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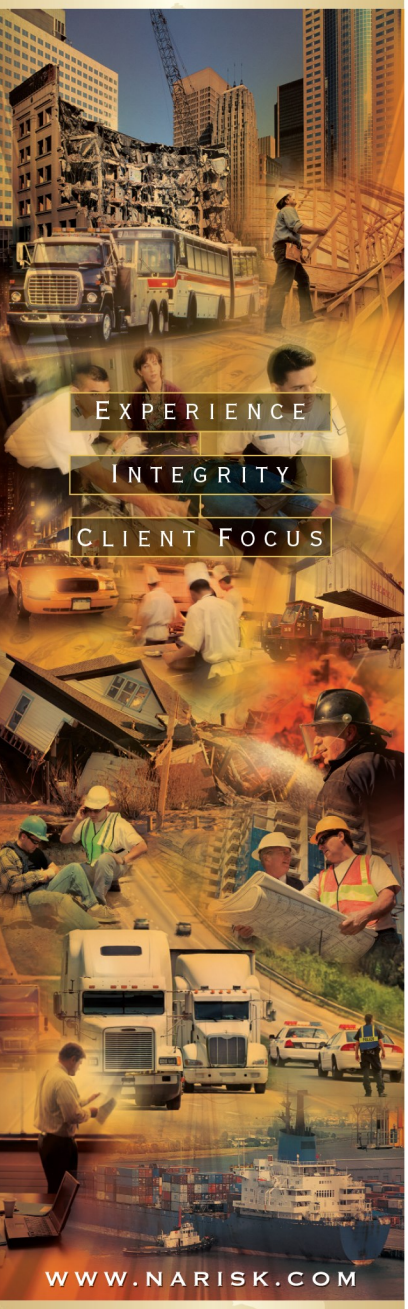

Assignment of Benefits: A Florida Case Study

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Assignment of Benefit (AOB) is a simple term that can have drastic consequences. Assignment **means** to take something and give it to someone else.

Now that the 2016 hurricane season is over, claim professionals in Florida can return their attention to the ongoing onslaught of AOB claims and lawsuits. The simple mention of an AOB can raise the blood pressure of seasoned claim adjusters. It is one of those issues which leads carriers to lament the growing frequency and cost of water claims and litigation, often at the expense of their own insureds.

The AOB claims are quite often associated with water losses, mostly plumbing leaks and arise from the insured assigning all or part of his/her rights to the water mitigation company.

In a routine scenario, the insured incurs a covered loss and hires a water remediation company to dry out the house on an emergency basis. The water mitigation company renders the services under a contract with an assignment of the insured's benefits (AOB), and invoices the insurance company. The carrier reviews the invoice and attempts to pay the true value of services rendered. In some cases, the carrier must attempt to negotiate a reasonable resolution. If settlement cannot be achieved, the assignee is legally entitled to sue the carrier directly for insurance benefits under the insured's policy, usually without the insured's knowledge.

In some scenarios, there may be serious questions about coverage or the validity of the actual claim or loss that gave rise to the AOB. These claims tend to follow a similar pattern. The claim is often reported late, despite policy provisions, by an attorney or public adjuster, timely access is denied to the carrier, and the cause and duration of the loss cannot be determined due to spoliation of evidence. Sometimes the claim is presented with multiple losses at the same risk, such as a bathroom and the kitchen, with different dates of loss. The carrier can be presented with invoices for water mitigation which appear inconsistent with the type and severity of the loss, with no evidence that mitigation services were provided to the extent claimed, if at all. In this case, the problem is not how much should be paid for mitigation services, but whether anything should be paid at all. Regardless of the coverage decision for the underlying claim, many assignees end up suing the carrier.

Florida currently appears to be ground zero for the AOB issues with a dramatic increase in AOB claims. The Florida Office of Insurance Regulation indicated that from 2010 to 2015 the frequency of water-related claims increased by 46% and the severity of the claims by 28%. In the southeast counties of Florida, Citizens Property Insurance Company reports the average paid cost per closed water claim increased from $8,607 in 2010 to $13,182 in 2015, while water claim frequency increased from

7.0% to 14.6% in the same period. The increase in litigation has caused an increase in the loss adjustment expense of 450% since calendar year 2011 for Citizens. In fact, Citizens reports that the leading cause of loss for all new incoming lawsuits remains water loss, which represents 55% of all incoming lawsuits, while AOB maters represent 34% of all new lawsuits. There does not appear to be any physical reason for these alarming increases. Further, these figures are only for the underlying claim. There has been a much larger increase in the use of water mitigation companies. When the cost of handling AOB claims and lawsuits is included, the average cost per water claim can easily double, triple or more.

What is driving the explosion in AOB claims and suits? Financial incentive is always a powerful motivator and a number of entities are chasing a finite number of water losses, to the point of paying large referral fees to plumbers. The Florida Department of Financial Services has even discovered staged losses that never happened. But there are other factors which create this situation.

One factor is that the water mitigation industry has low barriers to entry. It is possible for a small contractor to enter the business with a very small investment and minimal technical expertise. Licensing is not required. While the industry has developed IICRC industry standards, there is no mechanism to enforce them and provide protection to the public. It seems that nearly anyone can call himself an expert and appear persuasive to an inexperienced homeowner or an uninformed jury.

Another factor is Florida Statute 627.428, often called the “fee shifting statute”, which makes this business particularly profitable for the assignees and their lawyers. Although it was created ostensibly to even the playing field between an insured and insurer, the fee shifting statute allows the award of legal fees to parties who obtain monetary judgments against the insurers regardless of the amount of recovery. If the vendor/assignee wins even $1 in court the insurance company must pay the assignee/vendor’s attorney’s fees, usually at a high hourly rate and increased with a multiplier. Unfortunately, the fee shifting statute has led to paradoxical and frightening outcomes such as the award of a million dollars in attorney fees for the recovery of less than ten thousand dollars in indemnity. It can present a “can’t lose” situation for the assignees and the lawyers who represent them. In this environment, it takes a strong stomach for an insurer to take their chances in the courtroom.

Sadly, the situation is not improving. On the contrary, if one lawsuit is profitable, two or three or four are even more so. It is entirely possible for one water claim to generate six AOB lawsuits from various vendors such as the plumber, the mold assessment company, the water mitigation company, the mold remediation company, the mold verification company and sometimes another mold remediation company if the first was not considered fully successful. The attorneys for each AOB suit have a good chance of getting paid by the insurer. Some of the awards make Auto Personal Injury Protection (PIP) AOB’s look small in comparison.

Unfortunately, the consumer picks up the tab since Florida homeowner carriers’ rates must reflect their loss experiences. Many carriers have been forced to raise rates, which is not a sound solution for the consumer or industry. Unfortunately, industry and legislative efforts thus far have not been successful.

So how have the insurers tried to defend themselves and protect their customers? Initially they tried to attack the validity of the assignment of benefit contract itself. However, courts concluded the assignment of benefits is not the same thing as the assignment of the policy, and the consent of the insurer is not required. The post loss assignment of benefits is legal.

The latest volley in this continuing legal debate stems from the argument that in the case of homestead properties, the unsecured assignment of rights is not allowed. Some legal experts have asserted it is doubtful that this argument will be successful because the public interest calls for emergency services to be provided as quickly as possible, which does not allow the service provider the time to obtain a secured assignment. One Florida carrier has OIR approved policy language that requires the AOB document be executed by the mortgagee. However, it is not certain whether this will be upheld by the courts.

The bottom line is that in Florida insurers are not winning the legal dispute on the validity of the assignment. Even with the support of the state insurer of last resort, Citizens, the industry was unable to develop a successful legislation solution. After exhausting other options, Citizens successfully pursued a different remedy. They were able to obtain approval for an internal limit of $3,000 or up to one percent of Coverage A towards emergency services without the approval of Citizens. It is an extreme but effective solution to a problem. This strategy worked successfully for them in the past. When Citizens implemented an internal limit for the dropped object claims (which often forced the insurer to replace an entire floor due to one cracked or broken tile) the avalanche of these claims slowed to a trickle. Some will argue this solution is not perfect, questioning the amount of the limit and the wording of the policy, but the end result is that questionable AOB claims and suits are discouraged. With a low internal limit there may not be enough "skin in the game" to make water mitigations claims as attractive.

Policy changes for internal limits may not be a feasible option for all carriers. They require presenting an actuarially sound case supported by data, and being prepared to trade premium decreases in exchange for the reduction in liability. Carriers may also want to consider offering endorsements for increased limits, thereby giving more options to the insureds. The objective is not to take away coverage from the insureds who need it and are willing to pay for it, but to discourage exaggerated and fraudulent claims.

Citizens has also launched the Call Citizens First campaign to encourage policy holders to call Citizens first following a claim, and is creating a managed repair program that will enable Citizens to provide emergency services and damage repair to the consumer's home. Other policy changes include requiring the consumer provide Citizens with notice of the claim and not conducting permanent repairs until the earlier of 72 hours or an inspection by Citizens.

On the claim front, Citizens and other carriers utilize a vendor to review water estimates against IICRC standards, continue to work closely with its SIU department to investigate all questionable claims, work with the Department of Financial Services on fraud referrals and investigations, and attempt to enforce policy conditions, such as late notice.

What are the takeaways of the Florida AOB experience so far? A wholesale "fight them all" approach is has proven inefficient from a cost perspective and ineffective from a result standpoint. Courts have been reluctant to enforce policy terms and conditions, suggesting the legislature should resolve the issues. Carriers should take a realistic approach to AOB claims as regards what resources it takes to dispute them and the chances of winning. Litigation should only be used in carefully selected cases.

The long term solution will probably come from a combination of approaches such as changes in the policies with internal limits; working with the state regulators and the legislature to remove the profit incentive from

water claims, supporting the legitimate water mitigation vendors to set and implement standards and licensing, and cooperation with the state insurance fraud division to build effective cases against the most egregious perpetrators. There is no single silver bullet, but a sustained effort by the insurance industry working with its partners on several fronts is likely going to be the best approach and hope to contain the AOB problem.

ABOUT THE AUTHOR

Giovanna Gallottini is a Senior Litigation Adjuster at NARS. Giovanna has over a decade of experience with all types of property claims, specializing in litigated cases for homeowner carriers. Her experience includes adjusting, examining and representation at depositions, mediations and trials.