

PROPERTY



FACTORING IN THE AOB EQUATION

The Latest Litigation Trend Involves Assigning Assignments

By *Brian P. Henry and Aaron D. Alfano*

One of the biggest challenges facing homeowners' insurance companies in Florida during the past decade has been the rise of assignment-of-benefits claims. An assignment of benefits (AOB) occurs when a policyholder assigns the benefits owed under a policy to a third party after a loss has occurred. Typically, these third parties are contractors and remediation companies that perform water extraction and property repairs following the loss.

During the last 10 years, AOBs have become common in property insurance claims. Plaintiffs' attorneys seeking a

lucrative new area of practice are conducting workshops in which they teach contractors and remediation companies "inside secrets that insurance companies don't want you to know." One firm, for example, promises to provide "complimentary documents and tools" at its workshops and teach attendees "how to collect money that has been owed to you by an insurance company with no cost to you."

Of course, these attorneys are marketing to these contractors and remediation companies and can offer their services with no cost to the contractors and remediation companies because of Florida Statute Section 627.428, which provides that an insured (or an assignee of an insured) who

recovers a judgment against an insurer is entitled to an award of "a reasonable sum as fees or compensation for the insured's or beneficiary's attorney prosecuting the suit in which the recovery is had." Because of this one-way attorney's fee statute, these "AOB attorneys" can take these cases on a contingency fee basis with virtually no risk that they will not be paid for their services. Consequently, lawsuits involving AOB claims have skyrocketed in recent years. According to the Insurance Information Institute, in 2013 there were 2,852 property-related AOB lawsuits statewide; by 2016, that figure had grown to more than 9,000.

Two additional factors have fueled the increase in AOB litigation. First, an



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assignee under an AOB does not need to perform the services called for in the AOB to be entitled to receive payment from the insurance company. In *One Call Property Services Inc. v. Security First Insurance Company*, the Fourth District Court of Appeal held that an assignable right to benefits accrues on the date of the loss, even though payment is not yet due under the loss payment clause of the policy.

Second, an insured may make only a partial AOB whereby the insured assigns only part of the claim to a third party. Generally, an AOB will provide that the policyholder assigns “any and all insurance rights, benefits, proceeds, and any causes of action under any applicable insurance policies...for services rendered or to be rendered” by the assignee. The policyholder retains the right to recover for all other portions of the claim. For example, if a policyholder enters into an AOB with a water remediation contractor, the policyholder would not be able to recover directly for the water remediation, but would still be able to pursue a claim for repairs to the property.

A policyholder’s assignment of only part of a claim greatly increases the complexity of handling and resolving

the claim, as the insurance company must investigate and resolve both the policyholder’s claim and also investigate and resolve the assignee’s AOB claim. In addition, a policyholder can enter into multiple AOBs for a single claim. For example, in a roof claim, a policyholder could enter into an AOB with the following: a water remediation company for water extraction; a contractor to repair the interior damage; and a roofer to repair damage to the roof. The policyholder would retain rights to pursue other elements of the claim, such as claims for damage to personal property and additional living expenses.

FACTORS TO CONSIDER

A new trend in AOB litigation has emerged in the last three years: AOB vendors are now selling their claims to factoring companies. Factoring is a financial transaction and a type of debtor finance in which a business sells its accounts receivable to a third party at a discount. A business will sometimes factor its receivable assets to meet its present and immediate cash needs. Factoring is common in the construction industry due to long payment cycles. However, because of the inherent risk

of the construction industry, most “generalist” factoring companies avoid construction receivables. As a result, specialized factoring companies have arisen to service the construction industry.

An assignment of benefits allowing a contractor to bring a claim and lawsuit directly against an insurance company makes a contractor’s receivables much more valuable to a factoring company. Such a receivable is far more likely to be collected than a typical construction invoice, and the virtual guarantee of an attorney’s fee award under Section 627.428 in the event the claim results in litigation allows the factoring company greater leverage in negotiating with an insurance company than it would typically have in negotiating with a debtor.

How should insurance companies deal with factored AOB claims? One of the biggest problems with AOBs is that the policyholder’s duties after a loss are not assignable. These include the policyholder’s duties to give prompt notice of the loss, protect the property from further damage, show damaged property, provide records and documents, submit to an examination under oath, and provide a sworn proof of loss. Because the policyholder has assigned his right to payment, the policyholder has little incentive to comply with his duties after the loss. However, if necessary, insurers should insist on the policyholder’s compliance with all duties after a loss, even when an assignee has taken over the claim.

In addition, many insurers are incorporating provisions into their policies requiring assignees of policyholders to also comply with post-loss conditions, including submitting to an examination under oath. Insurance companies should take advantage of all of the tools available to them to fully investigate any AOB claims, including insisting on full compliance with all post-loss conditions by all parties to whom they apply.

The assignment or factoring of an AOB multiplies the complexity of a property insurance claim. The formula for dealing with this new trend is good claims-handling practices plus insistence on compliance with all post-loss conditions. ■

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