these increasingly significant claim costs.

* Assistant Professor; Department of Finance, Banking and Insurance; Appalachian State University; andersonja2@appstate.edu.

** Associate Professor; Risk Management & Insurance and Employee Benefits Program Director; Appalachian State University; epermanisk@appstate.edu.

Introduction

An Assignment of Benefits (AOB) is a legal procedure that gives another party permission to receive payments or benefits directly from the insurance carrier rather than receiving the benefits directly. This practice is most common in the health care arena, where health insurers are billed directly for medical services rendered, while the insured remains responsible for any copayment or deductible obligations. Similarly, in first-party auto physical damage claims, quite often auto repair shops obtain an AOB in order to expedite authorized repairs.

In recent years in the state of Florida, ambitious emergency repair companies have increasingly instituted the AOB to secure a contract for services requiring an emergency fix, such as water damage claims or, to a lesser extent, roof damage claims caused by wind or hail, and auto windshield damage claims.¹ The problem with this growing trend, however, is that when the property owner executes an AOB without the insurer's knowledge, repair costs may be grossly inflated, and property damage coverage may not fully exist in the insurance contract.

Without the insured's knowledge, remediation companies often take the insurance company directly to court. The remediation company becomes the "prevailing party" in the suit, and, thus, the litigating attorney recovers an additional amount from the insurance company under Florida's One-Way Fee Shifting Statute.² Lawmakers and defense attorneys are working diligently to limit costs associated with this cycle by introducing bills to curtail this practice. There is evidence that Florida's homestead exemption may be a successful argument as a defense for claim denial.

This paper examines the growing costs incurred through an AOB for these first-party claims, and analyzes legal and regulatory arguments employed to curtail rising claims and litigation costs. We draw specific attention to the homestead exemption as an insurer defense to deflect mounting litigation efforts for reimbursing inflated claims costs.

Background

The practice of assigning benefits has long been held acceptable in instances where the insurer has a working relationship with the service provider and has a reasonable expectation of anticipated costs involved. This is particularly true in health care claims where the provider is typically "preapproved" and subject to a

1. Assigned auto windshield damage claims represents the newest trend in AOB filings in Florida. See Carollo, Malena, May 25, 2017, "Tampa Bay is Ground-Zero for Assignment of Benefits Cases over Broken Auto Glass," *Tampa Bay Times*, May 25, 2015, Retrieved June 27, 2017, www.tampabay.com/news/business/banking/tampa-bay-is-ground-zero-for-assignment-of-benefits-cases-over-broken-auto/2325132.

² FLA. STAT. §627.428.

negotiated payment scale for services rendered. Similarly, in auto physical damage claims, it is more efficient for the repair shop to estimate repair costs and receive approval from the insurer for such costs. In both instances, the insurer is part of the claim process.

Over the past decade, the extension of assigning benefits has become seriously magnified in the state of Florida with a plethora of claims involving homeowners assigning their right to recover costs associated with first-party emergency physical damage repairs. Jay Neal, Florida Association for Insurance Reform (FAIR) President and CEO, estimates that in the past decade, lawsuits filed by restoration contractors using an AOB provision have increased more than 1,000% (Neal, 2015). The past five years, however, represents the steepest increase in filed claims.

Citizens Property Insurance Corporation reports that the rising claims volume associated with non-weather-related water damage continues to aggravate company financial position, and without relief, significant premium increases are needed.³ The company notes that between January and November 2016, 8,097 new water damage lawsuits were filed despite a 26.3% drop in policy count during the same period. Citizens is an “insurer of last resort” for Florida homeowners. As the competitive Florida insurance market strengthens, a structured depopulation in policy count is the insurer’s goal. As further evidence of the increasingly costly ramifications of AOB abuse, Barry Gilway, President, and CEO of Citizens notes, “While less than 15% of water-related claims resulted in litigation in 2011, nearly 50% did so in 2016. ... The situation is really out of control.”

AOB agreements are most prevalent in water damage claims where time is of the essence in initiating cleanup. It also has been used in wind or hail damage claims, primarily for roofs, where again, the homeowner feels pressured to repair the damage or preserve the property from further loss or damage. The standard Insurance Services Office (ISO) (1999) Homeowners 3 (HO3) – Special Form provides coverage for reasonable repairs initiated to protect the property from further loss or damage:

Additional Coverages; E.2. Reasonable Repairs:

- a. We will pay the reasonable cost incurred by you for the necessary measures taken solely to protect covered property that is damaged by a Peril Insured Against from further damage (p. 5 of 22).⁴

Further, the HO3 form specifically outlines the insured’s charge to protect the property from further damage as outlined as part of their duties after loss:

3. Citizens Property Insurance Company Press Release, “Litigated Water Claims, AOB to Top Citizens 2017 Challenges,” Dec. 7, 2016, Retrieved March 15, 2017, https://www.citizensfla.com/-/20161207_bog-press-release.

4. Insurance Services Office, Inc., 1999, HO 00 03 10 00.

Section I Conditions; B. Duties After Loss:

4. Protect the property from further damage. If repairs to the property are required, you must:
 - a. Make reasonable and necessary repairs to protect the property; and
 - b. Keep an accurate record of repair expenses (p.13 of 22).⁵

Post-loss homeowners are typically in a vulnerable emotional state and feel the need to expedite cleanup and repair. They are subject to exploitation by dishonest and disreputable service providers. A typical case develops as follows:

- Joe Homeowner suffers a serious plumbing loss, which floods the property. Joe calls a plumber to fix the leak, who then refers Joe to ABC Water Mitigation Company for immediate cleanup services.
- ABC arrives with air blowers, dehumidifiers and other equipment, and dries out the property. Somewhere in this process, ABC presents the homeowner with a general cost estimate and other documents, including an AOB. The AOB, in effect, has Joe Homeowner assign all of his rights to recover insurance proceeds to ABC Water Mitigation Company.
- Since Joe Homeowner assigned his rights to ABC, the mitigation company now has direct access to the insurer for bill payment. Of particular concern is that many times this bill for services is often inflated, includes large referral fees paid to the plumber for access to Joe Homeowner and reflects costs for services excluded under the policy.

If the insurer objects to the billed amount, declines coverage under the policy or fails to negotiate an acceptable settlement, ABC Mitigation Company turns the matter to its attorney and directly files suit for breach of contract, thus circumventing the homeowners policy provision limiting lawsuits against the insurer.⁶

Contractors using AOB as a vehicle to obtain payment are not unique to Florida, but several factors contribute to Florida's hostile AOB environment and significant increase in claims volume. First, there is growth in the numbers of lawyers and public adjusters who were very dependent on income from first-party litigation during the height of hurricane and sinkhole claims several years ago (Lewis & Engelbrecht, n.d.). As these claims have settled and cases decreased, displaced personnel seek a new revenue stream.

A second component working to create the perfect storm reflects the free assignment of post-loss insurance proceeds and Florida's fee shifting statute. In

5. Ibid.

6. In a rising number of cases, mitigation companies and their attorneys move directly to filing suit against the insurer without first filing a claim for damages. In these instances, the legal action is the first notice of loss received by the insurer.

most states, each party bears the responsibility for their attorney fees. However, a few states, including Florida, offer a two-way fee-shifting statute with certain contract situations. Pursuant to FLA. STAT. §627.428, Florida provides a unique fee shifting statute that applies to first-party claims by allowing the insured to collect attorney fees if their claim prevails against a first-party insurer. This law also applies to assignees and allows an assignee to recover attorney fees as part of the litigation against the insurer. Ironically, public policy support for such a statute is to make the prevailing party whole and to level the playing field between insureds and economic giants such as insurance companies (Delegel & Kalifeh, 2015). Thus, the legal profession also benefits handsomely from AOB transactions facing scrutiny by insurers.

Historical Cost Escalation

Use and abuse of AOB rights to post claims mitigation costs directly to insurers without their prior consent and/or knowledge continues to rise in Florida, and some argue that those costs are now a critical factor in impending rate hike arguments. Florida insurance executives warn that the abuse of AOB and increase in claim counts is a \$1 billion rate increase issue for Florida consumers (O'Connor, 2016). Claim history in the tri-county area of Miami-Dade, Broward and Palm Beach is particularly alarming, where the state insurer of last resort, Citizens Property Insurance Company, asserts that an “actuarially sound” rate increase should be as high as 189% in order to cover these water damage/AOB claims. It is currently estimated that 50% of all new claims filed in the tri-county area are water damage claims (Citizens, 2015).

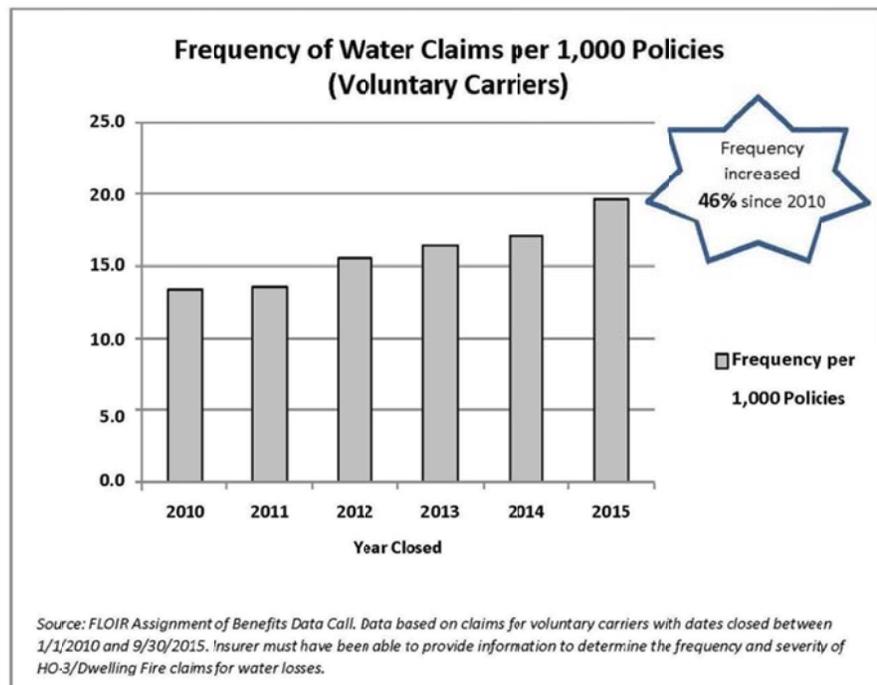
In order to assess the impact of AOB on property claims experience, on Oct. 23, 2015, the Florida Office of Insurance Regulation (OIR) issued a data call ordering Florida’s 25 largest property insurers to provide detailed information on water damage claims, with all insurers invited to participate. Collected information includes water loss claims, mitigation services costs, litigation and AOB status for claims having closed between Jan. 1, 2010, and Sept. 30, 2015. Thus, data reported by year reflects the closed claim date. The deadline to submit responses was Dec. 7, 2015, and the last re-submission of data received was Jan. 4, 2016. As a result, the OIR *Review of the 2015 Assignment of Benefits Data Call* was issued Feb. 8, 2016. A listing of participating companies is noted in Appendix A.⁷ The OIR received detailed information associated with 561,763 water or roof damage claims. A total of 152,187 Citizens Property Insurance Corporation claims were deleted from the analysis, as Citizens had previously publicly reported its own claims investigation. An additional 149,864 claims were deleted as either roof

7. See Florida Office of Insurance Regulation, 2016, *Report on Review of the 2015 Assignment of Benefits Data Call*, Feb. 8, 2016, Retrieved Dec. 15, 2016, www.floir.com/siteDocuments/AssignmentBenefitsDataCallReport02082016.pdf.

damage claims or claims not fitting the required data constraints. The remaining 259,742 claims were used in the analysis.

With regard to first-party claims for water damage, the Florida OIR reports that statewide, both the frequency and severity of losses have increased annually since 2010. Claims frequency has increased by 46%, which annualizes to an average frequency increase of 8.3%. Likewise, claims severity has increased 28% since 2010, representing an annual increase of 5.4%. Year by year, water damage claim expenditures in terms of frequency and severity are outlined in Figure 1 and Figure 2.

Figure 1

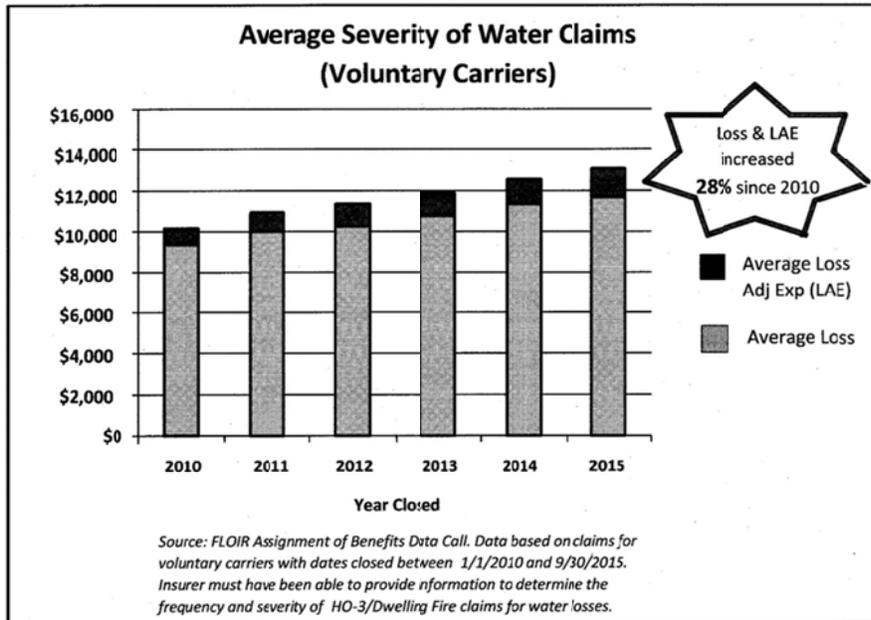


More importantly, during the same period, claims associated with an AOB reflect a 10% increase in severity than for claims handled directly between the insurer and insured. Figure 3 highlights the dramatic cost difference in average severity of water claims with and without an AOB.

As noted, OIR data reflects leading Florida insurers, with the exception of the state's "carrier of last resort," Citizens Property Insurance Company. Citizens has been an early adopter of the concern that AOBs in relation to non-weather-related water damage claims are rising dramatically and out of control. The company places particular onus on the claims loss history in the three South Florida counties of Miami-Dade, Broward and Palm Beach. Citizens completed an initial study of

the impact of water damage claims frequency and severity trends, and reported its Water Summit summary (Citizens Property Insurance Corp, 2015).

Figure 2



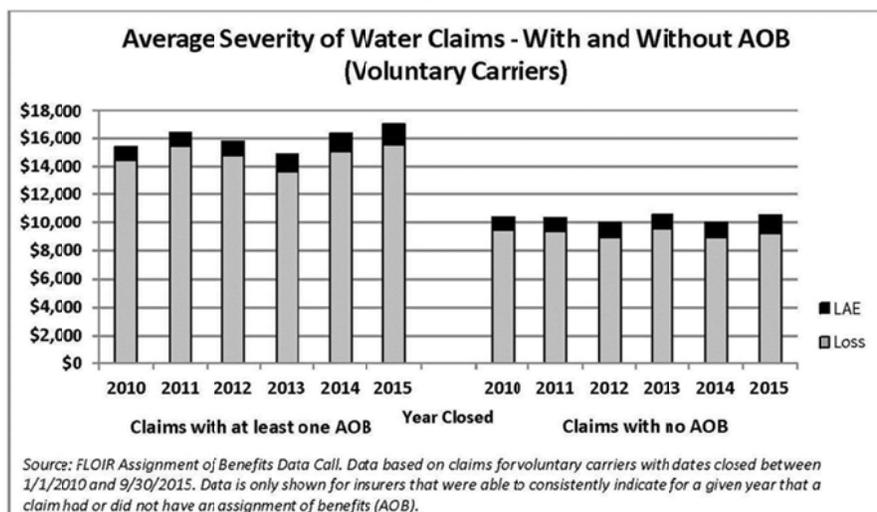
In terms of claims frequency, 2014 non-weather-related water damage claims are on average 9% more frequent in the Tri-County area v. statewide. Further, in the Tri-County area, 98% of 2014 water claims are filed with representation in hand. Possibly most alarmingly, Citizens reports that 2014 statewide non-weather-related water damage claims are identified with a First Notice of Loss (FNOL) filed by an attorney in a staggering 38% of filed claims. This is in sharp contrast to reliance upon attorneys in each of the other causes of loss categories, as shown in Figure 4.

As the “insurer of last resort” in Florida, Citizens is in a particularly challenging situation because the company is statutorily limited to increasing policy rates to 10% in a given year. Even with Florida having a multiyear reprieve from active hurricane losses, water damage claims alone are projected to reflect a much higher cost than could be recovered through a limited rate increase. Citizens said “actuarially sound” rate increases for the Tri-County should be in the area of 189%.⁸ Citizens received approval for a 2017 rate increase of 6.4% effective

8. See O’Connor, A., May 3, 2016. “Special Report: Execs Warn of Impending Florida Market Crisis Over Water Loss Claims,” *Insurance Journal*, retrieved: Jan. 10, 2017, www.insurancejournal.com/news/southeast/2016/05/03/407257.htm.

Feb. 1, 2017, mostly due to rising costs from AOB/water claims (Florida Office of Insurance Regulation, 2016). While this rate increase will certainly help, it may be a little late as Citizens posted a net loss of \$27 million for 2016, representing its first loss since 2005 and in a year with minimal hurricane damage from Hurricane Matthew. Citizens' Gilway notes that "the bottom line is the impact of AOB losses is starting to show up in our numbers." This is particularly true given increased costs stemming from South Florida litigation over non-weather-related water losses (Hurtibise, 2017).

Figure 3



Conditions continue to deteriorate, as Citizens projects a 2018 underwriting loss of \$85 million.⁹ To combat rapidly declining results, on June 20, 2017, Citizens' Board of Governors unanimously approved a projected 5.3% average statewide rate increase for 2018. The proposed rate increase may be as high as 10.5% for homeowners in Miami-Dade, Broward and Palm Beach counties. The Board also approved recommended policy changes aimed at reducing non-weather loss costs.¹⁰

9. Bestwire, June 16, 2017. "BestWeek: Citizens Projects \$85 Million Loss in 2018 on Florida Assignment of Benefits Fraud, *Bestwire*, June 16, 2017, www3.ambest.com/ambv/bestnews/newscontent.aspx?refnum=200719&altsrc=9.

10. Citizens Property Insurance Corporation Press Release, "Citizens' Board OKs 2018 Rates, Policy Changes," June 20, 2017, Retrieved June 27, 2017, <https://www.citizensfla.com/-/20170620-citizens-board-oks-2018-rates-policy-changes>.

Figure 4



Litigation Efforts

In response to rising concerns of AOB abuse, insurers have called upon the courts to analyze the application of insurance contractual provisions and prohibit the assigning of benefits in these types of claims. Since 1917, Florida courts have held anti-assignment provisions in insurance contracts do not apply to post-loss assignment.¹¹ Courts continue to rely on the distinction within non-assignment clauses, which prohibits the assignment of the policy without the insurers' permission versus claims arising from the policy.¹²

With little success, insurers have turned to other contractual arguments to invalidate questionable AOB claims. In one of the first cases to challenge the use of the fee-shifting statute in a post-loss assignment case, the insured assigned rights to directly bill the insurance company for a loss that involved cleanup from a decomposed body.¹³ When the mitigation company submitted the invoice, the insurer refused to pay the entire amount. The trial court found in favor of the insurance company as the mitigation company did not have an insurable interest at the time of the loss and, therefore, was unable to sue the insurer. However, the 5th District Court of Appeals (DCA) held that a post-loss assignee is not required to

11. *W. Fla. Grocery Co. v. Teutonia Fire Ins. Co.*, 77 So. 209, 210-211 (1917).

12. *Bioscience West Inc., a/a/o Elaine Gattus v. Gulfstream Property & Casualty Co.*, 185 So. 3d 638, 640 (Fla. 2nd DCA, 2016), *reh'g denied* (Mar. 9, 2016); *Citizens Prop. Ins. Corp. v. Ifergane*, 114 So.3d 190 (Fla. 3rd DCA, 2012) ("Post loss insurance claims are freely assignable without insurers consent"); 3d Couch on Insurance §35.7 (3d ed. 1999) ("An assignment before a loss involves a transfer of a contractual relationship, whereas an assignment after a loss is the transfer of a right to a money claim.").

13. *Accident Cleaners v. Universal Ins. Co.*, 186 So. 3d 1 (Fla. 5th DCA, April 10th, 2015).

have an insurable interest at the time of loss.¹⁴ The court reasoned because the statute did not explicitly preclude the common law right to freely assign the policy, the insurer could “not overcome the presumption that the Legislature did not intend to alter common law”.¹⁵ Three months later, an insurer denied coverage for a water loss and argued that the “duty to satisfy or contest the conditions of coverage” rested exclusively with the insured, not the mitigation company.¹⁶ The 1st DCA in reviewing that case held that an assignee could sue an insurer to seek recovery, as well as a coverage determination.¹⁷ Most surprising, the 3rd DCA ordered payment of attorney’s fees even though the jury at the trial level found the insureds made false statements to the insurer as they purportedly worked with the plumbing company to stage a significant water loss.¹⁸ Many insurers also attempted to argue that mitigation vendors filing claims under AOB are attempting to adjust claims as unlicensed public adjusters. The 2nd DCA disagreed with these claims, stating that the statute allows contractors to “discuss or explain a bid for construction or repair of covered property with the ... owner who has suffered loss covered by a property insurance policy.”¹⁹

In *One Call Property Services Inc. a/a/o William Hughes v. Security First Ins. Co.*, the insureds contacted a water mitigation company for emergency mitigation services after a water loss at their home. When the insurer received the invoice, it refused to pay the entire amount, and the mitigation company sued it.²⁰ Security First argued that there was nothing to assign at the time the AOB was executed because no benefits were due to the insured. The lower court agreed with the insurer that rights that had not yet accrued could not be assigned. The insurance industry was hopeful because if an insured failed to contact their carrier and obtain a coverage denial or offer for settlement, there were no rights to be assigned, which would help dismantle the AOB abuse. However, when the case went before the appellate court, the 4th DCA reversed the lower court’s decision, resulting in what the media referred to as “Black Tuesday” as the court refused put an end to the crisis and, in some regards, strengthened the argument in favor of the AOB right. *Hughes* laid out two strong yet competing policy arguments:

“Turning to the practical implications of this case, we note that this issue boils down to two competing public policy considerations ... 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 ... contractors argue that assignments of benefits allow

14. *Id.* at 3.

15. *Id.* at 2.

16. *United Water Restoration Group, Inc., a/a/o Oran Walker, v. State Farm Florida Ins. Co.*, 173 So. 3d 1025 (Fla. 1st DCA, July 8, 2015).

17. *Id.*

18. *Citizens Property Ins. Corp. v. Bascuas*, 178 So. 3d 902 (Fla. 3rd DCA, Oct. 14, 2015).

19. *Bioscience*, 185 So. 3d at 642.

20. 165 So. 3d 749 (Fla. 4th DCA, May 20, 2015).

homeowners to hire contractors for emergency repairs immediately after a loss, particularly in situations where the homeowners cannot afford to pay the contractors upfront.”²¹

Since *Hughes*, insurance companies have aggressively lobbied for alternative methods to bar the application of assignment of benefits in these questionable water mitigation claims. Security First Insurance Company, which has retained its share of these claims, sought to include policy language to prohibit post-loss assignments without consent. The Florida OIR denied its request, and the issue went before the 1st DCA. Despite the allegations of continued fraud and abuse, the court held that an insurer cannot include language in the insurance policy to prohibit post-loss assignments and, like the 4th DCA, declared this to be an issue best resolved by the legislature.²²

Legislative Efforts

Courts clearly articulate that AOB concerns require legislative attention for long-term resolution and go beyond the scope of judiciary authority.²³ However, the legislature has had a difficult time agreeing on the best legislative strategy to resolve the assignment of benefits crisis. In early 2016, Sen. Dorothy Hukill (FL) and Rep. Matt Caldwell (FL) filed legislation aimed to prevent vendors such as remediation companies and their lawyers from gaining an insureds policy rights (Stander, 2016). The proposed bill effectively removed the right for an assignee to sue for breach of contract in an insurance policy. This raised Access to Courts concerns under the state constitution. Supporters of the bill argued it did not impair access but rather restricted the assignment and for public policy reasons would meet the standard set forth in constitutional case law.²⁴ S.B. 596 along with H.R. 1097 died as a result of the Judiciary Committee inaction led by Sen. Miguel Díaz de La Portilla (FL).

Sen. Díaz de la Portilla subsequently sponsored S.B. 1248, which proposed placing limitations on referral fees, kickbacks and other case payments for remediation work.²⁵ This bill intended to act as a compromise to previously proposed S.B. 596 and H.B. 1097, but this too failed to gain necessary legislative support to move forward. Opponents thought that this bill did little to “address the cost drivers behind AOB abuse and cemented abuse by preventing further reform (Stander, 2016).”

21. *Hughes*, 165 So. 3d at 755.

22. *Security First Ins. Co v. Office of Ins. Regulation*, 177 So. 3d 627 (Fla. 1st DCA 2015).

23. See *Security First Ins. Co., vs. Office of Ins. Regulation*, 177 So.3d at 629; *Bioscience West Inc., a/a/o Elaine Gattus*, 185 So. 3d at 643; *One Call Property Services Inc. a/a/o William Hughes v. Security First Ins. Co* 165 So. 3d at 755.

24. S.B. 596 Impact Statement, pg. 9. Jan. 25, 2016).

25. See also H.R., 671, Reg. Sess. (Fla. 2016).

H.B. 669 and S.B. 1064 represented the last efforts by both the House of Representatives and Senate before the close of the 2016 legislative session. S.B. 1064 left some hope for the insurance industry, as it passed through two committees. This bill would have limited vendors' right to recovery under the AOB to only their right of payment (versus the entire claim). Ultimately, the bill failed in the before reaching the floor.

The failures of 2016 did not prevent Florida's largest homeowner's insurer, Citizens Property Insurance Corporation, from drafting a legislative wish list for 2017, which it published as a one-page executive summary (Citizens' Board of Governors, 2016). Desired improvements include:

- Prohibit vendors working under an assignment of benefits (or any variation) from seeking fees under the one-way attorney fee statute when litigation occurs.
- Require that the assignment agreement contain a written, itemized, per unit cost estimate of the work to be performed by the assignee.
- Require that an assignment agreement be provided to the insurer no later than three (3) business days after an assignment of benefits is executed by the policyholder.
- Limit assignments to only the work being performed (not the entire claim).
- Create statutory provisions requiring assignees to comply with responsibilities that are parallel to those required of the policyholder in the insurance policy.
- Provide consumer protections, including the ability to rescind the assignment and notice in writing as to what insureds are signing and what rights they are giving up.
- Prohibit an assignment from containing cancellation fees, check processing fees, or overhead and profit charges in estimates.
- Prohibit lien of a property for work that is completed under an assignment and is paid for with insurance proceeds.

While the list includes several action items previously attempted, it also supports a shift from changing the rights under AOB to more consumer friendly demands for legislative action (Citizens Board of Governors, 2016).

In February 2017, Sen. Hukill, with the support of Citizen's Property Insurance Corp. and other stakeholders, introduced S.B. 1038 (O'Connor, 2017). This bill focused on clarifying the intent of the assignment by the policyholder, limiting the scope of benefits provided and precluding attorney's fees in certain property insurance suits.²⁶ A related bill, H.B. 1421 filed by Rep. James Grant and supported by insurance and consumer advocates, made significant progress through the house but ultimately failed to make it to the floor by the end of the

26. S. 1038, Reg. Sess. (Fla. 2017).

2017 session (O'Connor, 2017). A significant part of the bill would have addressed attorney fees and awarded these fees under a formula based on judgment. It also would have allowed the insurer to recover similar fees or none at all depending on the judgement (O'Connor, 2017). While this marks the fifth year of legislative failure, lawmakers and advocates plan to continue to crusade for legislative action concerning AOB in the 2018 session.

Homestead Exemption Defense

To combat the use of AOB, some insurer attorneys are turning to legal arguments constructed under the Florida Homestead Exemption Act as a means of eliminating these claims for damages. Florida has a well-established homestead protection that keeps residents' primary dwellings from creditors absent a few well-defined exceptions. Courts have held that the constitutional protection extends beyond the actual home to include insurance proceeds. This leads to questions on whether the homestead exemption can be applied to the AOB in insurance contracts and subsequently to the attorney fees collected when the mitigation company prevails.

For many years, Florida has provided constitutional protection to citizens' residential property.²⁷ The purpose of the homestead exemption is to encourage stability in the midst of financial misfortune by enabling homeowners to retain their primary residence.²⁸ There are only three well-defined ways in which homestead protection may be waived: 1) mortgage (secured agreement); 2) sale; or 3) gift.²⁹ Courts thus far are reluctant to move beyond these exceptions.

Florida courts have long held that the homestead protection applies to insurance proceeds. In *Kohn et. al. v. Coats*, the insureds suffered a loss, and Kohn attempted to garnish his insurance proceeds.³⁰ The court reasoned to allow creditors to seize insurance proceeds undermines the purpose of the law by depriving the insured of the means to restore the property.³¹ Subsequently, courts have made similar rulings in attempts to execute a charging lien for attorney's fees against insurance proceeds.³²

In *Chames vs. DeMayo*,³³ Henry DeMayo hired Deborah Chames to help him with child support and alimony issues. Chames withdrew her representation, and

27. FLA. CONST. art. X, §4.

28. *Public Health Trust v. Lopez*, 531 So. 2d, 946, 948 (Fla. 1988) *aff'g* 509 So. 2d 1286 (Fla. 3d DCA, 1987).

29. A secured agreement is a document that provides a lender a secured interest in property that is pledged as collateral. Should the borrower default, the lender can seize the property.

30. 138 So. 760 (Fla. 1931).

31. *Id.* at 761.

32. A charging lien is an attorney's lien on a claim that the attorney has helped the client perfect, as through a judgment or settlement or a lien on specified property in the debtor's possession. *Charging Lien*, *Black's Law Dictionary*. (8th ed. 2004).

33. 972 So. 2d 850 at 853 (Fla 2007).

executed a charging lien and judgement against DeMayo for more than \$33,000 she was owed in fees. Then, the lien was applied to DeMayo's home. The case went before the Florida Supreme Court to decide whether a charging lien could be applied to DeMayo's home in light of the homestead protection. Chames argued that waiving the homestead exemption was a personal constitutional right. The court disagreed, emphasizing that you cannot waive a right designed to protect both an individual and the public.³⁴ Additionally, waiver of a constitutional right is only effective if it is knowing, voluntary and intelligent.³⁵ Ultimately, the court held that "waiver of the homestead exemption in an unsecured agreement is unenforceable."³⁶

In *Quiroga v. Citizens Property Insurance Co.*,³⁷ the insured, Jesse Quiroga, hired an attorney to help him collect unpaid insurance proceeds after two hurricanes caused damage to his home. The attorney agreed to be paid on a contingency basis, but when the insurance company agreed to pay out on the claim, Quiroga fired the attorney and refused to pay him. The law firm filed a charging lien against the insurance proceeds. The court held the proceeds were subject to the homestead exemption and based on *Chames*, could not be divested through an unsecured agreement.³⁸ If insurance proceeds cannot be divested through an unsecured agreement, this raises the question as to whether the homestead exemption invalidates the AOB as an unsecured agreement.³⁹

In *One Call Prop. Servs., Inc. a/a/o Schlanger v. St. Johns Ins. Co.*,⁴⁰ the insured contacted the water mitigation company, which then executed an AOB signed by only Mr. Schlanger. The claim was subsequently denied for coverage, and the mitigation company sued the insurer by way of its AOB rights. Using *Chames* and *Quiroga*, the trial court granted summary judgement in favor of the insurer as the Florida homestead exemption invalidates the AOB as an unsecured agreement. Additionally, the court cited two other reasons for its decision: 1) the AOB resulted in an unauthorized public adjuster agreement; and 2) the assignment was not signed by all named insureds.

On appeal, the 4th DCA issued a *per curiam* opinion in favor of the insurer holding a contractor's AOB to be invalid.⁴¹ While seemingly a victory for the insurance industry, the *per curiam* ruling means the DCA issued its decision without an opinion, and, therefore, lacks binding authority. Consequently, the basis of law used to affirm the court's ruling remains unclear. Notwithstanding the

34. *Chames*, 972 So. 2d at 861 (citing *Coastal Caisson Drill Co. v. Am. Cas. Co. of Reading Pa.*, 523 So.2d 791 (Fla. 2nd DCA, 1988)).

35. *Id.* (citing *State v. Upton*, 658 So.2d 86, 87 (Fla. 1995))

36. *Chames*, 972 So. 2d. at 855.

37. 34 So. 3d 101 (Fla. 3d DCA 2010).

38. An unsecured agreement is a loan not supported with property as collateral.

39. *Id.* at 102.

40. No. 2013CA000868, 2014 WL 7496474 (Fla. 19th Cir. Ct. Nov. 20, 2014), Affirmed Jan. 28, 2016.

41. *One Call Property Services, Inc. a/a/o Schlanger v. St. Johns Ins. Co., Inc.*, No. 4D14-4585, 2016 WL 363885 (Fla. 4th DCA, January 28, 2016).

4th DCA's *per curiam* opinion, this argument may in fact be the successful litigation strategy to combat AOBs, where a court order for an insured to pay AOB costs plus attorney's fees may be a direct violation of the Homeowners Exemption and, thus, invalidate the AOB as an unsecured agreement.

Conclusion

AOB under the current legal framework is weakening an already unstable insurance market in Florida. Courts have collectively made it clear that public policy arguments are not going to unravel decades of insurance case law. Florida's homestead exemption provides some hope to invalidate AOB as the assignment constitutes an unsecured agreement. Nonetheless, the homestead exemption will merely provide a temporary bandage until the legislature can provide a statutory solution to regulate the abuse. The legislature is challenged with not only putting forth a bill that will address the root of the AOB abuse, but one that will pass the scrutiny of the plaintiff's bar and consumer advocates. In the meantime, insurance companies will have to continue to rely on more creative ways of limiting the rising costs associated with AOB abuse by educating agents and consumers about the claims process and rights under the contract. Ultimately, insureds will pay an additional amount in homeowner's premium increases as a direct result of the escalation and trending abuse of these types of claims.

Appendix A

Listing of Insurers Included in the Florida Office of Insurance Regulation 2015 Data Call

Count	Company
1	AIG Property Casualty Company
2	American Home Assurance Company
3	American Integrity Insurance Company of Florida
4	American Strategic Insurance Corporation
5	American Traditions Insurance Company
6	Ark Royal Insurance Company
7	ASI Assurance Corporation
8	ASI Preferred Insurance Corporation
9	Castle Key Insurance Company
10	Citizens Property Insurance Corporation*
11	Federated National Insurance Company
12	First Protective Insurance Company
13	Florida Family Insurance Company
14	Florida Peninsula Insurance Company
15	Heritage Property & Casualty Insurance Company
16	Homeowners Choice Property & Casualty Insurance Company, Inc.
17	Lakeview Insurance Company
18	Modern USA Insurance Company
19	Olympus Insurance Company
20	Omega Insurance Company
21	People's Trust Insurance Company
22	SafePoint Insurance Company
23	Security First Insurance Company
24	Southern Fidelity Insurance Company
25	St. Johns Insurance Company, Inc.
26	State Farm Florida Insurance Company
27	Tower Hill Preferred Insurance Company
28	Tower Hill Prime Insurance Company
29	Tower Hill Select Insurance Company
30	Tower Hill Signature Insurance Company
31	United Property & Casualty Insurance Company
32	United Services Automobile Association
33	Universal Property & Casualty Insurance Company
34	USAA Casualty Company
35	USAA General Indemnity Company

* Citizens Property Insurance Corporation data was submitted and reviewed, but was not ultimately used in the report since Citizens released its own analysis.

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