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**LMA BACKGROUNDER**

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# Assignment of Benefits (AOB)

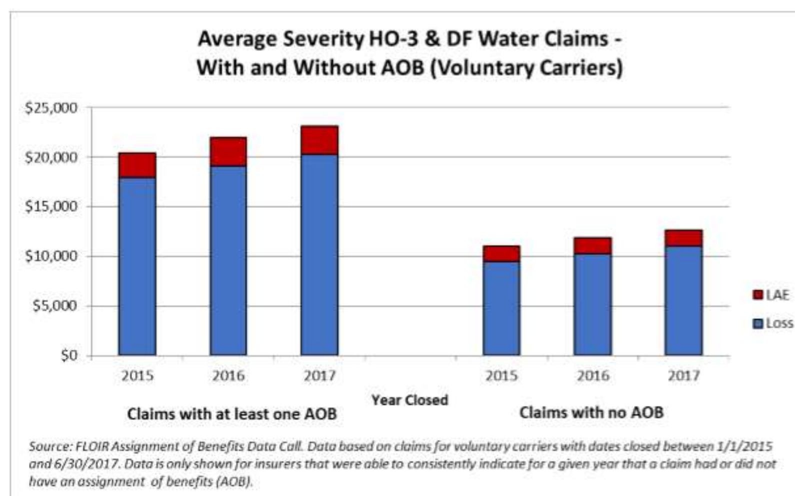
As the 2018 Florida Legislature convenes, lawmakers will attempt for the sixth year in a row to pass Assignment of Benefits (AOB) reform to stem growing abuses. An AOB agreement is a legal contract that allows repair vendors to receive payments directly from insurance companies for work they perform at a policyholder's home, without the homeowner having to pay money upfront. While it sounds good, unfortunately in the past 7 years, unscrupulous vendors and their lawyers have taken advantage of AOB to take control of a homeowner's policy, then inflate the scope and cost of claims and sue the insurance company if it refuses to pay the inflated bills.

By any measure, AOB abuse is a problem. Consider this data from the Florida Office of Insurance Regulation (OIR):

- *Frequency of Claims involving AOB* (up 46% from 2010-2016);
- *Severity of Claims involving AOB* (up 28% from 2010-2016); and
- *Number of AOB lawsuits* (from 405 lawsuits in 2006 to 28,200 in 2016) are all up.

Increased costs equal increased rates by insurance companies, with the Florida Office of Insurance Regulation warning that annual 10% rate increases on homeowners insurance policies in Florida could become the norm.

The problem is getting worse, especially in non-weather related water claims. In January 2018, OIR released its [2017 Review of Assignment of Benefits (AOB) Data Call Report]. The report states that since 2015, the frequency of water claims has risen 44% and severity of those claims has risen 18%. "The total combined impact of these changes reflect an average 42.1% annual increase in water losses, which is nearly triple the 14.2% average annual increase shown in the previous report," it said. That previous 2016 report covered the prior six years. This chart is probably the most telling of the report:



After weeks of testimony last fall from various sides of the AOB issue, Senate leadership finally showed its hand on January 23, 2018 before its Banking and Insurance Committee. In a well-orchestrated move, Committee Chair Senator Anitere Flores (R-Miami) considered a last-chance strike-all amendment by Senator Doug Broxson to gut the committee's preferred bill, SB 1168 by Senator Greg Steube (R-Sarasota), before quickly dispensing of it and moving to the Chair's intended purpose: to pass SB 1168.

Senator Broxson (R-Pensacola) called his amendment "a simple solution to a simple problem": a combination of bills and input from Senator Steube's 1168, Senator Hukill's SB 62, the Florida Office of Insurance Regulation, and Citizens Property Insurance. "The state of Florida has too much litigation. This amendment puts the one-way attorney fees back to whom it was untended, the named policyholder. It sends a message to courts on their overreach on this issue," Senator Broxson said.

To be clear, the biggest difference between Broxson and Steube's measures are how attorney fees are handled in third-party AOB disputes with insurance companies. Broxson's measure preserves reimbursement for attorney fees solely to policyholders while Steube's continues current practice to allow it to the prevailing party in a lawsuit or settlement – whether that be the policyholder or a third-party vendor exercising an AOB. This is contrary to the intent of Florida's one-way attorney fee statute and to the advice of Florida Insurance Commissioner David Altmaier.

Associated Industries of Florida (AIF) pointed out that restoration and contractors who have disputes with insurance companies could still file lawsuits against them and if the billing is correct, be awarded attorney fees under general law. They just wouldn't be automatically entitled to them under the courts' application of current AOB law. AIF noted the current AOB statute is actually very clear as to who gets the one-way attorney fees – the policyholder – and that the courts have just chosen to overlook it.

Former Florida Supreme Court Justice Ken Bell, who now handles appellate work including insurance companies, backed-up Senator Broxson, saying "The one-way attorney fee was meant to be for consumers. It should not be extended to others and so I support this."

Attorneys and restoration specialists and many contractors groups present opposed Broxson's amendment with one saying "As for having policy language requiring a mortgagee to sign off on an AOB, that will be the end of AOBs."

Senator Broxson's amendment failed in a very quick voice vote.

In introducing SB 1168, Senator Steube modified his original bill with several consumer-friendly amendments, all of which were approved by the committee. The amendments:

- Prohibit an insurer from requiring a particular vendor make repairs and makes recommendations on vendors only if asked by the policyholder;
- Require an AOB vendor provide the policyholder with a written estimate;
- Require an AOB vendor provide an accurate updated statement of work;
- Allow a policyholder to cancel an AOB agreement within seven days;
- Require an insurer pay for work performed before the AOB cancellation;
- Waive the right of an AOB vendor to go after the policyholder for unpaid claims beyond the deductible; and

- Require an AOB vendor provide a 30 day notice of intent to sue the insurer and proposal for settlement

SB 1168 at its initial introduction, prohibited insurance companies from including the costs of attorney fees paid in losing cases into their rate base or future rate requests, a concept Insurance Commissioner David Altmaier last fall called "one of the worst ideas he's heard." The reason the commissioner has this opinion is that insurance companies, for the most part, are not the instigator of litigation; the vast majority of AOB suits are from AOB law firm "factories," much like the home foreclosure saga where trial lawyer firms filed thousands of suits against banks. Senator Steube's bill also limits an insurer's ability to deny coverage because of fraud by an insurance applicant.

SB 1168 had the support of attorneys and restoration specialists and many contractors present at the committee meeting – the same folks who had opposed Senator Broxson's amendment. Critics of SB 1168, noted it lacked necessary consumer protection and cost controls (by its failure to address one-way attorney fees). Citizens Property Insurance Legislative Affairs Chief Christine Ashburn represented the sentiment by many in the audience. "We are concerned that this bill doesn't address the underlying bad behavior of the 11 attorneys and the vendors that are opening offices now beyond the Tri-County area and into Orlando," she said. "If we pay just one dollar more on the claim than we were going to, we're going to have to pay attorney fees – everyone wins but the consumer." There was also concern that multiple vendors on a house repair will generate multiple AOBs, with multiple attorney fees in case of dispute – with the homeowner not even aware they're part of such vendor lawsuits.

Senator Broxson said he appreciated what Senator Steube was doing with his amendments, but said "we're rearranging the chairs on the Titanic – we still have a giant hole in the middle of the deck." He also referenced last Sunday's Wall Street Journal editorial (Protecting Legal Fraud in Florida), the newspaper's latest editorial criticizing Florida lawmakers, and specifically Chair Flores, for inaction on the AOB crisis.

Chair Flores reiterated her past position, that what it comes down to for her is what impact there will be on rates by changing current AOB public policy. "The (insurance) commissioner and others tell us how much rates will go up if we fail to act… unfortunately, the converse… if we take away the problem, it should lower rates or at least stay the same. But they can't tell us if rates will go down with (resolving AOB). I have a real problem with that, and I think other members do as well."

Several senators voiced their expectation that insurers and trial attorneys continue to work toward a better compromise than the current version of SB 1168 provides. It passed the committee by a vote of 7-3 and now goes to the Judiciary Committee for consideration.

So the differences between the House and Senate versions of AOB reform currently boil down to how to handle attorney fees in third-party disputes (the same differences that sunk reform efforts in 2017).

The Florida House on January 12 passed its version of AOB reform, with HB 7015 by Rep. Jay Trumbull (R-Panama City). The bill addresses AOB abuses and enhances consumer/policyholder protections. It's a replica of last session's HB 1421, which had passed the House but was never heard in the Senate. The bill allows AOBs to exist under certain conditions, and requires that they be in writing, contain an estimate of services, notice the insurer, and allow the policyholder 7 days to rescind the AOB. It prohibits specified fees as part of an AOB as well as any policy changes related to a managed repair program. It requires a 10-business day notice prior to filing suit against an insurer, an assignee's pre-suit settlement demand and insurer's pre-suit settlement offer, and puts parameters around attorney fees. There would be consumer disclosure language so the consumer is fully aware of the consequences when executing an

AOB and would limit an assignee from recovering certain costs directly from the policyholder. Beginning in 2020, insurers would be required to report to OIR their data on claims paid via AOBs.

While one-way attorney fees would continue to exist for first-party claims filed by a policyholder against an insurer, this bill sets special two-way attorney fees for third-party claims. Insurance Commissioner David Altmaier said consumers would be held harmless regardless of who wins the lawsuit and described the bill as a balance between discouraging abusive vendor claims while still allowing contractors to go after insurers who low-ball claims and settlement offers. Here's how (from the bill):

"If the parties fail to settle and litigation results in a judgment, the bill provides the exclusive means for either party to recover attorney fees. The bill defines the difference between the insurer's pre-suit settlement offer and the assignor's pre-suit settlement demand as "the disputed amount." The award of fees are as follows:

• If the difference between the judgment and the settlement offer is less than 25 percent of the disputed amount, then the insurer is entitled to attorney fees.

• If the difference between the judgment and the settlement offer is at least 25 percent but less than 50 percent of the disputed amount, neither party is entitled to fees.

• If the difference between the judgment and the settlement offer is at least 50 percent of the disputed amount, the assignee is entitled to attorney fees."

Meanwhile, Rep. David Santiago (R-Deltona), who has been a champion in the fight against the abuse of assignment of benefits for the past several years, has a catch-all insurance bill (HB 465), known as an "omnibus" bill to change several provisions of the insurance code. The bill expanded from 15 to 55 pages. While the committee substitute continues to cover several insurance topics such as property, auto, and surplus lines, it removed one of the most interesting, which excluded from the Department of Financial Services complaint registry complaints filed by third parties who are not satisfied with an insurance company's claims handling when an assignment of benefits is involved. The thinking is that there is an incentive by third party vendors to dispute the claim to delay it, which drives up the cost of the claim. Again, this provision is NOT in the newest version of the bill. Among other things, the bill increases confidentiality of documents submitted to OIR under Own-Risk and Solvency Assessment requirements and also allows auto insurers a blanket exclusion of transportation network services coverage. The Senate Bill (SB 784) by Senator Brandes has not been placed on an agenda thus far.

There are other AOB bills in the Senate, but they are all stalled. They include SB 62 by Senator Dorothy Hukill (R-Port Orange). The bill prohibits certain attorney fees and requires those vendors that execute the AOB to comply with certain requirements prior to filing suit. HB 7015, which passed the House on January 12 has some elements of this bill.

Likewise stalled is SB 256 by Senator Gary Farmer (D-Ft. Lauderdale), which would prohibit insurer managed repair programs and prevent most property insurance policies from prohibiting or limiting AOB. But it would also require the AOB be in writing, be limited to an accurate scope of work to be performed, and allow the policyholder to cancel the AOB within seven days without penalty and otherwise, be shared with the insurer within seven days of execution. A final repair bill would be required to both policyholder and insurer within 7 days of work completed. Referral fees would be limited to $750 and require water damage remediation assignees to be ANSI certified. Insurance companies would be required to offer any settlement within 10 days of assignee filing suit over an AOB dispute. It also prohibits insurers from including the costs of attorney fees paid in losing cases into their rate base or future rate requests. Under

the bill, OIR would be required to conduct an annual AOB data call beginning in 2020.  HB 7015 which passed the House on January 12 has some elements of this bill, but not the attorney fee rate recoupment.

For examples of how AOB abuse impacts Florida consumers, listen to these two episodes of The Florida Insurance Roundup podcast:

Episode 2: The Abusive Roofer

Episode 9: The AOB Trap